

## Recommended Reading

3.5 – American Bar Association – Formal  
Opinion 497, February 10, 2021

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 497

February 10, 2021

## Conflicts Involving Materially Adverse Interests

*Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are “materially adverse” to the interests of a former client or prospective client on the same or a substantially related matter.<sup>1</sup> But neither Rule specifies when the interests of a current client are “materially adverse” to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client.<sup>2</sup> Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. General economic or financial adverseness alone does not constitute material adverseness.*

### Introduction

ABA Model Rule of Professional Conduct 1.9(a) addresses conflicts between current clients and former clients of a lawyer. It reads:

(a) 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, confirmed in writing.

(Emphasis added).

Model Rule 1.18 addresses prospective clients and its paragraph (c) similarly requires analysis when a lawyer subsequently represents another person with “interests materially adverse to those of the prospective client.” Rule 1.18(c) provides:

(c) A lawyer subject to paragraph (b) shall not represent a client *with interests materially adverse to those of a prospective client* in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph,

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> Typically, the lawyer does not perform legal work for a prospective client, and therefore it is unlikely the lawyer would “attack” work done for a prospective client.

no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(Emphasis added). This Opinion addresses how to construe the language “interests [that] are materially adverse to the interests of the former client” in Rule 1.9(a) and similar language used in Rule 1.18(c).

### I. The origins of the “materially adverse” standard

The language “interests [that] are materially adverse to the interests of the former client” has roots in Canon 6 of the ABA’s 1908 Canons of Ethics. Canon 6 prohibited, in relevant part, “the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

Under the ABA Model Code of Professional Responsibility, “there was no direct corollary to” Model Rule 1.9(a).<sup>3</sup> Instead, “former client conflicts were sometimes treated under Canon 9 of the Code under the appearance of impropriety standard.”<sup>4</sup> The current language was crafted by the 1977 Commission on the Evaluation of Professional Standards, frequently referred to as the Kutak Commission. Initial ideas appear in the Commission’s January 1980 and May 1981 Reports, but the current formulation was not proposed until the August 1982 draft, with non-substantive wording changes made in advance of final adoption of Rule 1.9 in August 1983.<sup>5</sup> Rule 1.18 was adopted in 2002 and appears simply to have borrowed the language “materially adverse to those [the interests] of the former client” from Rule 1.9(a).

As adopted in 1983, Comment [1] to Rule 1.9 stated that “[t]he principles in Rule 1.7 determine whether the interests of the present and former client are adverse.”<sup>6</sup> Citing this language, ABA Formal Op. 99-415 (1999) concluded that “a lawyer must look to Rule 1.7 to determine . . . whether the interests of the parties are materially adverse.”

Rule 1.7 prohibits the representation of interests that are “directly” as opposed to “materially” adverse. As a result, ABA Op. 99-415 concluded that “only direct adverseness of interest meets the threshold of ‘material adverseness’ sufficient to trigger the prohibitions established in Rule

<sup>3</sup> Peter Geraghty, *Ethics Tip - August 2017*, A.B.A. (Aug. 1, 2017).

[https://www.americanbar.org/groups/professional\\_responsibility/services/ethicssearch/ethicstipaugust2017/](https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/ethicstipaugust2017/).

<sup>4</sup> *Id.*

<sup>5</sup> The January 1980 and May 1981 drafts proposed that lawyers be prohibited from representing clients in the same or substantially related matters where the interest of the client “is adverse in any material respect to the interest of the former client.” See, e.g., A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS DISCUSSION DRAFT, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_1-80.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_1-80.pdf) (Jan. 30, 1980); A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS PROPOSED FINAL DRAFT [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_5-81.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_5-81.pdf) (May 30, 1981); A.B.A. COMM’N ON EVALUATION OF PROFESSIONAL STANDARDS REPORT TO THE HOUSE OF DELEGATES, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/kutak\\_8-82.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/kutak_8-82.pdf) (last visited Jan. 26, 2021). See also A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 901 (Art Garwin ed. 2013) [hereinafter A LEGISLATIVE HISTORY] (Rules as adopted).

