

ABA MODEL RULES GENERAL NOTES

INTRODUCTION

The ABA Model Rules General Notes address general rather than specific issues.

Some of the observations in this document also appear in the ABA Model Rules Specific Notes (usually the most important or noticeable issues).

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A. Inconsistent Rule Titles

ABA Model Rules' titles contain an inconsistent mixture of singular and plural references, and some odd word choices.

Examples:

- ABA Model Rule 1.4's title refers to "Communication" (singular), but the next ABA Model Rule 1.5's title refers to "Fees" (plural).
- ABA Model Rule 1.4's and ABA Model Rule 4.2's titles refer to "Communication" (singular), but ABA Model Rule 7.1's and ABA Model Rule 7.2's titles refer to "Communications" (plural).
- ABA Model Rule 1.7's and ABA Model Rule 1.8's titles refer to "Conflict of Interest" (singular), but the titles of two later Rules in the same series (ABA Model Rule 1.10 and ABA Model Rule 1.11) refer to "Conflicts" (plural).
- ABA Model Rule 1.9's title refers to "Former Clients" (plural), but ABA Model Rule 1.18's title refers to "Prospective Client" (singular).
- ABA Model Rule 1.11's title refers to "Former and Current Government Officers and Employees" (plural, separated by the word "and"), but the next ABA Model Rule 1.12's title refers to "Judge, Arbitrator, Mediator or Other Third-Party Neutral" (singular, separated by the word "or").
- ABA Model Rule 1.12's title refers to a "Judge" (singular), but ABA Model Rule 7.6's title refers to "Judges" (plural).
- ABA Model Rule 2.3's title refers to "Evaluation" (singular) used by "Third Persons" (plural).
- ABA Model Rule 4.2's and ABA Model Rule 4.3's titles refer to a "Person" (singular), but the next ABA Model Rule 4.4's title refers to "Third Persons" (plural).
- ABA Model Rule 5.1's title refers to "Partners, Managers, and Supervisory Lawyers" (plural), but the next ABA Model Rule 5.2's title refers to "a Subordinate Lawyer" (singular).
- ABA Model Rule 5.7's title refers to "Law-Related Services" (plural), but the next ABA Model Rule 6.1's title refers to "Pro Bono Publico Service" (singular).

- ABA Model Rule 6.2's title refers to "Appointments" (plural) and ABA Model Rule 6.4's title refers to "Activities" (plural), but in between those two Rules ABA Model Rule 6.3's title refers to "Membership" (singular).
- ABA Model Rule 8.1's title refers to "Admission" (singular) and "Matters" (plural).

"Conflict" and "Conflicts"

Some ABA Model Rule titles refer to "Conflict" in the singular:

ABA Model Rule 1.7

ABA Model Rule 1.8

Some ABA Model Rule titles refer to "Conflicts" in the plural:

ABA Model Rule 1.10

ABA Model Rule 1.11

"Client" and "Clients"

Some ABA Model Rules titles refer to "Client" in the singular:

ABA Model Rule 1.2

ABA Model Rule 1.13

ABA Model Rule 1.14

ABA Model Rule 1.18

ABA Model Rule 6.4

Some ABA Model Rules titles refer to "Clients" in the plural:

ABA Model Rule 1.7

ABA Model Rule 1.8

ABA Model Rule 1.9

ABA Model Rule 7.3

Singular and Plural References to “Persons”

Some ABA Model Rule titles refer to non-client persons in the singular:

ABA Model Rule 1.2

ABA Model Rule 1.12

ABA Model Rule 2.1

ABA Model Rule 2.4

ABA Model Rule 3.4

ABA Model Rule 3.7

ABA Model Rule 3.8

ABA Model Rule 3.9

ABA Model Rule 4.2

ABA Model Rule 4.3

ABA Model Rule 5.2

ABA Model Rule 5.4

ABA Model Rule 7.1

ABA Model Rule 7.2

Some ABA Model Rule titles refer to non-client persons in the plural:

ABA Model Rule 1.11

ABA Model Rule 2.3

ABA Model Rule 4.1

ABA Model Rule 4.4

ABA Model Rule 5.1

ABA Model Rule 8.2

Singular and Plural References to Things

Some ABA Model Rule titles refer to things in the singular:

ABA Model Rule 1.13

ABA Model Rule 1.16

ABA Model Rule 1.17

ABA Model Rule 2.3

ABA Model Rule 3.3

ABA Model Rule 4.2

ABA Model Rule 5.6

ABA Model Rule 6.1

ABA Model Rule 7.3

Some ABA Model Rule titles refer to things in the plural:

ABA Model Rule 1.4

ABA Model Rule 1.5

ABA Model Rule 1.9

ABA Model Rule 1.18

ABA Model Rule 3.1

ABA Model Rule 3.8

ABA Model Rule 3.9

ABA Model Rule 4.4

ABA Model Rule 5.1

ABA Model Rule 5.2

ABA Model Rule 5.3

ABA Model Rule 5.7

ABA Model Rule 6.2

ABA Model Rule 6.4

ABA Model Rule 6.5

ABA Model Rule 7.1

ABA Model Rule 7.6

ABA Model Rule 8.1

Use of “A” Before a Singular Reference

Some ABA Model Rule titles contain the word “a” before a singular reference to a person:

ABA Model Rule 3.8

ABA Model Rule 5.2

ABA Model Rule 5.4

ABA Model Rule 7.1

ABA Model Rule 7.2

Some ABA Model Rule titles do not contain the word “a” or the word “an” before a singular reference to a person:

ABA Model Rule 1.2

ABA Model Rule 1.18

ABA Model Rule 2.4

ABA Model Rule 3.4

ABA Model Rule 4.2

ABA Model Rule 4.3

“And” and “Or”

Two ABA Model Rule Titles use the word “and” when referring to a list of people:

ABA Model Rule 1.11

ABA Model Rule 5.1

One ABA Model Rule Title uses the word “or” when referring to a list of people:

ABA Model Rule 1.12

“Lawyer” and “Counsel”

Some ABA Model Rule Titles use a form of the word “lawyer.”

ABA Model Rule 1.2

ABA Model Rule 2.4

ABA Model Rule 3.7

ABA Model Rule 5.1

ABA Model Rule 5.4

ABA Model Rule 7.1

ABA Model Rule 7.2

Some ABA Model Rule Titles use the more pretentious but presumably synonymous word “counsel.”

ABA Model Rule 3.4

ABA Model Rule 4.2

B. Inconsistent Guidance: "Should" and "Must"

The ABA Model Rules and Comments frequently contain the words "should" and "must" in providing guidance or direction.

As explained below, the ABA Model Rules and Comments inexplicably often contain the word "should" (especially in Comments) where the word "must" would seem more appropriate or required.

"Must"

ABA Model Rule Scope [14] explains that "[s]ome of the [ABA Model] Rules are imperatives, cast in the terms 'shall' or 'shall not'." This statement is somewhat ironic, because, as explained above, the word "shall" is not as clearly "imperative" as the word "must."

ABA Model Rule Scope [14] then explains that other rules "generally cast in the term 'may,' are permissive and define areas under the [ABA Model] Rules in which the lawyer has discretion to exercise professional judgment." The ABA Model Rules and the Comments rarely use the word "may."

ABA Model Rule Scope [14] next acknowledges that "[t]he [ABA Model] Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role."

ABA Model Rule Scope [14] then notes that "[m]any of the [ABA Model Rule] Comments use the term 'should.'" ABA Model Rule Scope [14] concludes by noting that "[c]omments do not add obligations to the [ABA Model] Rules but provide guidance for practicing in compliance with the [ABA Model] Rules."

"Shall"

The word "shall" appears most frequently in black letter ABA Model Rules. Because the word "shall" has various meanings that range from direction to take some action (or forego some action) to predicting action or inaction to suggesting action or inaction, courts and state legislatures have been moving toward replacing the word "shall" with the less ambiguous word "must" or some other similar unmistakable command.

Although the ABA Model Rules primarily use the word "shall" in black letter Rules and the less ambiguous word "must" in Comments, there are exceptions. The following black letter ABA Model Rules contain the word "must."

ABA Model Rule 1.0(b)

ABA Model Rule 1.5(c)

The word "shall" appears in several ABA Model Rule Comments.

ABA Model Rule 1.2 cmt. [1]

ABA Model Rule 1.15 cmt. [3]

Presumably these uses are deliberate. Those two ABA Model Rule Comments contain both the word "must" and the word "shall."

If there is any ambiguity about the word "shall" in directing a lawyer to engage in some action or forego some action, there are several places where the word "must" would have been more appropriate than "shall":

(ABA Model Rule 1.15 cmt. [3] (indicating that "[t]he undisputed portion of the funds [in lawyers' trust accounts] shall be promptly distributed" (emphasis added)).

