



Conflicts Involving Former Clients in Criminal Cases: Questions and Answers

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This bulletin addresses common questions that arise related to potential conflicts of interest involving former clients in criminal cases.¹

It is common in public defender offices, especially in offices that represent the great majority of indigent defendants in a particular jurisdiction, for witnesses in current cases to be former clients of the office. In some cases, the former client may have a criminal conviction arising from the prior representation, and the lawyer for the current client may need to cross-examine the former client. In some cases, the office has received information during the prior representation that may have a bearing on the current case. The lawyer who represented the former client may have left the office or may still be on staff. Alternatively, a lawyer within the office may have represented the witness while previously employed at another firm.

On a near-daily basis, chief public defenders must decide whether conflicts exist and whether to keep cases in-house or reassign them to outside counsel (“farming out” the cases). These decisions can be challenging as the above permutations present different ethical concerns. To take the first example, where a former client of the office will be cross-examined as a witness in a current client’s case, impeaching the former client using a conviction arising from a case the office handled could implicate the loyalty and zealousness of the lawyers involved or simply result in awkwardness. Furthermore, the cross-examination might “spill over” into areas that should remain confidential between the former client and the former lawyer. Considering another scenario, even where there is no prior conviction to use for impeachment, confidential material information derived from a prior representation must remain off-limits when, for example, a lawyer is engaged in plea negotiations on behalf of a current client.

After briefly addressing other types of conflicts to lay the foundation for the discussion, the bulletin proceeds in a question-and-answer format, offering guidance to defenders on issues that frequently arise involving potential conflicts between current and former clients.

I. First Principles: Conflicts Involving Co-Defendants, Concurrent Clients, and Successive Clients in the Same Matter

Before delving into conflicts involving current and former clients, we begin with a brief discussion of conflicts involving co-defendants, concurrent clients, and representation of successive clients in the same or substantially related matter.² The principles underlying these types of conflicts relate to those involving former-client conflicts, so it is worthwhile to begin with these foundational concepts.

Conflicts Between Co-Defendants

A baseline principle is that lawyers should “ordinarily” decline to represent co-defendants in a criminal case given the “grave” potential for conflict.³ However, the North Carolina Rules of Professional Conduct contemplate that a lawyer could theoretically represent co-defendants

1. The author thanks John Rubin for his support and his previous work in this area. See NORTH CAROLINA DEFENDER MANUAL, ch. 12, *Right to Counsel*, app. 12-1 (UNC School of Government 2013) (online at <https://defendermanuals.sog.unc.edu/pretrial/12-right-counsel>). The author also thanks Mary Pollard, Whitney Fairbanks, Brian Oten, Belal Elrahal, Phil Dixon, Jacob Ward, and Laura Powell.

2. See N.C. RULES OF PRO. CONDUCT rr. 1.7, 1.9.

3. See N.C. RULES OF PRO. CONDUCT r. 1.7 cmt. 23. Rule 1.7 addresses conflicts involving current clients.

where the conditions of Rule 1.7(b) are met: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, (2) the representation is not prohibited by law, (3) the representation does not involve the assertion of a claim by one client against another, and (4) each affected client gives informed written consent.⁴ The commentary to Rule 1.7 explains that certain conflicts are *non-consentable*, meaning that it would not be reasonable for the lawyer to believe that competent and diligent representation is possible, and the lawyer thus cannot properly ask the client to consent.⁵ For example, co-defendants might have antagonistic defenses, or one co-defendant may seek to cooperate with the prosecution against the other.

Conflicts Between Current Clients Where One Client Is a Witness or Victim in Another Client's Case

As compared to conflicts arising between current and former clients discussed below, the potential for conflict is significantly greater where the representation is concurrent, as the duty of loyalty to each client may preclude simultaneous representation.⁶ Where the two clients have interests that are “directly adverse” to each other, simultaneous representation is generally not permissible.⁷ Simultaneous representation is also generally impermissible where representation of one client may be “materially limited” by the responsibilities to the other client.⁸ Yet, as discussed above in the context of representation of co-defendants, where the four conditions of Rule 1.7(b) are met, representation of concurrent clients may be permissible, though potentially inadvisable.

