cessor counsel or another likely holder of the property subject to the lien if the attorney's representation in the matter is terminated before there is a recovery. Absent the former client's consent, however, the notice must not contain information about the client's lack of resources, the client's past refusals to pay, or any other information gained in the professional relationship that would be embarrassing, or likely to be detrimental, to the client. Any further efforts to enforce the lien or collect the fees must comply with the rules governing fee disputes between lawyers and clients. Disclosures of client confidences can be made only to the minimum extent necessary to collect the fees, and even then protective orders and filings *in camera* or under seal should be used to the maximum extent possible to protect client confidential information from exposure to third parties without a need to know.

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Opinion 380

Conflict of Interest Issues Related to Witnesses

This Opinion examines certain recurring conflict of interest issues related to witnesses. Such issues can arise under D.C. Rules of Professional Conduct 1.7 and 1.9, and when they arise, Rule 1.10(a) can impute resulting conflicts within law firms, as that term is defined in Rule 1.0.

Section I outlines the practice scenarios in which these conflicts are most likely to arise: (A) issuing subpoenas to current or former clients; (B) advising current or former clients who are potential witnesses about Fifth Amendment rights; and (C) cross-examining current or former clients. Section II addresses the existence and resolution of unavoidable conflicts: (A) the creation of thrust-upon conflicts involving unforeseen witnesses and (B) the imputation of conflicts of interest across a firm. Section III offers practice suggestions for anticipating, identifying, preventing, and resolving conflicts of interest related to witnesses.

Applicable Rules

- Rule 1.0 (Terminology)
- Rule 1.1 (Competence)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)

Introduction

Conflicts under Rules 1.7 and 1.9 can arise from the many differing interests of clients and former clients who know, or may know, facts related to litigation. For example, such clients may prefer not to become witnesses and therefore not to be subpoenaed to testify. If they testify, they may prefer not to have their testimony challenged by cross-examination. Or they may prefer not to disclose certain information even though it is relevant to the litigation. Some witnesses may want to obtain an advantage from being witnesses. Some witnesses may want to avoid becoming targets in criminal prosecutions or parties in civil litigation.

The interests of client-witnesses can conflict with the interests of other clients, including clients currently involved in litigation. Litigation parties usually have interests in mustering all evidence in support of their cases, as well as in limiting or qualifying adverse evidence. Consequently, their lawyers may issue subpoenas and conduct cross-examinations. At the same time, both parties and witnesses have interests in obtaining counsel of their choice and in competent, diligent, and zealous representation by that counsel.[1]

Whether or not a witness-conflict arises, is imputed to an entire law firm, or is waivable by affected clients or former clients will depend on the facts and circumstances. Some commonly recurring scenarios are discussed below.

A. Subpoenaing current or former clients who do not want to testify

The representation of witnesses and any related conflicts of interest are subject to Rules 1.7 and 1.9. Generally, these Rules detail the circumstances constituting conflicts of interest arising from current client (Rule 1.7) and former client (Rule 1.9) representations. As reflected in the Rules and highlighted below, avoiding current or former client conflicts associated with witnesses involves considerations of loyalty and confidentiality together with ensuring delivery of diligent and competent representation.[2]

One common question is whether issuing a subpoena to a current client, or to a former client in a substantially related matter, always constitutes a conflict. Ethics committees that have examined this question have reached different conclusions.[3] For example, the California Standing Committee on Professional Responsibility and Conduct concluded that serving a discovery subpoena "is an adverse action such that a concurrent client conflict of interest arises."[4] The New York City Bar was not so absolute in its approach, concluding in Opinion 2001-3 that "[s]ubpoenaing a current client on behalf of another current client ordinarily entails a conflict of interest that requires that the attorney obtain informed written consent from both clients." (emphasis added.) On the related subject of cross-examining a client, the ABA in Formal Opinion 92-367 opines that cross-examination "will likely" constitute a conflict. (emphasis added.)

The Committee disagrees with California's opinion that the issuance of a subpoena to a current client is a *per se* conflict of interest. In our view, subpoenaing a current client creates a conflict only if the client objects, or if it is reasonably foreseeable that the client will object to any aspect of the subpoena or to the burden and costs it creates.

A client-witness, or former client-witness, may want to help a lawyer's litigation client but may prefer to receive a subpoena because the witness might receive a financial or other benefit in connection with a deposition or court appearance only if a subpoena were issued. Issuance of that subpoena would not create a conflict. However, if a client-witness or former-client witness preferred not to testify for any reason, subpoenaing that witness would create

[1] *See* Rule 1.1 regarding the provision of competent representation, Rule 1.3 regarding the provision of diligent and zealous representation, and Rule 1.7(c)(2) regarding conflict waivers.

[2] These issues are addressed in detail in the context of responding to third-party subpoenas in D.C. Bar Legal Ethics Opinion 381 (2021).