ABA Model Rule 5.4(c) (explaining that "[a] lawyer shall not permit" a person who recommends, employs, or pays the lawyer to interfere with the lawyer's professional judgment (emphasis added) (accompanying ABA Model Rule 5.4 cmt. [1] inexplicably states that "such arrangements should not interfere with the lawyer's professional judgment" (emphasis added)).

ABA Model Rule Scope [14] (addressed above) might leave the impression that ABA Model Rule Comments do not describe direction, but rather only suggest that lawyers take or refrain from taking action. That is incorrect. Many ABA Model Rule Comments contain both the word "must" and the word "should":

ABA Model Rule 1.3 cmt. [1]

ABA Model Rule 1.3 cmt. [4]

ABA Model Rule 1.4 cmt. [5]

ABA Model Rule 1.5 cmt. [7]

ABA Model Rule 1.5 cmt. [9]

ABA Model Rule 1.7 cmt. [3]

ABA Model Rule 1.7 cmt. [30]

ABA Model Rule 1.8 cmt. [13]

ABA Model Rule 1.13 cmt. [10]

ABA Model Rule 1.14 cmt. [7]

ABA Model Rule 1.15 cmt. [1]

ABA Model Rule 1.15 cmt. [6]

ABA Model Rule 1.18 cmt. [4]

One can only conclude that some ABA Model Rules and their Comments deliberately contain the directive word "must" and the suggestive "should." As explained below, in many of these situations the word "must" seems more appropriate, because it matches black letter ABA Model Rules' mandates.

Several ABA Model Rule Comments contain the phrase "ordinarily must." There is no explanation of how the term "ordinarily must" differs from the word "must." In fact,

the phrase “ordinarily must” seems to be an oxymoron. If lawyers only “ordinarily” must do something, then they are not required to do it.

The following ABA Model Rule Comments use the phrase “ordinarily must:”

ABA Model Rule 1.7 cmt. [4]

ABA Model Rule 1.10 cmt. [4]

ABA Model Rule 1.13 cmt. [3]

ABA Model Rule 1.16 cmt. [2]

ABA Model Rule 1.13 cmt. [3] contains both the word “must” and the term “ordinarily must,” so presumably those word choices were deliberate.

One ABA Model Rule Comment contains the word “must” when the word “should” would be more appropriate:

ABA Model Rule 8.3 cmt. [3] (explaining that ABA Model Rule 8.3 “limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent” (emphasis added)).

Several ABA Model Rule Comments contain the word “must” to describe lawyers’ consideration of or attention to extrinsic law. It would seem more appropriate to use the word “should” in those settings, although presumably lawyers’ failure to do so might result in lawyers’ violation of their duty of competence (ABA Model Rule 1.1), diligence (ABA Model Rule 1.3) and perhaps other ABA Model Rules.

The following ABA Model Rule Comments use the word “must” in that setting:

ABA Model Rule 3.1 cmt. [1]

ABA Model Rule 3.3 cmt. [4]

Not surprisingly, several other ABA Model Rule Comments understandably contain the word “should” in describing lawyers’ consideration of or attention to extrinsic law:

ABA Model Rule 1.10 cmt. [7]

ABA Model Rule 1.14 cmt. [7]

ABA Model Rule 4.1 cmt. [2]

ABA Model Rule 5.5 cmt. [14]

ABA Model Rule 5.7 cmt. [10]

The ABA Model Rules and Comments follow the same pattern when addressing lawyers' consideration of or attention to facts, various other duties, rules, etc.

The following ABA Model Rule Comments contain the word "must" in that setting:

ABA Model Rule 1.5 cmt. [3]

ABA Model Rule 1.14 cmt. [3]

ABA Model Rule 3.7 cmt. [4]

ABA Model Rule 3.7 cmt. [6]

ABA Model Rule 5.7 cmt. [10]

Again, and not surprisingly, more ABA Model Rule Comments contain the word "should" in that setting:

ABA Model Rule 1.1 cmt. [6]

ABA Model Rule 1.7 cmt. [29]

ABA Model Rule 1.13 cmt. [4]

ABA Model Rule 1.14 cmt. [6]

ABA Model Rule 1.14 cmt. [8]

ABA Model Rule 1.16 cmt. [3]

ABA Model Rule 5.3 cmt. [2]

ABA Model Rule 6.4 cmt. [1]

ABA Model Rule 8.4 cmt. [5]

"Should"

As explained above, ABA Model Rule Scope [14] acknowledges that "[m]any of the [ABA Model Rule] Comments use the term 'should.'"

ABA Model Rule Scope [14] does not define the word "should," but follows that acknowledgement with an implicit explanation that the word "should" suggests rather than mandates action or inaction: "[c]omments do not add obligations to the [ABA Model] Rules but provide guidance for practicing in compliance with the [ABA Model] Rules." As explained below, many ABA Model Rule Comments use the word "should," in several circumstances where the word "must" would have been required or otherwise more appropriate.

Several ABA Model Rule Comments contain the term "ordinarily should." Unlike the seemingly oxymoron term "ordinarily must" discussed above, the term "ordinarily should" seems appropriate to strongly suggest that lawyers engage in the described action or inaction.

The following ABA Model Rule Comments contain the term "ordinarily should" (or its equivalent):

ABA Model Rule 1.1 cmt. [6]

ABA Model Rule 1.6 cmt. [13]

ABA Model Rule 1.7 cmt. [23]

ABA Model Rule 1.14 cmt. [4]

ABA Model Rule 5.3 cmt. [4]

Several ABA Model Rule Comments contain a similar term "generally should." That term would seem to be synonymous with the term "ordinarily should."

The following ABA Model Rules contain the term “generally should”:

ABA Model Rule 1.10 cmt. [9]

ABA Model Rule 1.11 cmt. [7]

ABA Model Rule 1.12 cmt. [5]

One ABA Model Rule Comment contains the term “should” when the word “may” would have seemed more appropriate:

ABA Model Rule 1.13 cmt. [14] (explaining that ABA Model Rule 1.7 “governs who should represent the directors and the organization” in derivative actions (emphasis added)).

Most seriously, many ABA Model Rule Comments use the word “should” when the word “must” would be more appropriate.

Significantly, several ABA Model Rule Comments contain both the word “should” and the word “must” – demonstrating that the ABA Model Rules’ and their Comments’ drafters deliberately chose the different terms and presumably intended the stark implications. For instance, ABA Model Rule 1.15 cmt. [6] explains that “a lawyer must participate (in “[a] lawyers’ fund for client protection”) where it is mandatory, and, even when it is voluntary, the lawyer should participate” (emphases added).

“Should” Where “Must” Would be Appropriate or Required

Two paradigmatic examples highlight the seemingly inappropriate use of the word “should” when the word “must” would be more appropriate if not required.

ABA Model Rule 1.5 cmt. [9] ABA Model Rule 1.5 cmt. [9] describes two possible contexts in which lawyers and clients may resolve fee disputes.

ABA Model Rule 1.5 cmt. [9] contains both the word “should” and the word “must,” and includes one scenario that uses the former when the latter would clearly seem required.

The first context is “a procedure . . . established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar.” In that context, ABA Model Rule 1.5 cmt. [9] understandably explains that lawyers either “must” or “should” comply with the procedure – depending on whether it is mandatory or only suggested; (1) “the lawyer must comply with the procedure when it is mandatory”; (2) “even when it is voluntary, the lawyer should conscientiously consider submitting to it” (emphasis added).

The second context is where “[l]aw may prescribe a procedure for determining a lawyer’s fee” (emphasis added). ABA Model Rule 1.5 cmt. [9] provides examples: “for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages.” ABA Model Rule 1.5 cmt. [9] concludes with an inexplicable statement that “[t]he lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure” (emphasis added). In other words, ABA Model Rule 1.5 cmt. [9] only suggests that lawyers “comply” with the legally-required “prescribed procedure”. This would be alarming enough, but is even more surprising because two sentences earlier ABA Model Rule 1.5 cmt. [4] bluntly stated that “the lawyer must comply with the procedure [“established by the bar”] when it is mandatory” (emphases added).

ABA Model Rule 1.8 cmt. [2] ABA Model Rule 1.8 cmt. [2] addresses (among other things) lawyers’ obligation to disclose information about their business transactions with clients.

ABA Model Rule 1.8 cmt. [2]’s concluding sentence begins with the phrase “[w]hen necessary” – thus presumably identifying a situation when lawyers must take some

action. After this introductory clause, ABA Model Rule 1.8 cmt. [2] suggests that in that situation lawyers “should discuss” certain things with their clients, and “should explain” the desirability of their client obtaining another lawyer’s advice (emphases added).