Conflicts Between Successive Clients in the Same or Substantially Similar Matter

Finally, conflicts that arise when a lawyer represents a client in the same matter in which the lawyer previously represented a former client may be addressed by seeking informed written consent from each affected client under Rule 1.9 (addressing duties to former clients). Rule 1.9(b) contemplates that seeking informed written consent may be appropriate even where the former client's interests are materially adverse to the current client *and* the lawyer acquired confidential, material information from the former client. However, again, some conflicts are non-consentable in light of the particular facts, the recency of the former representation, and other circumstantial nuances. Furthermore, even where it may be ethical to seek informed consent, it may not be advisable in light of available alternatives.

Implications for Informed Consent with Conflicts Involving Former Clients

Crucially for our purposes in delving into conflicts involving former clients, the examples above of representation of co-defendants, clients with concurrent potential conflicts, and representation of successive clients in the same matter demonstrate that even in circumstances where a grave or heightened potential for conflict exists, it is possible for representation to continue in

4. N.C. RULES OF PRO. CONDUCT r. 1.7(b).

5. See N.C. RULES OF PRO. CONDUCT r. 1.7 cmts. 14, 15.

6. See N.C. RULES OF PRO. CONDUCT r. 1.7 cmt. 1.

7. See N.C. RULES OF PRO. CONDUCT r. 1.7(a)(1); *id.* r. 1.7 cmt. 6 (cross-examining a client in a case involving another client may result in a “directly adverse conflict” because testimony might be “damaging” or because the client might “feel betrayed”).

8. See N.C. RULES OF PRO. CONDUCT r. 1.7(a)(2); *id.* r. 1.7 cmt. 8 (key question is the likelihood that “a difference in interests will eventuate”).

limited circumstances where the involved clients give informed written consent. The potential conflicts involving former and current clients are, as a general matter, less stark, and informed written consent again comes up as a core “remedy” to allow continued representation in certain circumstances. Informed written consent ensures that a client understands the full context of the representation, the risks of proceeding, and the potential for a conflict to develop or become problematic.

Important Note

An amendment to Rule 1.10 (permitting screening and notice in certain circumstances) became effective April 1, 2026.⁹ The change allows for screening the former assistant public defender and giving notice to the former client as an alternative “remedy” to informed consent in most cases involving potential conflicts with former clients, including those involving representation of successive clients in the same or substantially similar matter.¹⁰ The practice of screening and notice is discussed further below.

II. Conflicts Involving Former Clients

In determining whether a conflict exists where a lawyer or a lawyer’s firm previously represented an individual involved in a given case, several factors are relevant:

- Did the prior representation result in a conviction?
- Where did the prior representation occur—inside the firm or outside the firm?
- Does anyone currently in the firm have knowledge of material information related to the prior representation?
- Does the firm possess case files from the prior representation with information material to the current case?

The examples below address different combinations of the above factors, providing guidance on common scenarios.

Question 1: A public defender’s office currently represents a criminal defendant in a criminal case. One of the state’s witnesses in the current case was a client of a lawyer in the office in a previous case. The previous case ended in a conviction. A different lawyer in the office represents the current client. Is there a conflict?

As a general matter, this appears to be a conflict. The North Carolina State Bar addressed this question in an unpublished opinion that first expressed concern about the use of confidential information obtained during the prior representation, which would violate the former client’s rights.¹¹ The State Bar was also concerned that the defender might pull punches during cross-examination out of deference to the former client, thereby violating the current client’s right to

9. See the [Appendix](#) for the full text of Rule 1.10 as amended.

10. See N.C. RULES OF PRO. CONDUCT rr. 1.10(g) (as amended Apr. 1, 2026), 1.9.

11. See 98 Ethics Decision 9 (N.C. State Bar Oct. 14, 1998) (unpublished); N.C. RULES OF PRO. CONDUCT r. 1.9.

zealous representation.¹² The State Bar recognized that the conviction was publicly available¹³ but was concerned that additional material information related to the prior representation might be used on cross-examination that was not “otherwise publicly disseminated.”¹⁴ The lawyer’s knowledge of this additional material information is imputed to other lawyers in the firm under Rule 1.10 of the N.C. Rules of Professional Conduct.¹⁵