[3] *See generally, e.g.,* Virginia Ethics Opinion 1882 (2015) (explaining that concurrent representation of two clients in unrelated criminal matters requires withdrawal from both representations if one client offers to provide incriminating information to prosecutors regarding the other client); California Ethics Opinion 2011-182 (2011); N.Y. City Bar Opinion 2001-3 (2011); Connecticut Bar Opinion 99-14 (1999) (determining that lawyer could not have reasonably concluded that cross-examination of a current client in an unrelated matter constituted a waivable conflict based on the facts underlying the litigation and the nature of the representation); ABA Formal Opinion 92-367 (1992).

[4] *See* California Formal Opinion No. 2011-182.

a conflict because of the compulsion to testify.

We therefore agree with the New York City Bar that the issuance of a subpoena to a current client, or to a former client in a substantially related matter, will ordinarily, but not always, result in a conflict.

1. Rule 1.7(a) – Current clients' adverse positions or interests in the same matter

Rule 1.7(a) states, "A lawyer shall not advance two or more adverse positions in the same matter," and defines the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients. When a lawyer undertakes the joint representation of a litigation party and a witness in the same litigation, Rule 1.7(a) therefore prohibits the lawyer from subpoenaing the witness on behalf of the party if the witness would not want to testify for any reason.[5] The lawyer cannot on behalf of the litigation party advance the position that the witness should be required to testify and at the same time advance the position on behalf of the witness that he should not be required to testify as demanded by the subpoena.

Such a conflict could arise in a joint representation of an employer and an employee-witness whose interests appear aligned at the beginning of a litigation. Later, factual questions about which they disagree could arise, or their substantive interests related to the litigation could change. If the employee-witness does not want to testify at that later point, because she does not want to be cross-examined or because she now disagrees with the purpose of the litigation, issuing a subpoena would constitute a non-waivable conflict under Rule 1.7(a). Similarly, the employee-witness may be willing to testify while his or her employment continues but not willing to testify after that employment ends. If the joint representation continues after the end of employment, issuing a subpoena would constitute a non-waivable conflict.

2. Rule 1.7(b) – Concurrent clients' adverse positions or interests not in the same matter

Rule 1.7(b) protects the same client-witness interests protected by Rule 1.7(a) when a lawyer represents a subpoenaing litigation party and at the same time, in an unrelated matter, represents a client who happens also to be a witness in the party's case, even if the client-witness is represented by another law firm in the litigation.[6] Unlike conflicts arising in the same matter under Rule 1.7(a), however, conflicts arising under Rules 1.7(b)(1) through (4) are waivable, and Rule 1.7(c) permits a lawyer to seek informed consent to the lawyer's continued representation. Specifically, Rule 1.7(c)(1) requires informed consent from "each potentially affected client . . . after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[7] Consent may only be sought, however, if the lawyer reasonably believes "that the lawyer will be able to provide competent and diligent representation to each affected client."[8]

Under Rule 1.7(b)(1)[9], a conflict would arise if a matter involves a specific party or parties and "a position to be taken by one client in a matter is adverse to a position taken or to be taken by another client in the same matter even though the other client is unrepresented or represented by a different lawyer."

Example. If a lawyer's client, who happens also to be a witness in another client's case, does not want to be subpoenaed for any reason, Rule 1.7(b)(1) applies because litigation is a "matter involv[ing] a specific party or parties" and the position taken by the party issuing the subpoena is adverse to the position of the witness who objects to testifying.

Under Rule 1.7(b)(2) or (b)(3),[10] a conflict would arise if the representation of either a client-witness or a client-party would be or likely would be adversely affected by the representation of the other client.

Examples of client-witness interests. In one example, a lawyer represents a client-witness in a business transaction unrelated to a trial in which the lawyer represents a party where the business client will be a witness. If the business transaction would be or likely would be disrupted by public testimony of the witness, a conflict would result from the issuance of a trial subpoena. In another example, a lawyer represents a client-witness in obtaining a security clearance that the client needs to expedite in order to obtain a new job. If the clearance would be or likely would be delayed if the client has to report to the Department of Defense the fact of recent testimony, a conflict would result from a subpoena. In each example, the lawyer would need to obtain the informed consent of the client-witness after informing the client of the possible negative consequences of testifying. The lawyer would also have to be satisfied objectively and subjectively that the lawyer would be able to provide competent and diligent representation to each client. In the first example, the lawyer would need to have a reasonable belief that she would be able to address the disruption to the business transaction without harm to the client. And in the second example, the lawyer would need a reasonable belief that a timely clearance could be obtained notwithstanding reporting requirements and potential resulting delays.

Examples of client-party interests. As a general proposition, a client-party issuing a subpoena has an interest in ensuring that all available evidence is mustered for the party's benefit. In the examples above, if the business client or security-clearance client of the lawyer objects

[5] *See* D.C. Bar Legal Ethics Opinion 217 (1991).

