Navigating Ethical and Compliance Challenges

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Meet Steve: *Steve has just been named Compliance Officer of Boomer Health of Maryland, a regional health system with a community hospital, ambulatory surgery center, and urgent care clinic. Steve comes from Massive Health, a large California health system with multi-campus medical centers, physician practices, and ambulatory surgery centers. Steve was business transactions attorney for Massive, working on mergers, acquisitions and complex contracts. Steve is happy to move back to his small hometown and is confident his legal experience with Massive will lead to success at Boomer. What could possibly go wrong?*

Issue: Is he qualified to be a Compliance Officer?

Model Rule 7.1: Communications Concerning a Lawyer's Services

Information About Legal Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment 2: Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

DOJ Guidance § Is the Program Adequately Resourced and Empowered to Function Effectively?

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax, under-resourced, or otherwise ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a "paper program" or one "implemented, reviewed, and revised, as appropriate, in an effective manner." JM 9-28.800. In addition, prosecutors should determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts." JM 9-28.80 (Justice Manual)

II.B. Autonomy and Resources

Prosecutors should evaluate whether "internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy," as an indicator of whether compliance personnel are in fact empowered and positioned to "effectively detect and prevent misconduct." JM 9-28.800.

Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance," "[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk," and "[t]he authority and independence of the compliance function and the availability of compliance expertise to the board." JM 9-47.120(2)(c); see also JM 9-28.800 (instructing prosecutors to evaluate whether "the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law")

Experience and Qualifications – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? How does the company invest in further training and development of the compliance and other control personnel? Who reviews the performance of the compliance function and what is the review process?

Day 1: As Steve is settling in on his first day, Boomer is served with a civil subpoena for all records related to an identity theft and insurance fraud investigation. Boomer doesn't have a legal office, so the subpoena comes to Steve, since everyone knows he was a big-time lawyer in California. Steve's never responded to a subpoena. How hard could it be?

Issue: Should he handle a legal matter that where he has no experience?

Model Rule 1.1 Competence: Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 1: In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
Comment 2: A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.
Comment 4: A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation.
Comment 5: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

Issue: Is he admitted to practice in Maryland?

Maryland Rules for Attorneys 19-305.5 Unauthorized Practice of Law.

(b) An attorney who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the attorney is admitted to practice law in this jurisdiction.
(d) An attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
(1) are provided to the attorney's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;
Comment 16: Subsection (d)(1) of this Rule applies to an attorney who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This subsection does not authorize the provision of personal legal services to the employer's officers or employees. The subsection applies to in-house corporate attorneys, government attorneys and others who are employed to render legal services to the employer. …
Comment 20: In some circumstances, an attorney who practices law in this jurisdiction pursuant to section (c) or (d) of this Rule may have to inform the client that the attorney is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 19-301.4 (b) (1.4).

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Comment 4: Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rule 7.1.

Comment 19: A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

Maryland State Bar Committee on Ethics Opinion 2017-01 Duty to Report Unauthorized Practice of Law

"It is professional misconduct for an attorney to violate or attempt to violate the Maryland Attorneys' Rules of Professional Conduct. (1) An attorney who knows that another attorney has committed a violation of the Rules that raises a substantial question as to that attorney's honesty, trustworthiness or fitness as an attorney in other respects, shall, according to the Rules, inform the appropriate professional authority. (2)"

Day 2: Steve realizes one of the individuals named in the subpoena is the CEO's former daughter-in-law, a coder who no longer uses her married name. The coder was involved in some upcoding issues at a previous job and was excluded from federal healthcare programs. She now works at the Hospital, but the CEO tells Steve that the subpoena doesn't apply since the name is wrong. Steve drafts a response saying Boomer has no employee by that name. He signs the letter Steve, Esq. Compliance Officer. No problem!

Issue: A subpoena is a court order. Appropriate responses: respond fully, object in writing, move to quash or modify, or contact the adverse party who may challenge.

Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation…

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment 1: Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.

Comment 9: Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. N

Side Note on Counseling for Cannabis: Cannabis is still illegal under federal law. Current federal Controlled Substances Act, 18 U.S.C. § 801 et seq., prohibits the production, distribution, sale, use, or possession of marijuana. The federal statute provides no exception for medical or other uses authorized or regulated by state law. Can an attorney advise a client on a cannabis business?

- Montana amendments to Rules of Professional Conduct to provide a safe harbor for advise clients in the cannabis business. (Counsel and assist regarding Montana law; also advise client regarding related federal and tribal law.);
- Compare to Illinois Rule 1.2(d)(3) "…may…counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences."

ABA Opinion 491 (2020)

"As set forth in Section II of this opinion, a lawyer who has knowledge of facts that create a high probability that a client is seeking the lawyer's services in a transaction to further criminal or fraudulent activity has a duty to inquire further to avoid assisting that activity under Rule 1.2(d). Failure to make a reasonable inquiry is willful blindness punishable under the actual knowledge standard of the Rule. Whether the facts known to the lawyer require further inquiry will depend on the circumstances. As discussed in Section III, even where Rule 1.2(d) does not require further inquiry, other Rules may. These Rules include the duty of competence under Rule 1.1, the duty of diligence under Rule 1.3, the duty of communication under Rule 1.4, the duty to protect the best interests of an organizational client under

Rule 1.13, the duties of honesty and integrity under Rules 8.4(b) and (c), and the duty to withdraw under Rule 1.16(a)."