<sup>6</sup> A LEGISLATIVE HISTORY, *supra* note 5, at 901.

1.9.”<sup>7</sup> However, as part of the Ethics 2000 revisions to the Rules, Comment [1] to Rule 1.9 was changed. The sentence relied upon in ABA Op. 99-415 in Comment [1] to Rule 1.9—that Rule 1.7 governed the issue of adverseness—was deleted, without specific explanation.<sup>8</sup>

## II. Subsequent interpretation of the language “materially adverse to the interests of the former client” in Rule 1.9

Subsequent to the Ethics 2000 amendments, courts, regulatory authorities, and ethics scholars have interpreted the meaning of “material adverseness” in Rule 1.9. These authorities have generally concluded that “material adverseness” includes, but is not limited to, matters where the lawyer is directly adverse on the same or a substantially related matter. While material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not.

However, “material adverseness” does not reach situations in which the representation of a current client is simply harmful to a former client’s economic or financial interests, without some specific tangible direct harm. In *Gillette Co. v. Provost*, the court concluded that “[w]ith respect to the ‘material adverse’ prong of Rule 1.9, representation of one client is not ‘adverse’ to the interests of another client, for the purposes of lawyers’ ethical obligations, merely because the two clients compete economically.”<sup>9</sup> As noted in New York State Bar Association Ethic Opinion 1103, “[j]ust as competing economic interests do not create [a Rule 1.7 conflict] so they do not create a ‘material adverse’ interest within the meaning of Rule 1.9(a).”<sup>10</sup> Thus, a lawyer does not have a Rule 1.9 conflict solely because the lawyer previously represented a competitor of a current client whose economic interests are adverse to the current client. Material adverseness, referred to by the *Gillette* court, “requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests.”<sup>11</sup>

As the Court of Appeals for the Eighth Circuit explained in *Zerger & Mauer LLP v. City of Greenwood*:

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<sup>7</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 99-415 (1999).

<sup>8</sup> The minutes of the Commission’s December 12, 1998, meeting note that one member observed: “that the organization and content of the comment to Rule 1.9 should be revised.” He noted the illogical organization of the comment, the irrelevance of some comments (e.g., Comments [4] and [5] regarding legal history), the use of the term ‘material adversity’ with no explanation, and the incomplete definition of ‘substantial relationship’. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday Dec. 11 & Saturday Dec. 12, 1998*, A.B.A. (last visited Jan. 26, 2021),

[https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/121198mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/121198mtg/).

The next reference to Rule 1.9’s Comment [1] by the Ethics 2000 Commission was in the Minutes from the May 7, 2000 meeting: “A member noted that two stricken sentences in Comment [1] were relied on in a recent ethics opinion, 99-415. The Commission felt that no action was necessary in response.” But there was no explanation about why the two sentences (including the reference to “direct adversity”) were stricken. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), *Meeting Minutes Friday May 5 – Sunday May 7, 2000*, A.B.A. (last visited Jan 26, 2021),

[https://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission/050500mtg/](https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/050500mtg/).

<sup>9</sup> *Gillette Co. v. Provost*, 2016 WL 2610677 (Mass. Feb. 11, 2019).

<sup>10</sup> N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 1103 (2016).

<sup>11</sup> See *Gillette Co.*, 2016 WL 2610677, at \*3.

Generally, whether a former client and current client have materially adverse interests is not a difficult question, as the situation usually involves a new client suing a former client. However, the question is more complicated when a former client, “although not directly involved in the [current] litigation may be affected by it in some manner. When such is the case . . . a fact-specific analysis is required in order to evaluate ‘the degree to which the current representation may actually be harmful to the former client.’ This analysis focuses on ‘whether the current representation may cause legal, financial, or other identifiable detriment to the former client.’”<sup>12</sup>

Such detriment has its limits, otherwise the concept of materiality would have no meaning. Further, in the absence of direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client’s interests does not constitute “material adverseness.”

The following are types of situations where “material adverseness” may be found.