It would seem axiomatic that a lawyer “must” engage in such a discussion and “must” explain such a desirability “[w]hen necessary.”

Other Examples

The following ABA Model Rule Comments use the word “should” when the word “must” would seem required or otherwise more appropriate – although there are varying degrees of apparent impropriety in some of the Comments:

- ABA Model Rule 1.0 cmt. [2] (suggesting that “[a] group of lawyers could be regarded as a firm for purposes of the [ABA Model] Rule [presumably ABA Model Rule 1.7(b)(3)] that the same lawyer should not represent opposing parties in litigation” (emphasis added)).
- ABA Model Rule 1.0 cmt. [9]
- ABA Model Rule 1.1 cmt. [3]
- ABA Model Rule 1.1 cmt. [6] (suggesting that “the lawyer should ordinarily obtain informed consent from the client . . . [b]efore a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client” (emphasis added)).
- ABA Model Rule 1.1 cmt. [7] (suggesting that “lawyers ordinarily should consult with each other and the client about the scope of their respective representations and allocation of responsibility among them . . . [w]hen lawyers from more than one law firm are providing legal services to the client on a particular matter” (emphasis added)).
- ABA Model Rule 1.4 cmt. [5]
- ABA Model Rule 1.5 cmt. [5] (suggesting that “[a] lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures”).
- ABA Model Rule 1.5 cmt. [9] (discussed above) (two sentences after stating that a “lawyer must comply with the procedure [“established for resolution of

fee disputes established by the bar”] when it is mandatory,” suggesting that a lawyer “should comply with the prescribed procedure [prescribed by “[l]aw . . . for determining a lawyer’s fee”]” (emphases added).

- ABA Model Rule 1.6 cmt. [15]
- ABA Model Rule 1.7 cmt. [10] (suggesting that “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client” (emphasis added)).
- ABA Model Rule 1.7 cmt. [27] (suggesting that “the lawyer should make clear the lawyer’s relationship to the parties involved” in estate administration work – because “[i]n estate administration, the identity of the client may be unclear under the law of a particular jurisdiction” (emphasis added)).
- ABA Model Rule 1.7 cmt. [30]
- ABA Model Rule 1.7 cmt. [32]
- ABA Model Rule 1.7 cmt. [35]
- ABA Model Rule 1.8 cmt. [2] (discussed above) (suggesting that “[w]hen necessary, the lawyer should discuss both the material risks of the proposed transaction [with the client], including any risk presented by the lawyer’s involvement, and existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable” (emphases added)).
- ABA Model Rule 1.8 cmt. [7]
- ABA Model Rule 1.8 cmt. [8]
- ABA Model Rule 1.8 cmt. [16] (suggesting that “one of the risks that should be discussed” before a lawyer undertakes a joint representation is the risk of “[d]ifferences in willingness to make or accept an offer of settlement” (emphasis added)).
- ABA Model Rule 1.8 cmt. [21]
- ABA Model Rule 1.13 cmt. [10] (explaining that “[t]here are times when the organization’s interest may be or become adverse to those of one or more of its constituents,” and suggesting that [i]n such circumstances in which case the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation” (emphasis added)).

- ABA Model Rule 1.14 cmt. [2] (in contrast to black letter ABA Model Rule 1.14(a)'s insistence that "a lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client" "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished," suggesting that "the lawyer should as far as possible accord the represented person [who 'suffers a disability'] the status of a client, particularly in maintaining communication" (emphases added)).
- ABA Model Rule 1.15 cmt. [1] (suggesting that "[a] lawyer should . . . comply with any recordkeeping rules established by law or court order" (emphasis added)).
- ABA Model Rule 1.16 cmt. [1] (suggesting that "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion" (emphasis added)).
- ABA Model Rule 2.1 cmt. [4] (suggesting that "the lawyer should make such a recommendation" "[w]here consultation with a professional in another field is itself something a competent lawyer would recommend" (emphasis added)).
- ABA Model Rule 2.3 cmt. [2]
- ABA Model Rule 2.3 cmt. [4] (suggesting that lawyers conducting an evaluation for use by third persons "should . . . describe[] in the report" "any such limitations [on "the terms of the evaluation"] that are material to the evaluation" (emphasis added)).
- ABA Model Rule 3.6 cmt. [7] (in contrast to black letter ABA Model Rule 3.6(c)'s requirement that "[a] statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity" (emphasis added), suggesting that "[s]uch responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others" (emphases added)).
- ABA Model Rule 3.8 cmt. [5]
- ABA Model Rule 5.4 cmt. [1] (suggesting that "such arrangements ["[w]here someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer"] should not interfere with the lawyer's professional judgment" (emphasis added)).
- ABA Model Rule 8.2 cmt. [2] (in contrast to black letter ABA Model Rule 8.2(b)'s requirements that "[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the [ABA Model] Code of Judicial Conduct," suggesting that "the lawyer should be bound by applicable limitations on political activity . . . [w]hen a lawyer seeks judicial office" (emphases added)).

C. Inconsistent Use of the Undefined Word "Associated"

Introduction

A lawyer's possible "association" with a law firm or other lawyers can dramatically affect the imputation of that lawyer's or other lawyers' prohibition on representing clients or engaging in other actions. But the word "associated" and related variations of that word are not defined in the ABA Model Rules or their accompanying Comments. There are hints of the meaning, but there are also confusing ABA Model Rules and Comments that add to the uncertainty.

As explained below, a 1988 ABA legal ethics opinion articulated a logical (although fact-intensive) definition, but for some reason the ABA has never incorporated that definition into the ABA Model Rules or Comments.

The bottom line is that most lawyers practicing together in a law firm, law department or other entity are "associated" with their colleagues for purposes of applying the ABA Model Rules. But some colleagues presumably are not "associated." Those non-"associated" lawyers are still bound by their own individual ABA Model Rule ethics application, and thus may ultimately be treated the same way for imputed prohibition and other issues as their "associated" colleagues.

General Usage

When used as a noun, the word "association" generally refers to an entity comprised of several individuals or other entities.

ABA Model Rule 1.0(g) defines “partner” as “a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law” (emphasis added). ABA Model Rule 5.1 cmt. [1]’s second sentence addresses lawyers with “managerial authority” – “includ[ing] members of . . . associations authorized to practice law” (emphasis added).

In general non-lawyer parlance, the word “associated” normally denotes some relationship that a person has with some other person, entity, idea, etc. Some ABA Model Rules use the term in this way.

ABA Model Rule 1.13(b)’s first sentence addresses lawyers’ knowledge of an organizational client’s constituents’ specified actions. That ABA Model Rule defines the individuals who might engage in such action or inaction: “an officer, employee or other person associated with the organization” (emphasis added).

ABA Model Rule 1.13(d) uses essentially the same phrase: “an officer, employee or other constituent associated with the organization” (emphasis added).

ABA Model Rule 1.16 cmt. [7]’s second sentence explains that a lawyer’s withdrawal is justified “if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it” (emphasis added).

ABA Model Rule 3.8(f) requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [ABA Model] Rule 3.6 or this [ABA Model] Rule” (emphasis added).

General Law Firm Usage

In common law firm usage, the word “associate” commonly refers to a lawyer practicing in a law firm but not owning a portion of the law firm (in other words, not a partner).

ABA Model Rule 1.8 cmt. [8]’s first sentence uses the term in this common way: “[t]his [ABA Model Rule 1.8] does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position” (emphasis added). ABA Model Rule 5.1 cmt. [7]’s first sentence and ABA Model Rule 5.4(a)(1) use the word “associate” to mean the same thing.

Ironically, an “associate” is less likely than a partner to meet the presumed ABA Model Rule definition of the word “associated.” As explained below, it appears that the word “associated” focuses on lawyers’ general access to clients’ protected client confidential information. An “associate” is more likely than a partner to work on just one client’s matters, although in most law firms and similar institutions full-time “associates” have access to other clients’ information. But partners are much more likely to have such general access.

ABA Model Rule Usage

The ABA Model Rules and their comments describe several arrangements in which lawyers can be “associated” with others.

Under the ABA Model Rules, lawyers can be “associated in a law firm” (ABA Model Rule 1.5 cmt. [8]); “associated in a partnership” (ABA Model Rule 1.5 cmt. [7]’s sixth

sentence); or “associated with a government colleague” (ABA Model Rule 1.11 cmt. [2]’s fourth sentence).

Law Firm Colleagues It seems clear that not all lawyers who are “associated” with one another are a “firm,” and that not every lawyer practicing in a firm is “associated” with other lawyers in that firm.