However, it is notable that the analysis in the unpublished opinion relies on a determination that there is a “high probability that the lawyer will delve into facts relative to the conviction that are not public record . . . or, in forgoing such questions, fail adequately to represent the lawyer’s current client.”¹⁶ The opinion also encourages the lawyer to consider whether the representation of the current client would be any different were it not for the duty of confidentiality to the former client. Thus, where a lawyer can predict with confidence that cross-examination will be limited to the bare fact of conviction (neither the lawyer nor the firm is in possession of any additional material information, or there is no conceivable way for such information to be introduced), it is arguably consistent with the reasoning in the opinion to conclude that no conflict exists and to continue the representation. There remains the awkwardness of cross-examining a former client of the firm regarding a conviction arising from a matter in which the former client was represented by the firm, but this does not appear to preclude representation of the current client, given the somewhat restricted duty of loyalty to former clients.¹⁷ In considering whether a conflict exists, the lawyer should also consider the recency and relevance of the former representation, as well as the relative centrality of the former client’s testimony in the current case. For example, if the former client plays a minimal role in the current matter (e.g., as a custodian of business records) or the credibility of the witness is not crucial to the case, the potential need for aggressive cross-examination and the likelihood of spillover into confidential topics may be minimal.¹⁸

Hypothetical

The following example, in which there is likely an untenable risk that cross-examination will spill over into confidential information beyond the bare fact of the conviction, derives from a conversation with a chief public defender: A lawyer in a firm previously represented a client in

12. See also 2003 Formal Ethics Opinion 14 (Oct. 21, 2004) (citing 98 Ethics Decision 9 (Oct. 14, 1998) (unpublished) and relying on its analysis in addressing conflicts involving prosecutors who previously represented defendants and defense lawyers who previously prosecuted clients).

13. See N.C. RULES OF PRO. CONDUCT r. 1.9(c)(1), (2) cmt. 8.

14. See N.C. RULES OF PRO. CONDUCT r. 1.9(c)(1). Note that Rule 1.9 has been amended. The applicable language at the time of the 1998 unpublished opinion considered whether the information was “generally known.” See N.C. RULES OF PRO. CONDUCT r. 1.9 (1998).

15. See N.C. State Bar Council on Rules of Pro. Conduct, Op. RPC 65, [Representation of Codefendants by the Public Defender](https://www.nccbar.gov/for-lawyers/ethics-and-governing-rules/ethics-opinions/opinions/rpc-65/) (public defender office considered equivalent to a single law firm), <https://www.nccbar.gov/for-lawyers/ethics-and-governing-rules/ethics-opinions/opinions/rpc-65/>.

16. See *supra* note 10.

17. Compare N.C. RULES OF PRO. CONDUCT r. 1.7 cmt. 6 with N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 1.

18. See N.C. DEFENDER MANUAL, ch. 12, [Right to Counsel](#), app. 12-1, at 12-72 (UNC School of Government 2013), for further discussion of how the concern in 98 Ethics Decision 9 (Oct. 14, 1998) (unpublished) regarding confidentiality may be both over- and under-inclusive (over-inclusive because cross-examination is generally limited to the fact of conviction under Rule 609 of the N.C. Rules of Evidence, and under-inclusive because it only addresses cross-examination rather than other contexts in which material information may be used, such as during plea bargaining) (online at <https://defendermanuals.sog.unc.edu/pretrial/12-right-counsel>).

a drug matter. This former client is now an alleged victim in a pending case where the current client is charged with breaking into the home of the former client. Though it is certainly possible that information obtained during the prior representation would not be admissible on cross-examination of the alleged victim, one can also imagine that information related to the alleged victim's prior substance-use disorder, familial and community ties, and housing situation might naturally become relevant during impeachment or as substantive information. Between this concern and the inherent awkwardness of cross-examining a former client about a conviction obtained through the prior representation, this would almost certainly be a conflict.

A Contrasting Hypothetical

A lawyer in a firm represented a client in a driving while impaired (DWI) case eight years earlier. There was no indication of substance-use disorder, and the former lawyer has no memory of the prior case. The former client is now an alleged victim in a misdemeanor assault case involving neighbors. It may well be that the current lawyer can be confident that cross-examination would be limited to the bare fact of conviction and thus no conflict exists.

Question 2: Is there still a conflict if ten years have elapsed since the date of conviction or release from confinement under Rule 609 of the North Carolina Rules of Evidence?

Probably not. A conflict is unlikely to exist if ten years have elapsed because the conviction is presumptively inadmissible under Rule 609. However, if the defense could reasonably prevail in advancing an argument under Rule 609(b) that the probative value of the conviction substantially outweighs the prejudicial effect, and thus the prior conviction is admissible for impeachment purposes, a conflict may exist for the reasons discussed above. In addition, as discussed below, if confidential information obtained during the prior representation could be used to materially advance the current client's position, a conflict would exist.¹⁹

Question 3: Does a conflict exist if the lawyer anticipates that the matter will not proceed to trial but will instead be resolved by plea?