#### **A. Suing or negotiating against a former client**

Suing a former client or defending a new client against a claim by a former client (*i.e.*, being on the opposite side of the “v” from former client) on the same or on a substantially related matter is a classic example of representing interests that are directly adverse and therefore “materially adverse” to the interests of a former client.<sup>13</sup> In assessing whether a lawyer has represented parties on both sides of the “v,” the analysis of who or what the lawyer at issue formerly represented may

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<sup>12</sup> *Zerger & Mauer LLP v. City of Greenwood*, 751 F.3d 928, 933 (8th Cir. 2014) (internal citations omitted). *See, e.g., Plotts v. Chester Cycles LLC*, 2016 WL 614023 \*7-8 (D. Ariz. Feb. 16, 2016) (stating that “[w]hile the existence of possible personal liability [as to a former client] would establish material adversity [in a substantially related matter], the non-existence of personal liability does not necessarily dictate a different result.”). In *Plotts*, an adverse financial impact on an entity in which the former client had an ownership interest and that had been the subject of the prior representation constituted material adverseness. *See also, In re Carpenter*, 863 N.W. 2d 223 (N.D. 2015). In *Carpenter*, an individual met with a lawyer about representation in a matter adverse to the Christian Science Church of Boston. Through extensive research, the prospective client had discovered that the mineral rights to 300 acres of North Dakota land had been left by a decedent to the Church and hoped for a fee or other compensation from the Church for bringing the information to its attention. The individual briefed the attorney on his research and conclusions. The attorney, after declining to represent the individual, promptly took the information that he had been given and contacted the Church, offering to represent it with respect to the mineral rights. The lawyer’s representation of the Church was found to be “materially adverse” to the prospective client’s interests. *Carpenter* was found to have violated Rule 1.18 and was suspended for 90 days.

<sup>13</sup> *See, e.g., Persichette v. Owners Insurance Co.*, 462 P.3d 581, 585-86 (Colo. 2020) (law firm representing plaintiff in lawsuit against former client was “materially adverse” to the interests of such former client); *Anderson & Anderson LLP v. North American Foreign Trading Corp.*, 3 N.Y.S.3d 284 (Sup. Ct. 2014) (“direct adversity in litigation meets the definition of ‘materially adverse interests.’”); *Jordan v. Philadelphia Housing Authority*, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004) (“There is no situation more ‘materially adverse’ than where a lawyer’s former client is in a suit against lawyer’s current client . . .”); *Disciplinary Counsel v. Broyles*, 49 N.E.3d 1238 (Ohio 2015) (lawyer disciplined for representing bank at a default hearing in a foreclosure case and then seeking to vacate the default on behalf of the property owners).

be important.<sup>14</sup> In addition, being across the table, so to speak, from a former client and negotiating against that former client in transactional matters typically constitutes “material adverseness.”<sup>15</sup>

### **B. Attacking lawyer’s own prior work**

Another type of “material adverseness” exists when a lawyer attempts to attack her own prior work.<sup>16</sup> For example, one court held that a lawyer cannot challenge a patent that the lawyer previously obtained for a former client.<sup>17</sup> Another court found that a lawyer may not challenge a real estate restrictive covenant for a new client that the lawyer previously drafted for the prior seller of the land.<sup>18</sup> When a lawyer represents a current client challenging the lawyer’s own prior work done for a former client on the same or a substantially related matter, the situation creates a materially adverse conflict.

Even when lawyers are not directly attacking their own prior work, but instead seeking to undermine that work or the result achieved for a former client, material adverseness may exist. These situations, however, do not lend themselves to a “bright line” test of when there is and is not material adverseness. An examination of the facts in three cases provides guidance as to what circumstances may constitute material adverseness.

