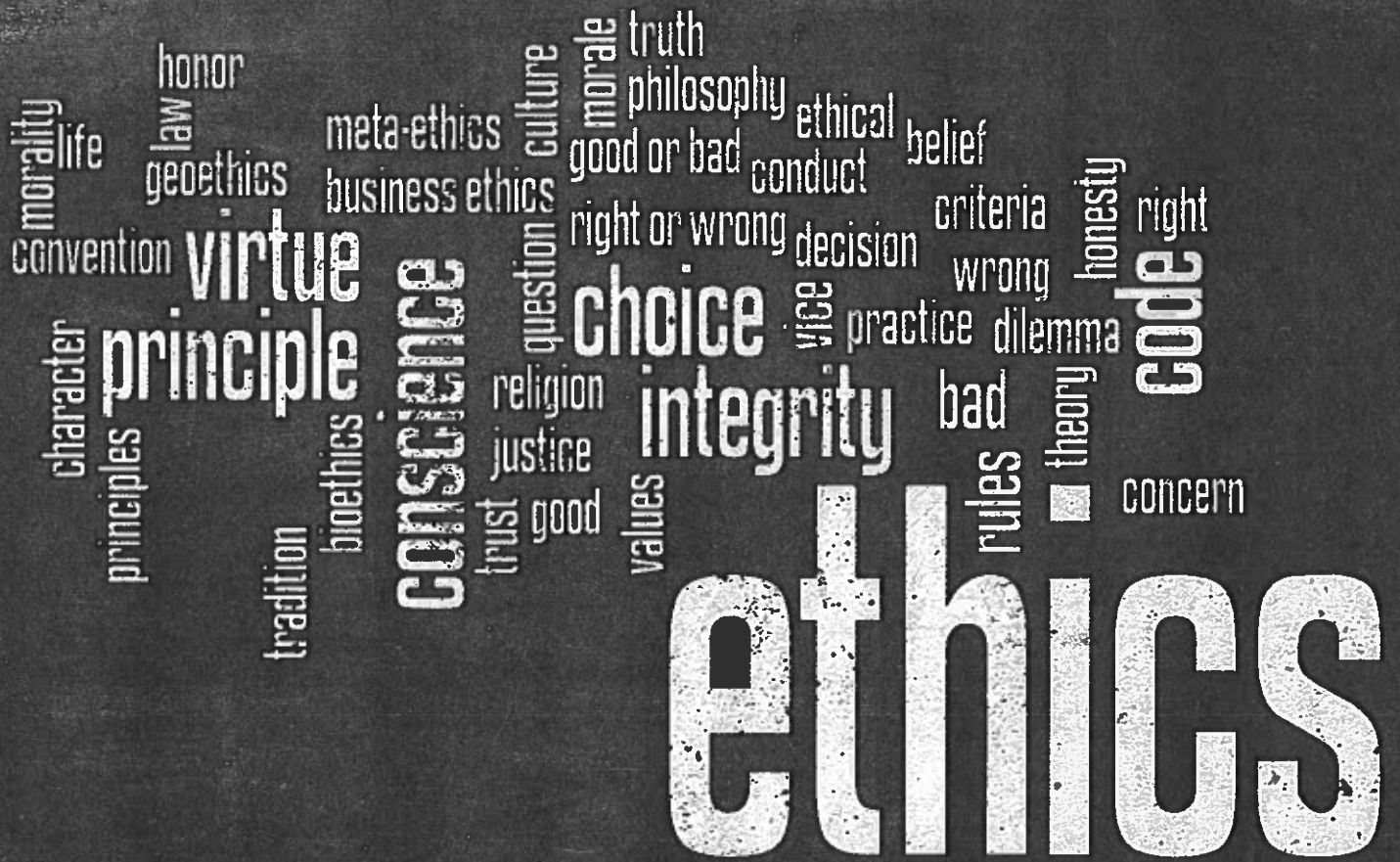


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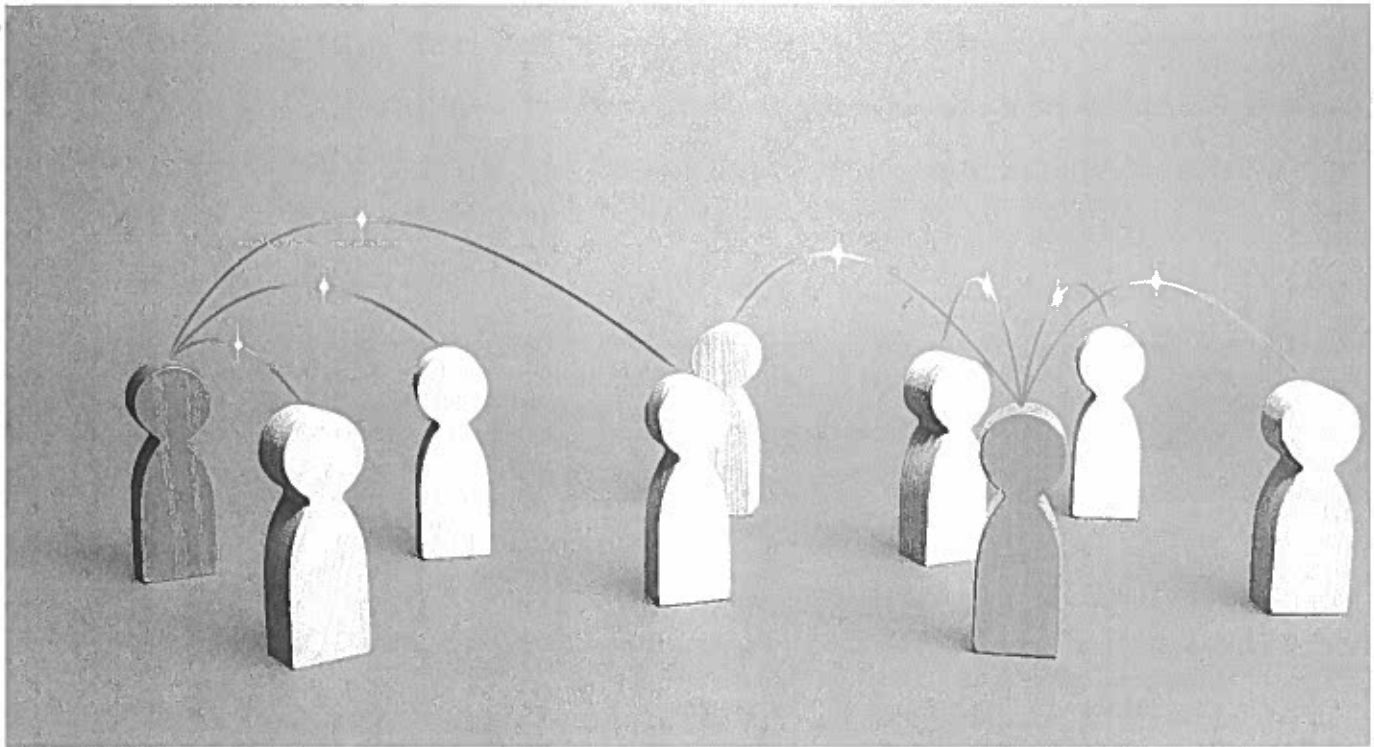


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## When a Non-Conflict Really Is a Conflict: A Beginner's Guide to Not Losing a Client

By Jared M. Moser, Esquire

Everything a lawyer does in practice is governed by rules of ethics, and we, as members of the American Inns of Court, are particularly mindful of the Inns' vision: "A legal profession and judiciary dedicated to professionalism, ethics, civility, and excellence." Whether looking to the American Bar Association's Model Rules of Professional Conduct or the rules of professional conduct for your particular jurisdiction, we are guided by rules generally focused on the attorney-client relationship, duties as counselor and advocate, transactions with persons other than our clients, responsibilities of a law firm and among the various levels of the hierarchy within, public service, advertising, and general integrity of our profession. What happens, though, when an action or opinion is not inconsistent with the rules but still gives pause? Can that create a conflict? Yes, and you should be aware of the potential pitfalls.

Model Rules 1.7, 1.8, 1.9, 1.10, and 1.11—as well as many local counterparts, typically identified by the same numbering—are the primary rules addressing conflicts of interest in the legal profession. Rule 1.7 specifically addresses conflicts of interest relative to current clients and restricts a lawyer from representing "a client if the representation involves a concurrent conflict of interest," which the rule defines as a situation in which "the representation of one client will be directly adverse to

another client" or when "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Model Rules of Prof'l Conduct R. 1.7(a)(1), (2).