The first point is explicitly discussed in ABA Model Rule 1.0 cmt. [2]’s fourth sentence: “[t]he terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve” (emphases added).

For instance, ABA Model Rule 1.10(a) starts with the phrase “[w]hile lawyers are associated in a firm” (emphasis added). ABA Model Rule 1.11(b) contains a similar phrase (although using the word “with” rather than “in”): “no lawyer in a firm with which that lawyer is associated” (emphases added). ABA Model Rule 1.12(c) uses the identical language: “no lawyer in a firm with which that lawyer is associated” (emphases added).

If those and other ABA Model Rules intend to impute an individual lawyer’s prohibition to all “associated lawyers” whether or not they are in the same firm, it would have been easy for those ABA Model Rules to clearly say that – and not add the additional condition of the “associated” lawyers being “in a firm.”

Some ABA Model Rules generally refer to all lawyers in a firm, without distinguishing between those who are “associated” with their law firm colleagues and those who are not.

For instance, ABA Model Rule 1.6 cmt. [5]’s third sentence explains that “[l]awyers in a firm may, in the course of the firm’s practice, disclose to each other information

relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers” (emphasis added). This is an ironic provision. As explained below, the term “associated” seems to focus on lawyers’ access to all of a firm’s clients’ protected client confidential information, not just the information of one client. So one would think that ABA Model Rule 1.6 cmt. [5] would limit such “impliedly authorized” disclosure only to “associated” lawyers.”

ABA Model Rule 5.1(a) requires lawyers with institutional managerial supervisory positions in law firms or other entities to make reasonable efforts to “ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the [ABA Model] Rules of Professional Conduct” (emphasis added). It is not surprising that ABA Model Rule 5.1(a) refers generally to all lawyers in a firm – because presumably such institutional managerial supervisory lawyers must take the same reasonable steps in their supervision of all lawyers, not just those lawyers “associated” in the firm in which the supervisory lawyer practices.

Similarly, Model Rule 5.1(c)(2) describes lawyers’ responsibility for another lawyer’s ethics violation under certain circumstances – and does not distinguish between lawyers who are “associated” with their law firm colleagues, and those who are not.

Some ABA Model Rules contain a mismatch between references to all law firm lawyers and only law firm lawyers “associated” with their law firm colleagues. For instance, ABA Model Rule 3.7(b) assures that absent an articulated exception “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness” (emphasis added). Thus, black letter ABA Model Rule 3.7(b) does not distinguish between a lawyer “likely to be called as a witness” who is “associated” with

the law firm and a lawyer who is not. But ABA Model Rule 3.7 cmt. [7] does not follow that approach. ABA Model Rule 3.7 cmt. [7]'s first sentence explains that "a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so" by the stated exception (emphasis added). Thus, black letter ABA Model Rule 3.7(b) and ABA Model Rule 3.7 cmt. [7] articulate two different standards.

ABA Model Rule 5.1 cmt. [3] takes a different (perhaps inadvertently articulated) position. ABA Model Rule 5.1 cmt. [3]'s concluding sentence warns that "the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the [ABA Model] Rules" (emphasis added). Of course, ABA Model Rule 5.1 cmt. [3]'s explicit application only to "lawyers associated with the firm" (emphasis added) could not trump the more generic black letter ABA Model Rule 5.1 application of supervisory lawyers' duties to make reasonable steps ensuring that all law firm lawyers (not just "associated" lawyers) conform to the ABA Model Rules, and their possible derivative liability for lawyers' ethics violation under certain circumstances (not just ethics violations by "associated" lawyers).

If all lawyers in a firm were "associated" with their colleagues, presumably the ABA Model Rules and Comments would consistently use a much simpler formulation, such as "lawyers in a firm."

Government Lawyers Interestingly, one ABA Model Rule indicates that private lawyers can be "associated" with government-employed lawyers.

ABA Model Rule 1.10(d) points to ABA Model Rule 1.11 for guidance about “[t]he disqualification of lawyers associated in a firm with former or current government lawyers” (emphasis added). It is difficult to imagine a scenario in which a current government lawyer is “associated” with a current private-sector lawyer. As explained below, it appears that the key to determining whether lawyers are “associated” with another lawyer seems to be their sharing of client confidences. That standard would seem inappropriate when analyzing a possible “association” between a private-sector lawyer and a government lawyer.

Other Law Firms’ Lawyers Perhaps surprisingly, lawyers can be “associated” with lawyers who are in another firm.

ABA Model Rule 1.11 cmt [1]’s first sentence includes as one of the factors in determining whether a lawyer has the requisite “competence” to undertake a representation “whether it is feasible to...associate or consult with...a lawyer of established competence in the field in question” (emphasis added). ABA Model Rule 1.5(e) describes a permissible “division of a fee between lawyers who are not in the same firm” (emphasis added). ABA Model Rule 1.5 cmt. [7]’s second sentence explains that “[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well” (emphasis added).

Other States’ Lawyers The term “associated” can even involve lawyers who are not licensed in the same state.

Under ABA Model Rule 5.5(c)(1), lawyers can temporarily practice in a state where they are not licensed – if their legal services “are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter”

(emphasis added). ABA Model Rule 5.5 cmt. [8]’s first sentence uses essentially the same term.

Nonlawyers At the far end of the odd “association” standard, the ABA Model Rules even recognize the possibility of an “association” between lawyers and nonlawyers.

ABA Model Rule 3.8 cmt. [6]’s first sentence explains that “[l]ike other lawyers, prosecutors are subject to [ABA Model] Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer’s office” (emphases added).

ABA Model Rule 3.8 is not alone in this acknowledgement. ABA Model Rule 5.3 begins with the phrase: “[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer” (emphases added).

Association “In” or “With” In addition to all of these confusing permutations, various ABA Model Rules contain what might be significantly different substantive relationships – but that perhaps only represents a linguistic alternative.

Most of the ABA Model Rules addressing lawyers’ association with other lawyers (or nonlawyers) contain the phrase contained in ABA Model Rule 1.10(a): “associated in a firm” (emphasis added).

But other ABA Model Rule imputation provisions contain a very different phrase. Thus, ABA Model Rule 1.11(b) contains the term “a law firm with which that lawyer is associated” (emphasis added). ABA Model Rule 1.12(c) contains the term “a law firm with which that lawyers is associated (emphasis added). Similarly, ABA Model Rule 5.1 cmt. [3]’s concluding sentence contains a similar phrase: “all lawyers associated with the

firm” (emphasis added). This begs the question of whether a lawyer’s association in a law firm differs from a lawyer’s association with a law firm.

To compound the confusion, ABA Model Rule 1.9 cmt. [4]’s first sentence contains the amalgam word “associated within a firm” (emphasis added).

In ABA LEO 356 (12/16/88), the ABA Standing Committee on Ethics and Professional Responsibility inexplicably stated in a footnote that it “perceives no substantive difference between the terms “in” and “with” in the context of [ABA Model] Rule 1.10.”

But words matter, so presumably the term “associated in” intends to apply a different definition from the phrase “associated with.” If not, presumably the ABA Model Rules and their Comments would have used a consistent phrase.

ABA Model Rule Comment Hints

Three ABA Model Rule Comments provide hints about what the word “associated” means in its frequent inclusion in ABA Model Rules and Comments.

As explained above, ABA Model Rule 1.0 cmt. [2] provides the most useful hint about what the key term “associated” means. Ironically, it hides this hint in an analysis of whether “associated” lawyers constitute a firm, instead of the reverse – whether lawyers in a firm are “associated” with other lawyers in the firm.

ABA Model Rule 1.0 cmt. [2]’s fourth sentence indicates that “[t]he terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm” (emphasis added). That should go without saying, but the sentence then goes on to explain another important factor: “as is the fact that they have mutual access to information concerning the clients they serve.” Thus, ABA Model Rule 1.0 cmt. [2] seems

to equate access to protected client confidential information with the “association” of lawyers with one another. Although that factor appears in a Comment about whether “associated” lawyers constitute a firm rather than the inverse, it gives some insight. But ABA Model Rule 1.0 cmt. [2] does not describe that information-access factor as dispositive – instead describing it as one of several factors.

ABA Model Rule 1.9 cmt. [6] also provides insight into this information-access factor. ABA Model Rule 1.9 cmt. [6] addresses blank letter ABA Model Rule 1.9(b)’s general prohibition on a lawyer from “represent[ing] a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated” had previously represented a client with adverse interests and about which “the lawyer had acquired information protected by [ABA Model] Rules 1.6 and 1.9(c) that is material to the matter” (emphasis added). Thus, the prohibition applies if the lawyer had been “associated” with her previous firm and had acquired client-protected confidential information about the law firm client against whom that lawyer now wishes to represent another client.