In *Zerger & Mauer*,<sup>19</sup> the City of Greenwood prosecuted and settled a nuisance claim against Martin Marietta involving the latter’s truck traffic to a local quarry. As part of the settlement, the City could designate the specific route that Martin Marietta’s trucks took on the way to the quarry. The law firm of Zerger & Mauer represented the City in this litigation. Thereafter, Zerger & Mauer brought a private nuisance action against Martin Marietta on behalf of various individuals with property interests along the route designated by the City for Martin Marietta’s traffic to the quarry. The City was not a part of the private nuisance action but sought to disqualify Zerger & Mauer from representing the private plaintiffs in that case. The court disqualified the firm, finding that it

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<sup>14</sup> *Delso v. Trustees for the Retirement Plan for Hourly Employees of Merck*, 2007 WL 766349 \*10-11 (D. N.J. Mar. 6, 2007) (finding no past attorney-client relationship between current lawyer for plaintiff and the defendant); see also Pa. Bar Ass’n Legal Ethics & Prof’l Responsibility Comm. Op. 2005-61 (2005) (concluding that there was likely no conflict as law firm represented seller, not corporation being sold).

<sup>15</sup> Sylvia Stevens, *Conflicts Part II: Former Client Conflicts*, OR. STATE BAR BULLETIN (Dec. 2009) (“Where the current and former clients are opposing parties in litigation or in a transaction, the adversity of their interests is obvious.”), <https://www.osbar.org/publications/bulletin/09dec/barcounsel.html>.

<sup>16</sup> *Franklin v. Callum*, 146 N.H. 779, 782-83 (2001) (plaintiff’s lawyer disqualified because case “may require her to interpret” an agreement drafted by one of her partners for a non-party to the litigation). Typically, the lawyer does not perform legal work for a prospective client, so it is unlikely the lawyer could “attack” work done for such a client.

<sup>17</sup> *Sun Studs, Inc. v. Applied Theory Associates*, 772 F.2d 1557, 1566-68 (Fed. Cir. 1985); *Nasdaq, Inc. v. Miami International Holdings*, 2018 WL 6171819 \*4-6 (D. N.J. Nov. 26, 2018) (failure to disqualify law firm “would allow the same law firm that argued for the patentability of Nasdaq’s inventions to represent parties adverse to Nasdaq in this suit who are arguing those very same patents are invalid.”) (internal quotations omitted).

<sup>18</sup> *North Carolina Bar Association v. Sossomon*, 197 N.C. App. 261, 266-67, 676 S.E.2d 910 (2009) (lawyer who previously represented seller of land in drafting of restrictive covenant disciplined for, in part, violation of Rule 1.9 for materially adverse representation on the very same matter by attempting to negotiate a waiver of the restrictive covenant from the former client for a new client, without getting a waiver of the conflict of interest or even disclosing that he was representing the other party).

<sup>19</sup> 751 F.3d 928 (8th Cir. 2014).

was “advocate[ing] a position that contradicts a term in [the City’s] settlement.”<sup>20</sup> The court also found that Zarger & Mauer’s current clients “have an interest in . . . disrupting Martin’s use of the [City’s] designated route” and “there is a very real possibility that other routes will come into play.”<sup>21</sup> The City also “may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling [it] in protracted litigation.”<sup>22</sup> The court upheld the lower court’s finding that the interests of the City and the private plaintiffs “remain[ed] materially adverse.”<sup>23</sup>

*National Medical Enterprises, Inc. v. Godfrey*,<sup>24</sup> is another example of circumstances in which a non-party, non-witness former client nevertheless had materially adverse interests to a lawyer’s current client.<sup>25</sup> In this case, a lawyer represented a former hospital administrator for National Medical Enterprises (NME). NME was accused of mistreating patients and defrauding insurers in a criminal investigation and parallel civil actions. The former client (the hospital administrator) had denied any wrongdoing, had not been charged with any crime, and had been dismissed from dozens of civil actions. About seventeen months after the lawyer and his firm withdrew from the representation of the former client, the lawyer’s firm brought an action against NME on behalf of some ninety former patients making the same types of allegations of physical and mental abuse at various NME facilities, including facilities under the administrative responsibility of the former client. The claims brought against NME did not include any allegations of misconduct by the former client. The lawyer for the former client was screened from the action against NME. The appellate court, reversing the district court, found the requisite adverseness to exist and ordered NME’s law firm disqualified citing the risk of renewed allegations or inquiries into the former client’s conduct as a result of the new action.<sup>26</sup>