Model Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 4.4: Respect for Rights of Third Persons; Transactions With Persons Other Than Clients

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Maryland Ethics Docket 2019-01

… the intentional evasion of process by an attorney is conduct that (i) interferes with the judicial system and is prejudicial to the administration of justice, (ii) a lawyer knows is fraudulent, and (iii) has no substantial purpose other than delaying the rights of a third person.

Model Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(c) (a) make a false statement of material fact or law to a third person; or

(d) (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Model Rule 7.1 Comment 4: It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Rule 8.4: Misconduct: Maintaining the Integrity of the Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

Day 3: The subpoena asks for the documents to be sent via email to a local attorney, Terry Friar, attorney for the state Medicaid agency. Steve, trying to meet the deadline, drafts an Outlook email but mistakenly selects the Tony Frye and sends the message to a similar name. The Boomer email system is antiquated, so Steve has been using his personal Office 365 account for work. Toni Friar calls the next day demanding the documents. Oops!

Issue: Confidential information went to the wrong party.

Model Rule 1.6 – Confidentiality of Information:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Acting Competently to Preserve Confidentiality

Comment 18: Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Model Rule 1.1 Comment 8: Maintenance of Competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

"Numerous ethics opinions have reinforced this directive, explaining that lawyers are required to take reasonable steps to protect their clients from injury resulting from ill-considered uses of technology. Lawyers risk violating these basic requirements when they expose client data to theft, which necessarily involves the RPC 1.6 duty to preserve client confidences, and when they fall prey to malicious scammers."

Anthony E. Davis; Ethical Obligations to be Technologically Competent; New York Law Journal. January 8, 2016. https://www.law.com/newyorklawjournal/almID/1202746527203/The-Ethical-Obligation-To-Be-Technologically-Competent/?mcode=0&curindex=0&curpage=2

ABA Opinion 477R (2017)

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security."

Day 4: Tony Fring, Boomer's Director of Coding and Billing, reads the email. Tony is excited that Boomer finally has a Compliance Officer because he has concerns about billing practices at Boomer related to the clinical decision support tools in the electronic health record system. He shares his concerns with Steve: the CDSS was set up to overstate acuity of patients and as a result, Boomer's inpatient reimbursement has significantly increased. Steve doesn't understand much about this technology stuff, but he's pretty sure the CEO isn't going to like this …

Issue: Should he tell the CEO?

Model Rule 1.4 Communications: Client-Lawyer relationship.

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Model Rule 1.3: Diligence

Client-Lawyer Relationship: A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 1: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

United States ex rel. Ormsby v. Sutter Health, 444 F. Supp. 3d 1010 (N.D. Cal. 2020) qui tam case related to the use of data analytics, electronic health records systems, and clinical decision support systems to cause the submission of false codes and false claims.

Day 35: After a month on the job and a few compliance webinars, Steve realizes he's in way over his head. His headhunter has found him a new job and he's just waiting for the formal offer letter. He's seen potential issues Stark, Anti-kickback, False Claims Act and Excluded Individuals. He doesn't want to be blamed if there is trouble, but he wants to keep his options open. One of those webinars included information about whistleblower lawsuits. He's saving documents in his Drop Box and forwarding emails to his Gmail account. How do you pronounce "qui tam"?

Issue: Can a compliance officer or in-house counsel become a relator or represent a former co-worker who becomes a relator?

Model Rule 1.1 Comment 8: Maintenance of Competence
To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Formal Opinion 483, "Lawyers' Obligations After an Electronic Data Breach or Cyberattack" (October 17, 2018). Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.
…
A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Model Rule 1.6. Confidentiality.

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Comment 7: Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. *Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule.* The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is

criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Comment 8: Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. *In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. P*aragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

Model Rule 1.13. Organization as client.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Comment 2: When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Comment 3: When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. **As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.**

Model Rule 1.16: Declining or Terminating Representation.

(a) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

1. withdrawal can be accomplished without material adverse effect on the interests of the client;
2. he client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
3. the client has used the lawyer's services to perpetrate a crime or fraud;

4. the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
5. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

- The Securities and Exchange Commission announced an award of more than a million dollars to a compliance professional who provided information that assisted the SEC in an enforcement action against the whistleblower's company. Security and Exchange Commission Press Release 2015-73; April 22, 2015.
- In a December 2016 decision in Wadler v. Bio–Rad Laboratories, Inc., a California federal district court ruled that Sarbanes Oxley (SOX) and Dodd-Frank, federal whistleblower protections can take precedence over attorney-client privilege.

Model Rule 1.9 Duties to Former Clients

(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.

(c) A lawyers who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

1. Use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
2. Reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment [1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.

Comment [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.

Comment [3] 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... Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A

former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. 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.

ABA Formal Opinion 497, "Conflicts Involving Materially Adverse Interests" February 10, 2021.
Addressing "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)."
"Suing a former client or defending a new client against a claim by a 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."
"Another type of "material adverseness" exists when a lawyer attempts to attack her own prior work… 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." (Citations omitted).