ABA Model Rule 1.9 cmt. [6] comes close to providing useful guidance about the significance of that now-former lawyer’s “association” with her former firm. ABA Model Rule 1.9 cmt. [6]’s first sentence explains that ABA Model Rule 1.9(b)’s application “depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together.” Unfortunately, that would seem to drain any dispositive meaning from the word “associated.” In other words, ABA Model Rule 1.9 cmt. [6]’s first sentence adopts a fact-intensive analysis, rather than pointing to a dispositive meaning of the word “associated.”

ABA Model Rule 1.9 cmt. [6] then describes two different scenarios. First, under ABA Model Rule 1.9 cmt. [6]'s second sentence, "[a] lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients." If ABA Model Rule 1.9 cmt. [6] intended to define that scenario as equating to a lawyer's "association" in or with a law firm, it missed the chance – the word "associated" does not appear there.

ABA Model Rule 1.9 cmt. [6]'s third sentence next describes the second scenario: "[i]n contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients." If ABA Model Rule 1.9 cmt. [6]'s third sentence intended to describe that scenario as the absence of such a lawyer's "association" in or with the law firm, it also missed the chance.

Another ABA Model Rule Comment seems to set the "default" standard as allowing all law firm colleagues to share protected client confidential information with each other – absent some affirmative client direction. ABA Model Rule 1.6 cmt. [5]'s concluding sentence explains that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers" (emphases added).

ABA Model Rule 1.6 cmt. [5] certainly describes the default information-access issue, but in a way that confuses rather than clarifies the meaning of the word

“associated.” If that ABA Model Rule Comment had used the phrase “lawyers associated in a firm” rather than “[l]awyers in a firm,” it would have shed important light on the meaning of the word “associated.” The latter language (which ABA Model Rule 1.6 cmt. [5]’s concluding sentence notably contains) would seem to render every lawyer in the firm “associated” with every law firm colleague. That is because absent client instructions, all lawyers have access to all of the other lawyers’ clients’ protected client confidential information.

Thus, these three ABA Model Rule Comments provide some hints about the meaning of “lawyers’ association” in or with a law firm – but do not cross the goal line. And they also fail to provide any hint about the possible distinction between association “in” a law firm and association “with” a law firm.

ABA Legal Ethics Opinion Guidance

The answer to the “association” mystery might appear to be in a decades-old ABA Legal Ethics Opinion.

ABA LEO 356 (12/16/88) addressed various ethics issues implicated by law firms hiring “temporary lawyers.” ABA LEO 356 (12/16/88) defined such “temporary” lawyers as denoting “a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency.” The definition explicitly “does not, however, include a lawyer who works part time for a firm or full time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an extended period and does legal work only for that firm.”

Thus, ABA LEO 356 (12/16/88) did not address lawyers employed by the law firm in the more traditional sense. Those lawyers’ “relationship with the firm, during the period

of employment, is more like the relationship of an associate of the firm” so their conduct and imputation issues will be governed by ABA Model Rules – “as with any associate of the firm” (emphasis added). So ABA LEO 356 (12/16/88) began by using the common law firm word “associate” to mean a full-time but perhaps non-partnership-track employee.

Analyzing ABA Model Rule 1.9 and ABA Model Rule 1.10, ABA LEO 356 (12/16/88) recognized that the pertinent ABA Model Rules mention lawyers associated “in” a firm and lawyers associated “with” a firm. Interestingly, “the [ABA Ethics] Committee perceives no substantive difference between the terms ‘in’ and ‘with’ in the context of the [ABA Model Rule 1.10].” That is a significant conclusion. As explained above, lawyers from different firms splitting their fees can be “associated with” a firm other than the one that employs them. And even lawyers from another state can be “associated with” a law firm without being employed by that law firm. Those lawyers are associated “with” but not “in” a firm. Presumably the ABA Model Rule’s word choice was deliberate, but ABA LEO 356 (12/16/88) seems to ignore that distinction.

ABA LEO 356 (12/16/88) then turned to the core issues hinted at by ABA Model Rule 1.0 cmt. [2]. ABA LEO 356 (12/16/88) explained that:

[w]hether a temporary lawyer is treated as being “associated with a firm” while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.

Id. (emphasis added).

ABA LEO 356 (12/16/88) next provided the example of a “temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, [who thus] may well be deemed to be ‘associated with’ the firm generally under [ABA Model] Rule 1.10 as to all other clients of the firm.” To rebut that conclusion, a law firm would have to “demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients.” ABA LEO 356 (12/16/88) suggested that law firms hiring such “temporary lawyers” screen them from “all information relating to clients for which the temporary lawyer does no work,” and “maintain a complete and accurate record of all matters on which each temporary lawyer works.” Similarly, ABA LEO 356 (12/16/88) suggested that temporary lawyers “working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working,” and “should also maintain a record of clients and matters worked on.”

ABA LEO 356 (12/16/88)’s phrase “avoid exposure” seems entirely inconsistent with the “associated” standard that examines whether lawyers have “access” to all of their law firm’s clients’ protected client confidential information. A lawyer who must “make every effort to avoid exposure” to such information presumably has access to it. If temporary lawyers did not have such access, presumably ABA LEO 356 (12/16/88) would have used a different phrase – such as “avoid seeking to access any information” or some similar formulation.

ABA LEO 356 (12/16/88) thus equated fully-employed lawyers to “associates” in the firm (thus essentially by definition making them “associated” with other lawyers in that firm), but acknowledged that temp agency-arranged “temporary lawyers” might not be deemed to be “associated” with the law firm in which they work, as long as they only have access to protected client confidential information of the clients on whose matters they work (rather than all of the firm’s clients).

As mentioned above, the concept that lawyers employed by the firm (rather than the temp agency-arranged temporary lawyers mentioned in ABA LEO 356 (12/16/88)) might not be “associated” for ABA Model Rule ethics purposes is severely undercut by ABA Model Rule 1.6 cmt. [5]. That provision explains that ABA Model Rule 1.6(a)’s impliedly authorized permissible disclosure allows “[l]awyers in a firm in the course of the firm’s practice [to] disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers” (emphasis added).

ABA LEO 356 (12/16/88)’s extrinsic guidance thus leads back to a position that appears in several ABA Model Rule provisions – that in nearly every situation all lawyers employed by a law firm are “associated” with their law firm colleagues. One might wonder why the pertinent ABA Model Rules (discussed below) would not simply say that, rather than pointedly using phrases like “lawyers are associated in a firm” and the “disqualified lawyer’s association with a prior firm.” In other words, the “association” condition appears in several important imputation rules – in places where the ABA Model Rules could simply have used the phrase “in the firm.”

New York LEO 715 (2/26/99) essentially articulated the same definition of “associated” in the context of a “contract lawyer” who temporarily works on specific projects for multiple law firms. Assessing the term’s meaning in the context of the old New York Code of Professional Responsibility, New York LEO 715 (2/26/99) acknowledged that “[t]he [New York] Code does not defined the term “associated”” – concluding that “the concept extends beyond lawyers who are partners, associates, or “of counsel” and affirming that “it does not apply to all lawyers who are in any way ‘connected’ or ‘related.’” New York LEO 715 (2/26/99) then relied on ABA LEO 356 (12/16/88), explaining that determining whether a contract lawyer is “associated” with the firm that employs her “depends upon the nature of the relationship, and especially whether the Contract Lawyer has access to information relating to the representation of firm clients other than the clients for which the Contract Lawyer is working directly.” New York LEO 715 (2/26/99) contrasts: (1) “[a] Contract Lawyer to whom a case is referred and who serves in the nature of co-counsel, working from his or her own office, [who] should not be deemed to have access to the confidences and secrets of all clients of the employing firm;” and (2) “lawyers who share office space but who are not in the same firm [who] have been deemed “associated” in a firm for purposes of the conflicts rules and vicarious disqualification rules.”

Focusing on the access issue, New York LEO 715 (2/26/99) explained that

[w]hether a Contract Lawyer who works in the offices of the employing firm should be deemed to have access to the confidences and secrets of all clients of the firm depends upon the circumstances, including whether the firm has a system for a restricting access to client files and for restricting informal discussions of client matters. This, in turn, may depend upon the size of the firm and the formality of procedures for restricting access to such information. . . . If the Contract

Lawyer has general access to the files of all clients of the firm and regularly participates in discussions of their affairs, then he or she should be deemed 'associated' with the firm. However, if the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be "associated" with the firm for purposes of vicarious disqualification.

Id. (emphasis added).