Not every situation involving adverseness constitutes material adverseness. There is a threshold below which adverseness is not material. In *Simpson Performance Products, Inc. v. Robert W. Horn, PC.*,<sup>27</sup> for instance, seat belt manufacturer Simpson Performance Products (SSP) hired lawyer Horn to investigate and evaluate and the possibility of a lawsuit by SPP against NASCAR when NASCAR alleged that SSP’s defective product was partially responsible for the death of Dale Earnhardt at the NASCAR Daytona 500 in 2001. To preserve a good relationship with NASCAR, SSP decided not to bring suit to challenge NASCAR’s allegations that SSP’s product was at fault. Thereafter, however, the retired founder of the company hired lawyer Horn to represent the founder in a suit against NASCAR on his own. When SSP refused to pay Horn, he sued SSP for unpaid fees. In response, SSP alleged that Horn violated Rule 1.9(a). The court found no material adverseness existed because the record demonstrated that the manufacturer’s

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<sup>20</sup> *Id.* at 934.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 924 S.W.2d 123 (Tex. 1996)

<sup>25</sup> It is not entirely clear from the court’s opinion whether the former client would be a witness in the proceedings at issue, but the court’s analysis of material adverseness does not rely on potential testimony of the former client or cross-examination by the client’s former law firm.

<sup>26</sup> See also Ill. State Bar Ass’n Comm. on Prof’l Conduct Advisory Op. 16-03 (2016) (representation of a second spouse in child support proceedings was “materially adverse to the interests” of the first spouse, a former client previously represented by lawyer, because recovery for current client could reduce husband’s ability to pay support to former client).

<sup>27</sup> 92 P.3d 283, 287-89 (Wyo. 2004).

relationship with NASCAR had not been adversely affected by the founder's lawsuit—the very reason SSP declined to sue NASCAR—and that the “company is doing just fine.”<sup>28</sup>

### C. Examining a former client

Rule 1.9(c)(1) prohibits using information from a former client “to the disadvantage of the former client.” If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become “generally known.”<sup>29</sup> However, even if a lawyer ethically can use the information or does not need to use information, the lawyer still may have a conflict of interest in examining a former client under Rule 1.9(a) if the former client's interests are “materially adverse” to the current client *and* the current matter is substantially related to the prior matter. Courts have sometimes found “material adverseness” when the lawyer proposes to examine a former client, where no information from the prior representation will be used.<sup>30</sup>

In ABA Opinion 92-367, this Committee considered the question of whether examining a current client in another client's matter created a conflict under ABA Model Rule 1.7. Discussing adverseness, the Opinion stated that “[i]t should be emphasized that the degree of adverseness of interest involved . . . will depend on the particular circumstances in which the question arises.” In order to avoid this conflict, the current client could retain separate counsel from a different firm just for the cross-examination and screen the conflicted lawyer from the examination.<sup>31</sup> Similarly in the former client examination situation a lawyer may avoid the potential conflict altogether by having the current client retain separate counsel to examine the former client, and screen the lawyer

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<sup>28</sup> Comment [1] to Wyoming Rule 1.9 contained the sentence adopting Rule 1.7's “directly adverse” provision as the standard for the term “materially adverse” in Rule 1.9 that had been deleted from the Model Rules in 2002. The Court's analysis of “materially adverse” does not appear to hinge on that comment and the discussion in *Simpson* of the materially adverse issue has been noted by one commentator as unusual in its “care and precision.” FREIVOGEL ON CONFLICTS, FORMER CLIENT, PART I, available at <http://www.freivogelonconflicts.com/formerclientparti.html> (last visited Jan. 27, 2021).

<sup>29</sup> See Supreme Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2013-4 (2013) (lawyer may impeach former client with criminal conviction only if conviction is “generally known” under Rule 1.9(c)); Utah State Bar Ethics Advisory Opinion Comm. Op. 02-06 (2002) (permitting lawyer to cross examine former client if matters are not substantially related and lawyer does not disclose or use information from former client to such client's disadvantage); Ill. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 05-01 (2006) (same). See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) for an explanation about what information is “generally known.”