[6] *Accord* N.Y. City Bar Opinion 2017-6.

[7] *See also* Comment [27] to Rule 1.7 ("Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation."). As with all conflict waivers, the need to obtain informed consent does not relieve the lawyer of the duty under Rule 1.6 to maintain the confidences and secrets of all current and former clients or seek consent to disclose. If a lawyer cannot provide adequate information to a client or prospective client to obtain informed consent, then the representation that the waiver would permit, if it could have been obtained with disclosure of the necessary information, cannot proceed: "If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue." *Id.*

[8] Rule 1.7(c)(2). *See also* Comment [30] to Rule 1.7 ("Generally, it is doubtful that a lawyer could hold such a belief where the representation of one client is likely to have a substantial and material adverse effect upon the interests of another client, or where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation.").

9 Rule 1.7(b)(1) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: (1) that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer; . . . ."

[10] Rule 1.7(b)(2) and (b)(3) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . . (2) such representation will be or is likely to be adversely affected by representation of another client; [or] (3) representation of another client will be or is likely to be adversely affected by such representation; . . . ."

to the subpoena, a conflict would result if the lawyer's client-party would be or likely would be adversely affected by the absence of evidence. Rule 1.7(c)(1) would then require the lawyer to obtain the client-party's informed consent to not issue the subpoena. Under Rule 1.7(c)(2), even if the client-party consented, the lawyer also reasonably would have to believe that she could provide competent and diligent representation, for example, in the absence of the witness or, as another example, if conflict counsel were employed.[11] Such a determination usually would take into consideration factors like the importance of the involved issue, the availability of other evidence to address the issue, or the effect of using conflict counsel.[12]

Regarding Rule 1.7(b)(4),[13] in some circumstances, the lawyer's own interests may give rise to a "punch-pulling" conflict, which could render compliance with 1.7(c)(2) difficult.[14]

Example. A witness in another client's upcoming trial also happens to be a long-standing and lucrative client of the lawyer in other unrelated matters. The client-witness might be an important source of testimony in the trial. At the same time, however, there are other sources of facts—maybe documents alone or documents and other witnesses—to prove the fact that the client-witness would be asked to establish. In any event, for a reason unrelated to any matters in which the lawyer represents the client-witness, the witness would prefer not to testify but will consent to receiving a subpoena. Whether or not to issue the subpoena to the client-witness is left to the sound judgment of the lawyer. Depending on the facts, then, "the lawyer's own financial . . . or personal interests," given the lawyer's relationship with the client-witness, could cause a Rule 1.7(b)(4) "punch pulling" conflict against the interests of the client-party on the judgment-call question whether a subpoena should issue to the witness. In the event of a "punch-pulling" conflict, informed consent by the client-party under Rule 1.7(c) again would be required, and the lawyer reasonably would have to believe that the lawyer would be "able to provide competent and diligent representation" to the client-party.

Rule 1.9 – Former-client adverse positions or interests

Under Rule 1.9, a lawyer "who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." A lawyer who is considering issuing a subpoena to a former client must consider whether the current matter is "the same or . . . substantially related" to the former client's matter,[15] and whether issuance of the subpoena would be considered "materially adverse."[16] In determining whether matters are substantially related, a lawyer should consider, among other things, whether "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[17]

In its discussion of Rule 1.7(a) above, the Committee explains that a lawyer cannot on behalf of one client advance a position requiring another client in the same matter to testify and at the same time advance the position on behalf of the other client that she should not be required to testify. Such positions are inherently adverse. Similarly, in the former client context, the coercive effect of a subpoena creates material adversity if a former client does not want to testify in a substantially related matter. In the event of a conflict in a substantially related matter, the lawyer may not properly issue the subpoena without the informed consent of the former client.

B. Potential conflicts in connection with advising current or former clients about Fifth Amendment rights

In D.C. Legal Ethics Opinion 232 (Multiple Clients/Criminal Matters), the Committee considered another context in which a client-witness conflict might arise in another client's unrelated matter. The specific inquiry involved a lawyer seeking to represent a client-witness in asserting his Fifth Amendment rights not to testify in a murder case against a current client of the lawyer's partner who was represented in the murder case by another law firm. Neither the murder case defendant nor the client-witness wanted the witness to testify. The Committee concluded that there was no conflict under Rule 1.7(b)(1) on the facts of the inquiry because the assertion of Fifth Amendment rights was not adverse to the interests of the murder-case defendant. In the words of Rule 1.7(b)(1), there was no adversity of the "positions" of the witness and the defendant.