Rule 1.7, comment 8 of the N.C. Rules of Professional Conduct states that a critical question in identifying conflicts of interest is "the likelihood that a difference in interest will eventuate." If the lawyer is confident in her professional judgment that the current matter will proceed to a negotiated resolution or dismissal and that cross-examination of the witness will not "eventuate," the lawyer may reasonably conclude that no conflict exists. However, a conflict would exist if the lawyer were to "foreclose courses of action that reasonably should be pursued on behalf of the client," such as proceeding to trial and cross-examining the witness or taking related steps.²⁰ Although in this situation it may well be that the conflict arising from cross-examining a former client will not "eventuate," it may not be advisable to proceed with the representation given that circumstances can change rapidly (as can the client's wishes as to how to proceed), resulting in a trial and the attendant need to confront the former client.

Furthermore, if the current lawyer has access to information from the former representation that could be used to "materially advance the [current] client's position," then a conflict would exist, notwithstanding the fact that the lawyer anticipates that the matter will be resolved

19. See N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 3.

20. See N.C. RULES OF PRO. CONDUCT r. 1.7 cmt. 8.

without a trial.²¹ The concern is the risk that the lawyer might improperly use confidential information derived from the prior representation. For example, if a firm possessed confidential information from the representation of a former client, who is now a key witness for the state, indicating that the former client had a severe substance-use problem, this knowledge could give rise to a conflict.

Question 4: Does informed written consent address the conflict in Question 1?

Yes. If the lawyer is concerned that a conflict exists in [Question 1](#), the representation could continue if the former client gives informed written consent to the representation and the expected cross-examination.²² Rule 1.0(f) of the Rules of Professional Conduct defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.”

In addition, the lawyer should obtain informed consent from the current client, given the potential concern that the lawyer might show improper restraint in cross-examining the former client.

It does not appear that the district attorney must be notified that informed consent has been obtained in the above situation, as the prosecutor is not the attorney for the witness but rather represents the state. There may, however, be reasons why notifying the state is preferable, such as avoiding surprise or ensuring agreement that continued representation is appropriate.

Important Note

The amendment to Rule 1.10 that became effective April 1, 2026 allows for screening the lawyer who represented the former client from the current matter and providing notice to the former client of such screening, rather than requiring the lawyer to obtain written consent (see below for further discussion of this course of action). This remedial measure would only be available within public defender offices (and the North Carolina Department of Justice) and would require the chief public defender to determine in each individual case whether the representation can reasonably be carried out within ethical bounds.²³

Question 5: If a conflict exists and the lawyer chooses not to pursue these remedial measures, or the former client does not consent, how should the lawyer proceed?

The lawyer should move to withdraw from the representation.²⁴

Question 6: Is the analysis different if the lawyer who handled the prior matter for the firm has now left the office?

Maybe. If no material information remains within the firm now that the lawyer who represented the former client has left the firm, one may plausibly determine that no conflict exists under the reasoning above.²⁵

21. See N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 3.

22. See N.C. RULES OF PRO. CONDUCT r. 1.9(b).

23. See N.C. RULES OF PRO. CONDUCT r. 1.10 (as amended Apr. 1, 2026) cmts. 12, 13.

24. See N.C. RULES OF PRO. CONDUCT r. 1.16.

25. See N.C. RULES OF PRO. CONDUCT rr. 1.10(a), (b).

However, if material information that could be revealed during “spillover” from cross-examination on the prior conviction remains in the memories of the firm’s current lawyers or staff, or in the firm’s case files, a conflict likely exists. Again, there remains the awkwardness of cross-examining a former client of the office using a conviction arising from a case the office handled. However, the reasoning of the State Bar’s unpublished opinion discussed in [Question 1](#) is based on the likelihood of cross-examination “spilling over” from the bare fact of conviction to additional material information.²⁶ Where the former lawyer has left the firm and the likelihood of such spillover is close to zero, no conflict appears to exist.

As discussed above in [Question 4](#), a conflict arising in this scenario can be addressed by seeking informed written consent from the former client. Seeking written consent in this scenario where the lawyer who represented the former client has left the firm may be more appropriate than in the scenario above, given the more attenuated nature of the conflict.

Important Note

As noted in [Question 4](#), in light of the amendment to Rule 1.10 of the Rules of Professional Conduct, screening and notice provisions may now be used instead of written consent.

Question 7: Is the analysis different if the former client was represented *outside the firm* by a lawyer who has now joined the firm?