<sup>30</sup> In *Illaraza v. Hovensa LLC*, 2012 WL 1154446 \*6-10 (D. V.I. Mar. 31, 2012), the plaintiffs' lawyer was disqualified from representing plaintiffs in action against their employer and others for wrongful discharge and defamation stemming from an incident in which plaintiffs and another employee-manager were prosecuted for grand larceny for stealing employer's property. The charges against the two plaintiffs were dismissed, but the third individual pled guilty to possession of stolen property. The plaintiffs' lawyer had represented the employee-manager in his criminal case. In the wrongful discharge and defamation action, the plaintiffs contended in their summary judgement submission that the employee-manager defamed them. The court found that this constituted “material adverseness” that could not be alleviated by various promises by the plaintiffs' lawyer not to use confidential information against the former client, employee-manager. The court rejected the lawyer's offer not to cross examine her former client on any topics in which the lawyer had confidential information.

<sup>31</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-367 (1992).

with the conflict from participating in the examination of the former client or sharing with separate counsel any information from the prior representation.<sup>32</sup>

### III. Waiver of materially adverse conflicts

If a reasonable lawyer reviewing the situation would conclude that the representation of a current client is “materially adverse” to a former client, the lawyer may still represent the current client, even if the current and prior matters are “substantially related,”<sup>33</sup> provided the lawyer obtains the informed consent of the former client (or prospective client), to waive the potential conflict of interest and that consent is confirmed in writing.<sup>34</sup> Thus, even if a lawyer is hired to sue a former client on behalf of a current client, or negotiate against a former client, or take the deposition of a former client on a substantially related matter, the lawyer may ask for the former client’s informed consent to waive the conflict and permit the lawyer’s representation of the current client. Informed consent to waive a conflict under Rule 1.9(a) will not, however, waive the lawyer’s obligation to maintain the confidentiality of all information learned during the prior representation. To allow the use or disclosure of information protected by Rule 1.6, the former client also must provide informed consent pursuant to Rule 1.6(a).

Similarly, if a lawyer seeks to represent a current client in a matter that is materially adverse to a prior prospective client in the same or substantially related matter on which that prospective client consulted the lawyer, and the lawyer has received “significantly harmful” information from the prior prospective client,<sup>35</sup> Rule 1.18(d)(1) permits representation of the current client if the current client and the prospective client give informed consent, confirmed in writing. Alternatively, the firm of the lawyer who received the “significantly harmful” information from the prospective client can represent the current client if the information-receiving lawyer is screened from the current representation and is apportioned no part of the fee from the representation and written notice is promptly provided to the prospective client pursuant to Rule 1.18(d)(2).<sup>36</sup>

### IV. Conclusion

“Material adverseness” under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on

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<sup>32</sup> See N.Y. City Bar Ass’n Formal Ethics Op. 2017-6 (suggesting that lawyer may associate with separate counsel to subpoena a current client).

<sup>33</sup> MODEL RULES OF PROF’L CONDUCT R. 1.9, cmt. [3] (2020). “Matters are ‘substantially related’ for purposes of this Rule if 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.”

<sup>34</sup> Informed consent may also need to be obtained from the lawyer’s current client if there is a “significant risk” that the lawyer’s representation of such client “will be materially limited” by the lawyer’s responsibilities to the former client. MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2).

<sup>35</sup> See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 492 (2020) for a discussion of “significantly harmful information.”

<sup>36</sup> In addition, the information-receiving lawyer must have taken “reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client.” MODEL RULES OF PROF’L CONDUCT R. 1.18(d)(2).

behalf of a current client in the same or a substantially related matter.<sup>37</sup> It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. “Material adverseness” may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client’s interests suffices.

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<sup>37</sup> Typically, the lawyer does not perform legal work for a prospective client and therefore there are unlikely to be situations where the lawyer “attacks” work done for such a client.