At the same time, the Committee opined that a Rule 1.7(b)(1) conflict would arise under the Rule if the client-witness "should later decide that it is in his interest to bargain his testimony against [the murder-case defendant] for some advantage." In that event, the prospect of adverse "positions" would have

[11] "Conflicts counsel" is the designation generally applied to the retention of a lawyer from a different firm engaged solely to represent the client on the discrete, severable aspect of the matter that gave rise to the conflict. *See* generally Ronald D. Rotunda, *Resolving Client Conflicts by Hiring 'Conflicts Counsel*,' 62 Hastings L. J. 677 (2011) (concluding that use of conflicts counsel is a useful tool to ameliorate the costs of disqualifying lawyers, while protecting legitimate client interests in confidentiality and loyalty). The use of conflicts counsel is consistent with our conclusion in D.C. Legal Ethics Opinion 343 (2008). In that opinion, we explained a lawyer may limit the scope of an engagement to a discrete legal issue or stage of litigation to avoid a conflict of interest under Rule 1.9.

[12] Similar considerations about informed consent and competent, diligent, and zealous representation apply to each of the Rule 1.7 and 1.9 witness contexts discussed in this opinion.

[13] Rule 1.7(b)(4) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . . (4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

[14] "Punch pulling" is a boxing term that refers to a fighter purposefully hitting his adversary with less than full force – as if the fighter pulled back a punch before making contact. In the professional responsibility context, a punch pulling conflict refers to circumstances where a lawyer is less zealous in advocating for, or advising, a client out of concern over the impact on the lawyer's representation of another client.

[15] The substantial relationship test of Rule 1.9 has a different scope than that of Rule 1.6 in connection with confidential information: "Matters are 'substantially related' for purpose of this rule if they involved the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Comment [3] to Rule 1.9.

[16] The meaning of "material adversity" is determined by the principles of Rule 1.7, including the specific language of the Rule and the principles discussed in Comments [7] and [8] to Rule 1.7. *See also* Comment [1] to Rule 1.9.

[17] *See* Comment [3] to Rule 1.9; D.C. Legal Ethics Opinion 343 (2008) (discussing factors in determining whether matters are substantially related, as well as the rebuttable presumption that confidences were exchanged if the substantial relationship factors are met).

arisen because the client-witness could decide to testify when the client-defendant wanted the witness not to testify. In coming to this conclusion, the Committee concluded that the Fifth-Amendment bargaining and the murder-case defense involved the same "matter" under the Rule, and that waiver of the conflict would require the informed consent of both witness and defendant.

D.C. Legal Ethics Opinion 232 also noted that Rule 1.7(b)(2) would be implicated if a lawyer counseled a current client-witness not to testify against a current client-party when that advice might be adverse to the interests of the current client-witness. For example, if the refusal to testify were not legally warranted, the witness might be held in contempt of court. In this hypothetical, informed consent from the murder case defendant and the client-witness would be required after "full disclosure of the possible adverse consequences" of the advice.

Today, we add that a Rule 1.7(b) conflict would also arise if it were in the client-witness's interest to invoke the Fifth Amendment when the witness's testimony would assist the defense of the client-defendant.

C. Cross-examining current or former clients

D.C. Legal Ethics Opinion 232 also provides a framework for addressing cross-examination conflict issues.

1. Concurrent clients

To begin with, the prospect of a lawyer's cross-examination of a current client-witness in the trial of another client of the lawyer obviously would occur in the same "matter" for the purpose of both Rule 1.7(a), if there were a joint representation, and 1.7(b)(1), if the defendant were represented in the criminal case by another firm.

If a lawyer were representing both a party and a witness in the same case, Rule 1.7(a) would prohibit any cross-examination of the witness adverse to any position that the witness took on direct examination. Informed consent could not remove this conflict.

The question then arises whether all cross-examinations of a client-witness who would testify adversely to a client-party on direct examination are conflicted under Rule 1.7(a), which prohibits only advancing "two or more adverse positions in the same manner." The Committee concludes that there may be circumstances in which a lawyer could cross examine a client-witness who testifies adversely to a client-party on direct examination without running afoul of Rule 1.7(a) with the informed consent of both the client-witness and client-party.

Example. In a civil trial, a lawyer represents both a corporate defendant and a former employee of the defendant as a witness. The plaintiff calls the former employee-witness in the plaintiff's case in chief, and the witness (a) authenticates documents that reflect meeting communications adverse to the interests of the defendant; and (b) testifies that the witness clearly recalls the communications. Rule 1.7(a) would prohibit the lawyer from attempting to establish on a cross-examination that the documents were not authentic or that the communications did not occur. On the other hand, a cross examination in the nature of a redirect might not be prohibited. The lawyer might ask the witness (a) to authenticate other documents that ameliorate the adverse impact of the plaintiff's exhibit on the defense case without contradicting the witness's testimony; (b) to testify about other ameliorative communications to the same effect as the additional documents; or (c) to explain the technical meaning of one of the communications reflected in the plaintiff's exhibit. If such an examination were not adverse to any position taken by the witness on direct examination or the redirect, or to any position taken or to be taken by the corporate defendant, these circumstances should not constitute a conflict under Rule 1.7(a).