Even with a concurrent conflict, a lawyer may still represent a client if the ability to competently and diligently represent each affected client is not compromised, the representation is not otherwise

unlawful and does not involve directly adverse claims by one client against the other, and each client gives informed written consent. Model Rules of Prof'l Conduct R. 1.7(b)(1)–(4).

Rule 1.8 outlines a number of topic-specific conflicts concerning (a) business transactions between client and counsel, (b) use of client information against the client, (c) solicitation or receipt of gifts from a client, (d) literary or media rights for the client's story (sorry, Johnny Cochran), (e) financial assistance to a client, (f) payment of compensation to the lawyer by one other than the client, (g) joint settlements on behalf of multiple clients, (h) resolution of malpractice liability, (i) a lawyer's proprietary interest in the client's cause of action or subject matter of the litigation, (j) sexual relations with a client, and (k) imputation of the foregoing conflicts to every member of the same firm. Model Rules of Prof'l Conduct R. 1.8(a)–(k).

Rule 1.9 deals with conflicts with and duties to former clients. Model Rules of Prof'l Conduct R. 1.9(a)–(c). Rule 1.9 primarily seeks to avoid representation adverse to a former client's interest in the same or a substantially related proceeding. See *id.* In my own experience, this rule can be tricky because there is a split of authority around the country regarding whether an attorney who helps form a business entity represents the entity or the founding members, owners, officers, or directors who retain the lawyer for purposes of forming the business. Compare *In re Brownstein*, 602 P.2d 655, 657 (Or. 1979) (suggesting the individuals were clients), *Detter v. Schreiber*, 610 N.W.2d 13, 17 (Neb. 2000) (same), and *Matter of Nulle*, 620 P.2d 214, 217 (Ariz. 1980) (en banc) (same), with *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 611, 119 P.3d 1219 (2005) ("a lawyer representing a corporate entity represents only the entity, not its officers, directors, or shareholders ..."), and *Jesse v. Danforth*, 169 Wis.2d 229, 485 N.W.2d 63 (1992) (same). Rule 1.10 addresses imputation of one attorney's conflict to others in that attorney's firm, and Rule 1.11 governs "special conflicts of interest for former and current government officers and employees."

With all of these rules governing conflicts, that has to be exhaustive, right? Wrong. To understand how much more broadly the concept of conflicts of interest extends, one can first look to the definition of "legal ethics" in *Black's Law Dictionary*: "The standards of professional conduct applicable to members of the legal profession within a given jurisdiction." Legal Ethics, *Black's Law Dictionary* (11th ed. 2019). More broadly, the term "ethics" is defined as "a system of moral tenets or principles; the collective

doctrines relating to the ideals of human conduct and character." Ethics, *Black's Law Dictionary* (11th ed. 2019). More specifically, the term "conflict of interest" is defined as "a real or seeming incompatibility between one's private interests and one's public or fiduciary duties." Conflict of Interest, *Black's Law Dictionary* (11th ed. 2019). The takeaways here may be summarized as follows: As part of our jobs as attorneys, we must comply with the standards of conduct and the moral tenets or principles of our industry, which includes avoidance of taking seemingly incompatible positions in furtherance of our own interests when inconsistent with our fiduciary obligations to our clients.

By way of example, I am aware of a problem that arose for an associate at a firm that had significant clients that may not have agreed with the social media content the associate was quick to post. Notably, the clients' interests could have been perceived to be inharmonious with the messages contained on the associate's social media profile, creating a conflict of interest not necessarily proscribed by the Model Rules or rules of the jurisdiction but certainly prohibited by a strict reading of the general definitions of "conflict of interest," "ethics," and "legal ethics." As such, an attorney may be conflicted in trying to represent an equal rights coalition while simultaneously speaking out against marriage equality. Or, it may be difficult to represent immigrants and insist on the humane treatment of immigrant children while advocating for continued operation of detention centers along the U.S.-Mexico border that place children in cages.

I'm not making these examples to present my own opinions. Rather, I provide these scenarios for consideration, to reiterate the moral of this article and a general principle that seems to be ignored far too often in society today: We are entitled to our own opinions, even strong opinions, whether as an attorney or not. We are entitled to voice our opinions should we so choose. However, we are not free from the consequences of our speech, whether verbal, written, virtual, or otherwise. As such, remember the definitions above, and take this one measure to avoid a potential ethical violation: Do not express your personal views in a manner that is inconsistent with your fiduciary obligations to your or your firm's clients. ♦

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