The conflict analysis is generally the same as above, as once the prior lawyer has become associated with the current firm, the potential conflict is imputed to the firm.²⁷

However, prior to the recent amendment to Rule 1.10 of the Rules of Professional Conduct, the remediating measures were different where the conflict originated outside the office as opposed to within the office. Where the lawyer for the former client represented the client *outside the firm*, the conflict can be addressed by screening the lawyer from any involvement with the current representation and providing notice to the former client of such screening measures (so that the witness can ascertain compliance).²⁸

Prior to the amendment, where the conflict originated within the office, informed consent rather than screening and notice was required. The rules appeared to treat potential conflicts originating from within the firm differently from those originating from outside the firm. The reasoning appeared to be that conflicts originating from outside the firm are easier to “quarantine” when the lawyer joins the firm and can be handled through screening measures, whereas conflicts originating from within the firm are more difficult to contain (the representation may have involved multiple lawyers and staff) and thus require the former client’s consent.

However, after the amendment, screening and notice is appropriate regardless of whether the conflict originated within or outside the firm.²⁹

Screening a lawyer is defined under Rule 1.0(l) as “the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated

26. See *supra* note 10.

27. See N.C. RULES OF PRO. CONDUCT r. 1.10(c), 1.11(b).

28. See N.C. RULES OF PRO. CONDUCT r. 1.10.

29. See N.C. RULES OF PRO. CONDUCT r. 1.10(g).

lawyer is obligated to protect under these Rules or other law.” More detailed screening measures are discussed in [Question 11](#), below.

Question 8: What if the prior representation occurred inside the firm but *did not result in a conviction*?

If there is no conviction arising from the prior representation, the key question is whether the firm possesses material information.

If no attorney in the firm has access to material information that could be used against the former client to advance the position of the current client, then no conflict exists.³⁰

However, if material information remains in the firm, either in the memory of the lawyers or staff or in case files, then a conflict would exist that would require written consent from the former client to continue the current representation.

Furthermore, Comment 3 to Rule 1.9 of the Rules of Professional Conduct states that a “conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.” Thus, even if the former attorney believes *subjectively* that she has no recollection of any information that would be material to the current case, if the previous representation was extensive, recent, related, or some combination of the three, and one would reasonably expect the former attorney to possess such material information (*objectively*), then a conflict may exist.³¹

Important Note

As noted in [Question 4](#), in light of the amendment to Rule 1.10, screening and notice provisions may now be used instead of written consent.

Question 9: What if the prior representation (not resulting in a conviction) occurred outside the office, but the lawyer whose firm handled the prior matter has now joined the firm representing the current client?

If the former lawyer is in possession of material information that could be used to advance the position of the current client, then a conflict exists, but it could be addressed by screening the former lawyer from the current matter and providing notice to the former client of such screening.³² If the former lawyer is in possession of no such material information, then no such conflict exists.

Again, however, note that there is language in the commentary to Rule 1.9 that allows for “inferences, deductions or working presumptions” about how lawyers work together to determine whether the former lawyer possesses material information.³³ This sounds like the objective test discussed above. However, there is also language in the commentary that states that Rule 1.9(b)

30. See N.C. RULES OF PRO. CONDUCT r. 1.9.

31. See also *Worley v. Moore*, 370 N.C. 358, 365 (2017) (“In applying Rule 1.9(a), the trial court considers the circumstances surrounding each representation to objectively assess what would ‘normally’ have occurred within the scope of that representation.”).

32. See N.C. RULES OF PRO. CONDUCT rr. 1.9, 1.10(c).

33. See N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 6.

only disqualifies a lawyer who represented the former client at a different firm where the lawyer has “actual knowledge” (referring to the situation in which the former lawyer’s firm represented the former client, but the lawyer did not represent the client directly).³⁴

Question 10: What if a current client is making a proffer to the state to provide information and this information implicates a former client or is explicitly offered to build a case against a former client?

Although the relationship in which a client provides information that could be used to prosecute a former client is likely more antagonistic than that when a former client is cross-examined during the current client’s trial, the analysis is similar. The key question is whether the current lawyer has access to material information that was obtained from the former representation that could be used to further the current client’s endeavor to cooperate with the state.³⁵ The risk is likely to be significant that information obtained from the former client could spill over into the current client’s proffer, and thus a conflict almost certainly exists where the lawyer is in possession of material information.³⁶

Furthermore, a conflict may exist independently of the question of whether the lawyer is in possession of confidential, material information from the prior representation. If the lawyer’s loyalty to the former client prevents the lawyer from taking all appropriate steps to improve the current client’s position, such as pursuing certain avenues of investigation, negotiation, or cooperation with the state, then this would also constitute a conflict and require withdrawal.