Significantly, New York LEO 715 (2/26/99) indicated that "we believe it would be difficult for small firms hiring a Contract Lawyer to avoid vicarious disqualification where the Contract Lawyer is given office space at the firm." In contrast, "[i]f a Contract Lawyer is denied access to all information relating to each firm's clients other than the ones he or she is working on, and the firms are large enough to rebut the normal presumption of cross pollination among lawyers in a law firm, then the Contract Lawyer is not considered to be 'associated with' either firm and the two firms may continue their representation."

More recently, New York City LEO 2007-2 (2007) applied essentially the same analysis to lawyers who have been "seconded" to a client. New York City LEO 2007-2 (2007) explained that such "seconded" lawyers would not be considered still "associated" with the law firm that continued to pay them (and offered them the chance to return) as long as those lawyers were cut off from general access to their once and future firm's other clients' protected client confidential information while they were "seconded" at the client.

Pertinent ABA Model Rules

Given the few ABA Model Rules' and Comments' hints of the word "association's" meaning and ABA LEO 356 (12/16/88)'s explanation, it is possible to provide some analysis of that word's impact on the pertinent ABA Model Rules.

The bottom line is that most lawyers in a law firm or other entity are "associated" with their colleagues, but in some firms and legal entities a number of lawyers are not "associated" with their colleagues. Determining whether a lawyer is "associated" with her colleagues seems to focus on her access to information about the law firm's or entity's clients other than the client that the individual lawyer represents (or on whose matter she works).

It does not appear that the term "associated" examines whether the individual lawyers (or their colleagues) have actually disclosed protected client confidential information to each other. In other words, the "associated" standard seems to look at the firm's or other entity's structural arrangement, and whether that institutional arrangement makes it likely that a lawyer had access to other law firm clients' protected client confidential information.

This structural focus seems dramatically different from ABA Model Rule 1.9 cmt. [6]'s first sentence's focus on "a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together." ABA Model Rule 1.9 cmt. [6]'s concluding sentence clearly envisions a fact-intensive analysis: "[i]n such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought." So it is unclear whether the ABA Model Rule's imputation analyses rest on presumptions or case-specific facts. Perhaps the fact-

intensive focus becomes necessary only if there is some question about whether a lawyer is "associated" with a firm.

To make matters more confusing, some ABA Model Rules look at the lawyer who is the source of the imputation, and some ABA Model Rules look at lawyers who are the target of such imputation. Theoretically, there could be a factual inquiry at both ends of that analysis.

Of course, each lawyer must assess his or her own possible ABA Model Rule 1.7(a)(2) "material limitation" conflict. ABA Model Rule 1.7(a)(2) addresses whether the lawyer faces "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to [among other things] another client, a former client or a third person." So a law firm's lawyer who is not deemed "associated" with her colleagues might still face a conflict if she acquired protected client confidential information about another law firm client, despite normally not having access to that information. For instance, such a non-associated colleague might have lunch with a law school classmate who is "associated" with other law firm colleagues. If they talk over lunch about other law firm clients, the non-associated lawyer may have a conflict preventing her from adversity to that other client – which would affect her ability to represent clients at her current firm (where she is not "associated") or at another firm to which she moves.

A lawyer-by-lawyer personal "material limitation" conflict assessment thus differs from the automatic conflict imputation that many ABA Model Rules contain (as discussed below).

Unfortunately, the pertinent ABA Model Rules are on their face inconsistent and potentially confusing. As explained below, some “associated” lawyers are the source of imputed disqualification (or prohibition), and sometimes are the target of that limitation.

The pertinent ABA Model Rules also contain very different types of an “association.” As mentioned above, some of the ABA Model Rules refer to lawyer “associated in” a law firm. Other ABA Model Rules refer to lawyers “associated with” a law firm.

ABA Model Rule 1.1 cmt. [1] ABA Model Rule 1.1 cmt. [1]’s first sentence includes within its definition of lawyers’ competence “whether it is feasible to . . . associate . . . a lawyer of established competence in the field in question” (emphasis added). This highlights the possibility that lawyers who are not in the same firm may be “associated” with each other.

ABA Model Rule 1.6(b)(7) ABA Model Rule 1.6(b)(7) allows lawyers to disclose certain limited protected client confidential information “to detect and resolve conflicts of interest arising from the lawyer’s change of employment,” among other scenarios.

ABA Model Rule 1.6 cmt. [13]’s first sentence describes one scenario as follows: “such as when a lawyer is considering an association with another firm” (emphasis added). ABA Model Rule 1.6 cmt. [13]’s concluding sentence contains a similar phrase: “when exploring an association with another firm” (emphasis added). So on its face, black letter ABA Model Rule 1.6(b)(7) would not allow such limited disclosure of protected client confidential information when a lawyer applies for law firm employment in a role that would not render her “associated” with her new colleagues (perhaps a privilege review job in a remote location, etc.)

But as explained above, ABA Model Rule 1.6 cmt. [5]'s concluding sentence casts doubt on the ABA Model Rules' distinction between lawyers who are "associated" with their law firm colleagues and those who are not. ABA Model Rule 1.6 cmt. [5]'s concluding sentence states that absent a client's contrary instruction, "[l]awyers in a firm may . . . disclose to each other information relating to a client of the firm" (emphasis added). That recognition does not distinguish between lawyers who are "associated" with their colleagues and those who are not.

ABA Model Rule 1.7 cmt. [11] ABA Model Rule 1.7 cmt. [11] addresses lawyers' conflicts of interest triggered by their family relationships. In essence, lawyers may not represent a client adverse to a client who is represented by a close family member – absent the clients' informed consent.

ABA Model Rule 1.7 cmt. [11]'s concluding sentence essentially eliminates the imputation of such a conflict to other associated lawyers – stating that "[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated" (referencing ABA Model Rule 1.10) (emphasis added). The term "members of firms" presumably denotes all lawyers practicing in a firm. It would seem to include lawyers other than partners who own the firm. And it definitely distinguishes between lawyers practicing in a firm and lawyers who are "associated" with the firm. Thus, ABA Model Rule 1.7 cmt. [11] describes "associated lawyers" as being the target of the imputed prohibition, not the source.

That concluding sentence on its face does not address the imputation of family-related conflict by a lawyer who is not associated with his law firm colleagues. Perhaps ABA Model Rule 1.7 cmt. [11] uses the term "associated" generically to include all law

firm lawyers – although it would be safe to presume that the ABA deliberately used the phrase “with whom the lawyers are associated” rather than a phrase such as “with whom the lawyers practice” or similar terms that do not emphasize the “association” relationship.

ABA Model Rule 1.8(k) ABA Model Rule 1.8(k) addresses the imputation of an individual lawyer’s prohibition based on various relationships with clients, and other factors.

In essence, ABA Model Rule 1.8(k) imputes every ABA Model Rule 1.8 prohibition except ABA Model Rule 1.8(j)’s prohibition on sexual relationships between lawyers and clients under specified conditions. ABA Model Rule 1.8(k) understandably has a temporal aspect: “[w]hile lawyers are associated in a firm, a prohibition [other than the sexual relationship prohibition] that applies to any of them shall apply to all of them” (emphasis added). This imputation provision thus on its face does not apply to lawyers who are not “associated” with their law firm colleagues. Thus, ABA Model Rule 1.8(k) describes “associated” lawyers as both the source of the imputed prohibition and the target of the imputed prohibition.

As explained above, presumably those non-“associated” colleagues would face their own ABA Model Rule 1.7(a)(2) “material limitation” conflict assessment.

ABA Model Rule 1.8 cmt. [20] ABA Model Rule 1.8 cmt. [20] contains an odd mix of “association” applications.

ABA Model Rule 1.8 cmt. [20]’s first sentence explains that one of ABA Model Rule 1.8’s prohibitions “also applies to all lawyers associated in a firm with the personally prohibited lawyer” (emphasis added). That sentence does not explicitly state that the “personally prohibited lawyer” must be “associated” with the firm, which black letter ABA

Model Rule 1.8(k) requires. Thus, ABA Model Rule 1.8 cmt. [20] describes “associated” lawyers as the target of the imputed prohibition. But that first sentence plainly imputes any individual lawyer’s prohibition only to other lawyers “associated” in a firm.”

ABA Model Rule 1.8 cmt. [20]’s second sentence provides an example that generically describes “one lawyer in a firm” and “another member of the firm” – without mentioning the requirement that either lawyer be “associated in a firm.”

ABA Model Rule 1.8 cmt. [20]’s concluding sentence goes back to mentioning “associated lawyers” – assuring that ABA Model Rule 1.8(j)’s sexual relationship prohibition is not applied to such “associated lawyers.”