If a lawyer represented a party in litigation and if a current client of the lawyer in an unrelated matter also happened to be a witness in that litigation, while represented by other counsel, Rule 1.7(b)(1) again would preclude any cross-examination of the witness adverse to any position that the witness took on direct examination without the informed consent of each client. In contrast to a Rule 1.7(a) conflict, however, the Rule 1.7(b)(1) conflict is waivable pursuant to the terms of Rule 1.7(c).

Rules 1.7(b)(2) and (b)(3) also could be implicated in circumstances involving cross examination of the client-witness.

Example. A lawyer represents a party in highly publicized litigation. Following pretrial depositions, the lawyer understands that he may need to cross-examine a certain witness at trial by seeking authentication and introduction of certain documents. The lawyer then is asked to represent the witness as a client in unrelated business negotiations in which both sides of that negotiation agree that certain documents will not be exchanged. They include the documents that the lawyer may need to introduce at trial through the witness. Introduction of those documents on the public record likely would adversely affect the witness-client's business negotiating position, and the lawyer is aware of that fact. Under Rule 1.7(b)(2), representation of the witness in the business negotiations would require her informed consent to the conflict of interest arising by her authentication and introduction of the documents, as well as the informed consent of the litigation client. Of course, in seeking informed consent, the lawyer must remain mindful of protecting client confidences and secrets in accordance with Rule 1.6(a). The obligation to maintain confidences and secrets limits the information the lawyer may properly disclose to both the prospective client and existing client in seeking informed consent unless further consent to disclose relevant confidences and secrets for this purpose is obtained. In addition, the lawyer must "reasonably believe" that she is able to provide competent and diligent representation to both clients in accordance with Rule 1.7(c)(2). In particular, the lawyer would need to assess whether requiring the client-witness to authenticate particular documents at trial is consistent with his obligations to deliver competent and diligent representation to the client-witness in the business negotiation.

A conflict under Rule 1.7(b)(3) could arise if a lawyer's cross-examination similar to the previous example might adversely affect the interests of an existing client in a different matter.

Example. A lawyer represents a client in ongoig business negotiations in which both sides agree that certain documents will not be exchanged. The lawyer is then asked by a new client to try a highly publicized case, in which the business client is a witness and the new client is a party. At the time of this request, the lawyer understands that she will need to cross-examine the business client by asking him to authenticate documents covered by the agreement in the business negotiations. If foregoing use of those documents at the trial likely would adversely affect the litigation client's interests, a conflict would arise under Rule 1.7(b)(3). Again, provided the lawyer is able to seek informed consents without disclosing or using client confidences or secrets in violation of Rule

1.6(a), undertaking representation of the litigation client again would require compliance with Rule 1.7(c)(2).[18]

The two previous examples also could present a Rule 1.7(b)(4) punch-pulling conflict against the interest of the litigation client because the business client is a significant and lucrative client.[19] Because of the lawyer's "responsibilities to or interests in" the business client witness, the lawyer's professional judgment about whether to introduce the documents at trial at all or about whether or how to cross-examine the witness could be adversely affected, and informed consent would be required from the litigation client.

If either client were not willing to provide that consent, then the lawyer would not be able to undertake the representation of the client-witness in the first example or of the client-party in the second example.

2. Former client

Under Rule 1.9 the same interest analysis, resulting conflicts, and need for informed consents discussed above could apply, depending on the timing of the facts, if a lawyer cross-examined a former client-witness in any matter that was the same as or "substantially related" to a matter in which the lawyer had formerly represented the witness. Furthermore, we note that the Court of Appeals held in *Pinkney v. United States*, 851 A. 2d 479, 487-788 (D.C. 2004), that a prior representation of a witness was substantially related to a later representation of a different client even though the two representations involved different subject matters.[20]

In *Pinkney*, a criminal defendant challenged the trial court's decision to disqualify his defense counsel (Wood) because of Wood's prior and concurrent representation of a government witness (Henderson). Henderson was to testify at Pinkney's criminal trial on behalf of the government about defendant's alleged jailhouse confession. Wood had previously represented Henderson in an unrelated criminal matter, and was currently representing him in two other unrelated criminal matters. Relying on precedent from the Second and Seventh Circuits, the District of Columbia Court of Appeals acknowledged that the subject matter of Wood's representation of Pinkney was unrelated to the subject matter of his prior representation of Henderson. 851 A.2d at 487-88. Nevertheless, Wood's diligent and competent representation of Pinkney would require Wood to attack Henderson's credibility, implicating confidences and secrets learned in the prior representation:

> [B]ecause [Pinkney's] defense would necessarily involve refuting Mr. Henderson's testimony, it would consist mostly of attacking his credibility on cross-examination. . . . 'Because this impeachment could be accomplished by eliciting specific instances of misconduct involving matters of truthfulness, and because the trial court found that it was likely that [defense counsel] gained knowledge of such instances involving [the witness] through their attorney-client relationship, the trial court found that [defense counsel's] prior representation of [the witness] was relevant to 'the issues and determinations presented in the instant case.' [B] ecause impeachment of Mr. Henderson would be an important part of the defense, issues concerning Henderson's credibility were therefore 'substantially related' to Mr. Wood's representation of [Pinkney]. We think the approach taken by the Second and Seventh Circuits is sound, and thus we conclude that the court did not abuse its discretion in disqualifying Mr. Wood.