However, if the former representation occurred many years previously, and no material information remains in either the minds of those involved in the current representation or the firm’s files, it is conceivable that the relationship between the two matters is sufficiently attenuated such that no conflict exists.

After the [amendment to Rule 1.10](#) discussed above, this conflict could potentially be addressed through informed consent or screening and notice. However, given the directly antagonistic nature of the conflict and the fact that the proffer may be made in secret, seeking such consent may be impossible, impracticable, or ill-advised. Such a conflict may also be non-consentable.

Question 11: What practical considerations arise in implementing screening and notice?

Amended Rule 1.10(g) now allows for screening and notice as a remedy for most conflicts involving former clients. In determining whether representation of the current client can ethically continue after screening and notice, chief public defenders should speak with attorneys and staff involved in the former client’s case if they are still in the office. Chief public defenders should also consider reviewing the former client’s case files. Where chief public defenders

34. See N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 5.

35. See N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (matters are “substantially related” if there is a “substantial risk that information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter”).

36. See also N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 3.

determine that representation can ethically continue, they should consider appropriate measures to ensure that the remedy of screening and notice is applied effectively. Comment 9 to Rule 1.0 provides helpful guidance on effectuating screening:

The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

Technological measures also may be used to ensure that attorneys do not have electronic access to prior files, such as password-protecting files or restricting shared access.

Appendix: Rule 1.10

CHAPTER 02—RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

SECTION .0100—CLIENT-LAWYER RELATIONSHIP

27 NCAC 02 RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer, including a prohibition under Rule 6.6, and the prohibition does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
- (1) the personally disqualified lawyer is timely screened from any participation in the matter; and
 - (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.
- (f) The disqualification prescribed by Paragraphs (a) and (b) of this Rule when applied to members of the North Carolina Department of Justice may be resolved by following the screening and notice requirements as set out in Subparagraphs (c)(1) and (c)(2) of this Rule.
- (g) Disqualification pursuant to Rule 1.9 as prescribed by Paragraphs (a) and (b) of this Rule when applied to members of a public defender's office may be resolved by following the screening and notice requirements as set out in Subparagraphs (c)(1) and (c)(2) of this Rule.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]–[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in Paragraph (a) of this Rule gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) of this Rule operates only among the lawyers

currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in Paragraph (a) of this Rule does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in Paragraph (a) of this Rule also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does Paragraph (a) of this Rule prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of Paragraph (c) of this Rule are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(l). Paragraph (c)(2) of this Rule does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, nor does it specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(d) removes imputation with the informed consent of the affected client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(f).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, Paragraph (j) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[12] Lawyers working in a public defender's office provide clients with constitutionally guaranteed representation. Similarly, lawyers working in the North Carolina Department of Justice provide government entities, agencies, and individuals with statutorily guaranteed representation. See, e.g., N.C. Gen. Stat. § 114-2. Historically, lawyers working in either of these offices have been considered part of a single "firm" for conflict

analysis. See, e.g., 98 FEO 5. However, application of the imputed conflict rules set out in Rule 1.10 can create a limitation on the provision of constitutionally or statutorily guaranteed representation, thereby hindering the public's or the government's ability to avail itself to the legal representation provided by law. Considering the Rules of Professional Conduct are "rules of reason" (see Rule 0.2 Scope [1]; see also RPC 55), Rule 1.10(f) and (g) permit the North Carolina Department of Justice and public defender offices, respectively, to resolve certain imputed conflict issues by taking reasonable precautions to screen disqualified lawyers from participation in the representation giving rise to the conflict under this Rule and provide notice to the affected individual(s) as set out in Rule 1.10(c). Rule 1.10(f) and (g) only apply to the referenced agencies or offices and do not permit private law firms to avoid imputed disqualification under Rule 1.10 by employing screening measures other than as set out in Paragraph (c) of this Rule.

[13] The Chief Public Defender of any public defender office is tasked with making reasonable efforts to ensure all assistant public defenders employed by the office conform their conduct to the Rules of Professional Conduct. See generally Rule 5.1. Accordingly, the Chief Public Defender of a public defender office should review and make the determination as to whether a public defender office can proceed with representation pursuant to this Rule.

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