ABA Model Rule 1.9(b) ABA Model Rule 1.9(b) prohibits a lawyer from representing a client “in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client” (emphasis added) whose interests are adverse to the lawyer’s current client, and about which that lawyer had acquired protected client confidential information at her previous firm. Thus, ABA Model Rule 1.9(b) describes an “associated” lawyer as a target of the imputed prohibition.

As explained above, lawyers in other law firms and even in other states can be associated “with” a lawyer and thus presumably that lawyer’s firm. It is difficult to imagine that ABA Model Rule 1.9(b) intends to include such other lawyers in the analysis, but the word choice on its face might do so.

Also, ABA Model Rule 1.9(b) on its face does not apply to lawyers who had not been “associated” in a firm that previously employed them. Thus, a lawyer who had not been “associated” in a firm would not be barred by ABA Model Rule 1.9(b) from

representing a client adverse to that former firm's client. For instance, that ABA Model Rule 1.9 provision presumably would not apply to a lawyer who had handled privilege review work in a remote location.

But as explained above, that lawyer would face her own ABA Model Rule 1.7(a)(2) "material limitation" conflict assessment.

ABA Model Rule 1.9 cmt. [4] ABA Model Rule 1.9 cmt. [4] reinforces black letter ABA Model Rule 1.9(b)'s limitation to lawyers "associated" with the firm that formerly employed them. Thus, ABA Model Rule 1.9 cmt. [4] describes "associated" lawyers as being the target of an imputed prohibition.

ABA Model Rule 1.9 cmt. [4]'s first sentence introduces another phrase – discussing lawyers who "have been associated within a firm but then end their association" (emphasis added). The term "within" represents an odd amalgam of the very different words "in" and "with." Presumably the word is intended to be synonymous with "in."

Elsewhere, ABA Model Rule cmt. [4]'s fifth and sixth sentences contain the phrases "new associations," "having left a previous association," and "move from one association to another."

But ABA Model Rule 1.9 does not envision a lawyer moving within the same law firm from not being "associated" with the firm to being "associated" with the firm, or vice versa. Those moves might be a frequent career path. For instance, a lawyer hired to handle privilege review in a remote location might do such a good job as to be promoted to an "associate" position on a partnership track. In a reciprocal career move, a lawyer

might want to scale back on his hours, and intentionally move from a demanding "associate" job to a privilege review job in a remote location.

Neither ABA Model Rule 1.9 nor any other ABA Model Rule seems to address this clear career path possibility.

ABA Model Rule 1.10(a) ABA Model Rule 1.10(a) is the key imputed prohibition rule. Unfortunately, it is also the most potentially confusing.

ABA Model Rule 1.10(a) on its face only applies to lawyers "associated" with their law firm colleagues: "[w]hile 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 [ABA Model] Rules 1.7 or 1.9 "except under certain conditions" (emphasis added).

ABA Model Rule 1.10(a) uses the term "associated in" (emphasis added), and by its terms thus excludes lawyers from other firms or from other states who are "associated with" the firm. So on its face ABA Model Rule 1.10(a) does not extend any prohibition imputation to lawyers who are not "associated" with their law firm colleagues.

Thus, ABA Model Rule 1.10(a) on its face applies the imputed prohibition only from an "associated" lawyer as the source of the imputed prohibition and only to "associated" law firm colleague as the target of the imputed prohibition.

As explained above, ABA Model Rule 1.10(a) does not provide any guidance in a scenario involving a lawyer's possible career path change from not being "associated" with a firm to being "associated" with the firm (moving from a remote document review to a full-time status), or vice versa (leaving what the lawyer might see as a rat-race with only a remote chance of partnership).

ABA Model Rule 1.10(a)(2) In contrast to ABA Model Rule 1.10(a)'s imputation provision, ABA Model Rule 1.10(a)(2)'s description of an exception to ABA Model Rule 1.10(a)'s general prohibition imputation rule uses a different phrase – describing a conflict that “arises out of the disqualified lawyer’s association with a prior firm” (emphasis added). That issue is discussed above.

It is difficult to imagine that the ABA did not deliberately use the word “with” in that portion of the same sentence in what the ABA deliberately used the word “in.” But it also seems unlikely that the ABA intended to include lawyers from other firms or other states in the analysis.

ABA Model Rule 1.10(b) ABA Model Rule 1.10(b) addresses law firms’ ability to represent a client adverse to a client who had been represented by a lawyer who has since left the firm.

ABA Model Rule 1.10(b)'s first sentence contains the phrase “association with a firm,” in contrast to ABA Model Rule 1.10(a)'s first sentence's use of the word “in” (emphasis added).

ABA Model Rule 1.10(b) on its face only applies to “a client represented by the formerly associated lawyer” (emphasis added). On its face, that explicitly excludes clients who were represented by lawyers who were not “associated” in the firm before they left the firm’s employment. Presumably the ABA did not intend to narrow ABA Model Rule 1.10(b)'s reach in that way.

Neither ABA Model Rule 1.10(b) nor any other ABA Model Rule provision seems to address the implications of a lawyer terminating an “association” with her law firm, but not leaving the law firm. As explained elsewhere, it seems undeniable that under the

ABA Model Rules, law firms may employ lawyers who are “associated” with their law firm colleagues and lawyers who are not. And presumably a lawyer might move from one status to the other. So a lawyer who has “terminated an association with a firm” under ABA Model Rule 1.10(b) might be a lawyer who has moved from classic “associate” position (working toward partnership if things go well) to a more remote affiliation which the lawyer only works for one or a few firm clients (without the ambition of making partner at some point). To the extent that such a lawyer no longer has access to all of the law firm’s clients’ protected client confidential information, she presumably would no longer be “associated” with the firm.

Of course, as explained above, such an individual lawyer would still have to apply an ABA Model Rule 1.7(a)(2) “material limitation conflict” analysis. But that analysis would focus on her individual situation, rather than represent a *per se* imputed prohibition standard.

But compounding the confusion, ABA Model Rule 1.10(b)(2)’s exception allowing a law firm to represent a client who had been formerly represented by an “associated” lawyer who has now left the firm deliberately excludes the “associated” standard. Under ABA Model Rule 1.10(b)(2), the law firm’s ability to represent a client adverse to a client who had been represented by such a “formerly associated lawyer” disappears if “any lawyer remaining in the firm” has material protected client confidential information (emphasis added). Significantly, ABA Model Rule 1.10(b)(2) does not refer to any “associated” lawyer remaining in the firm. Thus, that imputed prohibition exception on its face applies if a non-associated lawyer handling a privilege review in a remote location has such information.

As this document explains in its summary, comparison and analysis of ABA Model Rule 1.10(b), ABA Model Rule 1.10(b)(2)'s exception does not make much sense anyway. It would allow a law firm to represent a client adverse to one of the law firm's former clients who had been represented by a lawyer who has left the firm – as long as all of the "lawyers" with material protected client confidential information have also left the firm. On its face, ABA Model Rule 1.10(b) thus would allow the law firm to switch sides in the same litigation even if a large team of paralegals and secretaries with material protected client confidential information stayed at the firm. The firm is not even required to screen them from the matter in which the law firm switches sides.

Similarly, ABA Model Rule 1.10(b) would allow the law firm to switch sides in the same litigation even if the law firm still possessed critical confidential documents provided to the firm by the now-former client or created by the lawyers who have since left the firm. The firm is not even required to screen the lawyers, paralegals or other non-lawyers from accessing such confidential documents remaining in the firm's possession.

ABA Model Rule 1.10(b)'s odd inconsistent inclusion of the "association" standard makes ABA Model Rule 1.10(b) even more inexplicable.

ABA Model Rule 1.10 cmt. [2] ABA Model Rule 1.10 cmt. [2] is equally confusing, as well as inconsistent with black letter ABA Model Rule 1.10.

ABA Model Rule 1.10 cmt. [2]'s first sentence describes the rationale for "[t]he rule of imputed disqualification" – explaining that it "gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm" (emphasis added). Thus, the rationale is not limited to lawyers "associated" in or with a law firm – it rests on a principle

applicable to all lawyers "who practice in a law firm," presumably even non-associated lawyers.

ABA Model Rule 1.10 cmt. [2]'s second sentence is even more stark – describing: (1) "the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client"; and (2) "the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated" (emphases added). The first of those premises is not limited to "associated" lawyers, but the second premise is. Presumably the ABA would not have blindly engaged in such different word choices in the same sentence. But that substantive distinction does not make any sense.

ABA Model Rule 1.10 cmt. [2]'s third sentence correctly notes that ABA Model Rule 1.10(a)(1) "operates only among the lawyers currently associated in a firm" (emphasis added).