Id. (quoting *United States v. O'Malley*, 786 F.2d 786, 792 (7th Cir. 1986)).[21] As highlighted in *Pinkney*, evaluating whether two matters are "substantially related" under Rule 1.9 requires the lawyer to not only consider whether they involve the same transaction or legal dispute, but also whether there "is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[22]

D. Thrust-Upon Conflicts

In rare circumstances, a Rule 1.7(b)(1) witness conflict may arise that was not reasonably foreseeable at the outset of the representation. In that case, even in the absence of informed consent, Rule 1.7(d) may allow a lawyer to cross-examine the client-witness in an unrelated matter. Rule 1.7(d) provides:

> If a conflict not reasonably foreseeable at the outside of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph(c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

The example below illustrates this thrust-upon conflict situation.

Example. A lawyer represents the buyer in a lengthy real estate transaction. The lawyer then undertakes representation of a company in defense of a fast-track patent case. Near the end of discovery in the patent case, the plaintiff adds as a new expert witness: the lawyer's real estate client. Even if the expert witness did not want to be cross-examined (or subpoenaed) by his or her lawyer, Rule 1.7(d) might apply if the addition of this particular expert witness was not reasonably foreseeable at the outset of the representation and the cross-examination would not adversely affect the real estate deal.

E. Imputation and Confidences or Secrets Regarding a Witness

Rule 1.6(a) forbids disclosure or use by a lawyer of the confidences or secrets of the lawyer's current clients, and Rule 1.6(g) continues this obligation after termination of the attorney client relationship.[23]

[18] When the facts of this example are viewed from the perspective of the prospective party client, the conflict arises under 1.7(b)(2) rather than (b)(3). If the business client were not willing to waive the conflict under 1.7(b)(3) to allow the introduction of the documents, the lawyer could not introduce them, which could adversely affect the party's litigation position. Just like the business client could decide to take the risk under 1.7(b)(3) and waive the conflict, the prospective party client could decide to take the litigation risk and provide informed consent to litigate the case without introduction of the business documents. The lawyer could accept this waiver assuming compliance with Rule 1.7(c)(2).

[19] As a general matter, whenever a client-witness's interest may cause a conflict, the possibility of a "punch-pulling" conflict related to the client-party's (or client-co-witness's) interest should be considered.

[20] Because it is beyond the scope of this Committee, we do not address the application of Sixth Amendment jurisprudence to cross examination of current or former clients in criminal trials.

[21] After concluding that disqualification of Wood was not an abuse of discretion, the Court of Appeals remanded the case to the trial court, faulting it for denying Pinkney's motion to reinstate Wood. *See* 851 A.2d at 490-91. The Court explained the trial court was required to consider whether Wood's conflict of interest still existed after the government no longer sought to call Henderson as a witness in Pinkney's criminal trial.

[22] Comment [3] to Rule 1.9.

[23] Rule 1.6(a) states: "Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; [or]

In connection with client witnesses, a lawyer may determine that she cannot satisfy Rule 1.7(b)(4): she is unable to provide competent and diligent legal services with independent judgment for a new client without drawing on her knowledge of the confidences or secrets of another current or former client that only the lawyer herself possesses. These confidences or secrets are unrelated to the substance of the representation and involve information that other lawyers at the firm are unlikely to have learned during the representation. The question then arises whether Rule 1.10 imputes a disqualification to the lawyer's entire firm even though other firm lawyers do not know, and have not had access to, those confidences and secrets. In the Committee's opinion, the answer to this question is no.

Example: A lawyer with a firm is considering representation of a defendant (Prospective Client A) in a criminal trial. The lawyer knows the prosecution intends to call Witness at trial who will testify about issues incriminating the defendant (Prospective Client A). The lawyer possesses certain information about this Witness she obtained during her representation of Client B in an unrelated business negotiation adverse to Party C. In particular, the lawyer learned from Party C that Client B and Witness were playing poker at a casino in Las Vegas on the precise date/time of the alleged crime of Prospective Client A. This information is completely extraneous to the business negotiation between Client B and Party C, but the lawyer learned it during the course of that representation. Client B would consider the public disclosure of this information embarrassing because Client B has a self-professed gambling problem. While Client B did not provide the information to lawyer, she learned it from Party C and concludes the information constitutes a client secret. She determines that she cannot undertake the representation of the Prospective Client A, the criminal defendant, because of Rule 1.7(b)(4). However, other lawyers at the firm could represent Prospective Client A provided that they do not possess, or have access to, the client secret the lawyer learned during the representation of Client B in the business negotiation.[24]

First, on its face, Rule 1.10 does not automatically impute to other lawyers in the firm knowledge of Rule 1.6 confidential or secret information known to another lawyer at the firm who are not or were not involved in the client's matter, providing instead a functional analysis. Comment [9] to Rule 1.10 (which deals with lawyers moving between firms) explains that a conclusive presumption that all partners in a law firm have access to all client confidences might properly apply if the client is extensively represented but may be unrealistic if the client is represented only for limited purposes. Rule 1.10 imputes only actual conflicts under Rule 1.7(a), (b)(1) through (b)(3), and Rule 1.9, but expressly carves out conflicts arising under Rule 1.7(b)(4). This analysis is reinforced by Rule 1.10(c), which provides that when a lawyer leaves a firm, the firm is not thereafter prevented from taking on matters adverse to a client formerly represented by the departed lawyer unless (1) the prospective matter is the same as or substantially related to the prior matter, and (2) another lawyer at the firm has information protected by Rule 1.6 that is material to the matter.

Second, given the importance of attorney-client confidentiality established by Rule 1.6, the Committee concludes that Rule 1.3 (Diligence and Zeal)—does not require a law firm to canvass confidential or secret Rule 1.6 information of all of its clients to fulfill the professional responsibility of one of its lawyers in his or her attorney-client relationship with any particular client. To the contrary, Rule 1.6 establishes an ethical mandate not to use or disclose the confidences and secrets of clients or former clients. When Rule 1.3(a) requires zealous and diligent representation within the bounds of the law, harvesting one client's confidences for another client's benefit is not required because it is outside those bounds. Similarly, Rule 1.3(b) forbids a lawyer's failure "to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." Consequently, in the Committee's view, there is no duty on one lawyer in a law firm representing Client A to obtain and use or disclose another lawyer's confidential or secret information of Client B about which the first lawyer is unaware.

Example. A lawyer represented a client-landlord in an eviction case. Years later, the same lawyer represents a plaintiff adverse to the landlord in an automobile accident personal injury case. The matters are not factually related, and there is no "risk that confidential information as would normally have been obtained in the prior [eviction] representation would materially advance the client's position in the subsequent matter." Comment [3] to Rule 1.9. But the lawyer remembers that the landlord commented during a meeting about the eviction that he carried no automobile insurance because it just encouraged people to sue, and he preferred to take his chances against greedy plaintiffs.

While details on automobile insurance are not the type of confidential information typically obtained in an eviction matter, they nevertheless constitute a protected "secret" under Rule 1.6. The lawyer learned of the landlord's automobile insurance practice in the course of representing the landlord and the lawyer's revelation of that information is embarrassing, or likely detrimental to the landlord. The lawyer could not report the information to the later plaintiff-client as they assess strategy for the accident case, nor should the lawyer use the information during strategy development. The lawyer cannot fulfill her duty to communicate with the plaintiff or zealously use her own memory to develop a competent strategy. Thus, the lawyer has a Rule 1.7(b)(4) conflict.[25] At the same time, however, the information and the subject matters of the two cases do not create a Rule 1.9 conflict, and another lawyer in the same law firm—not burdened by the memory of the first lawyer and screened from information about the eviction rep-

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."

Rule 1.6(g) explains: "The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment."

[24] Altering the facts of this example highlight the importance of distinguishing conflicts arising under Rules 1.7(b)(2) or (b)(3) —and subject to imputation under Rule 1.10(a)—from those arising under Rule 1.7(b)(4) and not subject to imputation. Under certain circumstances, the fact that Witness and Client B were playing poker at a casino in Las Vegas on a particular date/time might be material to the lawyer's representation of Client B in the business negotiation with Party C. For example, if the financial transaction that is the subject of the negotiation required Client B to make certain representations and warranties that implicate gambling issues, the lawyer's representation of Prospective Client A would give rise to a conflict under Rule 1.7(b)(2) or 1.7(b)(3). Under these circumstances, the lawyer's conflict is imputed to the entire firm and would preclude the firm's representation of Prospective Client A.

[25] If this had been a Rule 1.7(b)(2) or (b)(3) conflict (if the landlord/eviction matter is a current matter), the conflict would be imputed to other lawyers at the firm under Rule 1.10(a).

resentation—can develop and communicate strategy competently, diligently, and zealously without ethical constraint.

The Committee therefore concludes that Rule 1.10 imputed disqualification applies, as the Rule states, to Rule 1.7(a), (b)(1) through (b)(3) and Rule 1.9 conflicts, but does not extend to Rule 1.6 duties and information without more. This conclusion is consistent with Legal Ethics Opinion 237, which concluded:

> An attorney may represent a defendant in a criminal case, even though another attorney in his or her office formerly represented an individual who is now a witness in that case if (1) the agency's representation of the person who is the witness was in an unrelated case; (2) the attorney involved in the current case does not actually possess any confidences or secrets of the former client; and (3) the agency takes adequate steps to screen that attorney from any such confidences and secrets."

The Committee also referenced then Comment [11] (now Comment [12]) to Rule 1.10, which discusses lawyers' access to information about law firm clients:

> Access to information . . . is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Comment [12] to Rule 1.10. In between these two examples are endless other examples. In the Committee's view, in any given example, inferences may or may not be reasonable. More importantly, the focus of Opinion 237 should remain the principal inquiry: whether the particular attorney "actually possesses any confidences or secrets of the former client" that were material to the former client's representation.

F. Suggestions Regarding Conflict-of-Interest Issues Related to Witnesses

The Committee suggests the following considerations to help identify, prevent, and resolve conflict-of-interest issues related to witnesses.

- To facilitate early identification of potential conflicts of interest involving witnesses, a lawyer could consider including the names of potential witnesses (including experts) and other sources of facts in conflict checks[26] and then supplementing checks as additional names arise.[27] Depending on the size of a law firm, it might circulate conflict checks to lawyers in addition to database checking, and it could encourage lawyers to review checks regularly.[28]
- To facilitate resolution of potential con flicts of interest related to witnesses, a lawyer, in advance of issuing a subpoena, might attempt to discuss it with the client-witness, assuming such discussion would not violate the Rule 1.6 interests of the client-party. The discussion could include the suggestion that the client-witness consult with independent counsel.
- More generally, advance waivers of conflicts of interest relating to discovery or other witness-related issues could be discussed with prospective-clients at the beginning of attorney-client relationships. As explained in Comment [31] to Rule 1.7, advance waivers are permissible only if the prerequisites of the rule – namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" – are satisfied.[29]
- Regarding potential client-parties, a lawyer could discuss the use of scope limitations and/or engagement of conflicts counsel to take discovery from, or to cross-examine, other clients of the lawyer to avoid conflicts of interest.[30]
- Joint representations sometimes develop witness conflicts, which might be addressed by advance agreements and consents. For example, joint clients could agree to maintain confidentiality of jointly shared facts and advice. They also might agree in advance to procedures for addressing downstream conflicts, including whether an unwaived conflict would require the lawyer's withdrawal from the representation of all or only some of the joint clients. Advance agreements also sometimes address how client information would be handled after withdrawal.
- In any organizational setting *Upjohn* warnings should be given to employees to avoid inadvertent creation of attorney-client relationships that could create conflicts.[31]

* * * *

Obtaining information from current- or former-client witnesses often gives rise to a variety of considerations. These issues might involve conflicts of interest pursuant to Rules 1.7 and 1.9, as well as considerations under Rule 1.6 and Rule 1.10. The opinion offers mechanisms for identifying, preventing, and resolving such conflicts while safeguarding confidentiality and remaining mindful of rules on imputation.

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[26] *See, e.g.*, New York Rule of Professional Conduct 1.10(e).

[27] At the beginning of litigation, it is often impossible to identify all potential adverse witnesses. D.C. Rule 1.7(d) regarding "thrust upon" conflicts applies a "reasonably foreseeable" standard to all conflict issues, including those involving witnesses. If an adverse witness were not identified and were not "reasonably foreseeable" at the beginning of a litigation engagement, then even if the witness were a current client of the trial lawyer, an adverse cross-examination of the witness might be permitted under the D.C. Rule. We also note, however, the ABA Model Rules do not include a Rule similar to D.C. Rule 1.7(d). "Conflicts counsel," as defined in note 11 above, are often utilized to address thrust upon conflicts that arise at trial.

[28] *See* Comment [19] to Rule 1.7 (explaining that the "test to be applied here [to determine potential conflicts] is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place").

[29] *See also* Comment [32] to Rule 1.7 ("Rule 1.7(a) provides that a conflict arising from the lawyer's advancing adverse positions in the same matter cannot be waived in advance or otherwise."); D.C. Legal Ethics Opinion 309 (explaining that advance waivers of conflicts of interest must comply with the overarching requirement of informed consent). *Accord* N.Y. City Bar Opinion 2005-5.

[30] *See, e.g.*, N.Y. City Bar Opinions 608 (2011) and 2017-6; ABA Formal Opinion 92-367.

[31] *Upjohn v. United States*, 449 U.S. 383 (1981). *See also* Rule 1.13(c) ("In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.") and Comments [9] and [10] to Rule 1.13.