ABA Model Rule 1.10 cmt. [3] The confusion continues in ABA Model Rule 1.10 cmt. [3] – which does not mention the "associated" standard at all.

ABA Model Rule 1.10 cmt. [3]'s second sentence provides an example: "[w]here one lawyer in a firm could not effectively represent a given client because of strong political beliefs . . . 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." That sentence's failure to use the "associated" standard is inconsequential, because the example does not include the law firm's disqualification.

ABA Model Rule 1.10 cmt. [3]'s third sentence's example goes the other way: "[o]n 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.” Thus, ABA Model Rule 1.10 cmt. [3] describes lawyers as a source of an imputed prohibition.

That sentence misses several opportunities to apply the “associated” standard. So on its face, that ABA Model Rule 1.10 cmt. [3] third sentence applies to all lawyers employed by the firm – whether they are “associated” in the firm or not. That flatly contradicts black letter ABA Model Rule 1.10(a)’s explicit limitation only to lawyers who “are associated in a firm” (emphasis added).

ABA Model Rule 1.11(b) ABA Model Rule 1.11 addresses former government-employed lawyers’ disqualification – and the imputation of their disqualification. Significantly, it takes a totally different view of the imputation implications than the preceding ABA Model Rule 1.10.

ABA Model Rule 1.11(b) contains an important exception allowing law firms who hire an individually disqualified former government-employed lawyer to handle matters, as long as they screen the new hire.

But the general rule to which that exception applies contains an odd formulation: “[w]hen a lawyer is disqualified from representation under [ABA Model Rule 1.11(a)], no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter” unless the exception applies (emphasis added). Thus, ABA Model Rule 1.11(b) describes lawyers as a source of an imputed prohibition.

Significantly, ABA Model Rule 1.11(b) applies to all lawyers who are employed by “a firm with which that lawyer is associated.” The words “with which” seem to focus on

the individually disqualified lawyer's "association" with the firm. If ABA Model Rule 1.11(b) intended to assess whether the individually disqualified lawyer's disqualification is imputed to other lawyers, the phrase would have been "no lawyer in a firm with whom that lawyer is associated" – not "with which that lawyer is associated."

So under ABA Model Rule 1.11(b), the "associated" lawyer is the source of the imputed disqualification (as in ABA Model Rule 1.10 and elsewhere), but any imputation applies beyond just "associated" lawyers.

As explained above, ABA Model Rule 1.10 only imputes an "associated" lawyer's disqualification to other "associated" lawyers. But ABA Model Rule 1.11(b) imputes an "associated" lawyer's disqualification to any "lawyer in a firm with which that lawyer is associated" (emphases added). In other words, on its face, ABA Model Rule 1.11(b) seems to impute the disqualification to lawyers who are not "associated" in the firm. All of the lawyers in the firm are targets of the imputed disqualification.

It is also worth noting that ABA Model Rule 1.11(b)'s phrase "lawyer in a firm" is dramatically different from the more commonly used phrases in the ABA Model Rules' imputation provisions: "associated in" a firm or "associated with" a firm. In other words, the ABA knew how to describe lawyers employed by a law firm – and thus presumably intended to limit some but not all of the imputation provisions to a subset of those lawyers – lawyers "associated" in or with the firm.

ABA Model Rule 1.12(c) ABA Model Rule 1.12 addresses former judges' and other specified individual's disqualification, and the imputation of their disqualification to lawyers in a firm that hires them.

Like ABA Model Rule 1.11(b), ABA Model Rule 1.12(c) explicitly describes “associated” lawyers (and former judges, etc.) as the source of the disqualification, but all lawyers in the hiring firm as the targets of an imputed prohibition: “[i]f a lawyer is disqualified by [ABA Model Rule 1.12(a)] no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter,” absent such exception (emphasis added).

As in ABA Model Rule 1.11(b), ABA Model Rule 1.12(c)’s phrase “a firm with which the lawyer is associated” focuses on the lawyer’s association with a firm, not with lawyers in the firm (emphasis added). The latter interpretation presumably would have required ABA Model Rule 1.12(c)’s provision to use different language: “no lawyer in a firm with whom that lawyer is associated” (emphasis added). In other words, the imputed prohibition presumably extends to lawyers who are not “associated” in the firm that hires the individually disqualified judge or other specified person.

ABA Model Rule 1.18(c) ABA Model Rule 1.18(c) addresses the disqualification of a lawyer who has interviewed a “prospective client,” and imputation of that lawyer’s disqualification.

Like ABA Model Rule 1.11 and ABA Model Rule 1.12 (but in stark contrast to ABA Model Rule 1.10), ABA Model Rule 1.18(c)’s second sentence identifies an “associated” lawyer as the source of the disqualification, but identifies all lawyers in the firm (not just “associated” lawyers) as the target of the disqualification: “[i]f a lawyer is disqualified from representation under [ABA Model Rule 1.18(c)], no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter,” except under certain conditions (emphases added).

ABA Model Rule 3.7 cmt. [7] ABA Model Rule 3.7 cmt. [7] addresses ABA Model Rule 3.7(b)'s imputation provision.

ABA Model Rule 3.7 cmt. [7]'s first sentence explains that ABA Model Rule 3.7(b) "provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by [ABA Model Rule 3.7(a)] (emphasis added).

There is a mismatch between this guidance and black letter ABA Model Rule 3.7(b). Black letter ABA Model Rule 3.7(b) allows a lawyer to "act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness," under certain conditions (emphasis added). The term "another lawyer" presumably means a lawyer who either is or is not "associated" with the lawyer who wishes to act as an advocate. In other words, the "associated" status plays no role in black letter ABA Model Rule 3.7(b)'s analysis. This contrasts with ABA Model Rule 3.7 cmt. [7]'s presumably deliberate reference to the disqualified witness-advocate lawyer who "is associated in a firm" with the lawyer wishing to act as an advocate.

ABA Model Rule 3.7 cmt. [7]'s focus on lawyers "associated" in a law firm understandably looks at lawyers who are most likely to be disqualified, because of their more intimate relationship with other lawyers in the firm (based on the sharing of protected client confidential information about law firm clients, etc.).

ABA Model Rule 3.7 cmt. [7]'s concluding sentence notes that "[i]f, however, the testifying lawyer would also be disqualified by [ABA Model] Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by [ABA Model] Rule 1.10 unless the client gives informed consent

under the conditions stated in [ABA Model] Rule 1.7” (emphasis added). Thus, ABA Model Rule 3.7 cmt. [7]’s first sentence’s analysis depends on an “associated” status, while its second sentence does not. To be sure, ABA Model Rule 1.10(a) itself depends on the “associated” status, which presumably would be imported into the ABA Model Rule 3.7 cmt. [7] analysis.

ABA Model Rule 3.8(f) ABA Model Rule 3.8(f) addresses prosecutors’ and others’ extrajudicial comments.

ABA Model Rule 3.8(f) requires that a criminal case’s prosecutor must “exercise reasonable care to prevent . . . other persons . . . associated with the prosecutor in a criminal case from making specified extrajudicial statements” (emphasis added).

Thus, ABA Model Rule 3.8(f) highlights the possibility that nonlawyers may be “associated” with lawyers.

ABA Model Rule 5.1 ABA Model Rule 5.1 addresses supervisory lawyers’ responsibilities.

ABA Model Rule 5.1(a) requires lawyers in an institutional managerial supervisory role to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the [ABA Model] Rules of Professional Conduct” (emphasis added). Thus, ABA Model Rule 5.1(a) does not limit that duty to only those lawyers “associated” in or with the firm. The same is true of ABA Model Rule 5.1(c)(2) – which addresses direct supervisory lawyers’ derivative liability under certain circumstances for ethics breaches by lawyers they supervise. ABA Model Rule 5.1(c)(2) does not apply only to ethics violations by lawyers “associated” with the firm.

ABA Model Rule 5.1 cmt. [3] mentions associated lawyers, but in a way that seems unclear. ABA Model Rule 5.1 cmt. [3]’s concluding sentence explains that “[f]irms, whether large or small, may also rely on continuing legal education in professional ethics” – noting that “the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the [ABA Model] Rules” (emphasis added). The limitation to such an assumption to “lawyers associated with the firm” seems inappropriate.

ABA Model Rule 6.5 ABA Model Rule 6.5 addresses the disqualification of a lawyer who provides “short-term limited legal services to a client.”

Under ABA Model Rule 6.5(a)(2), such a lawyer “is subject to [ABA Model] Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by [ABA Model] Rule 1.7 or 1.9(a) with respect to the matter” (emphasis added). Thus, under ABA Model Rule 6.5(a) an “associated” lawyer is the source of disqualification, and only “associated” lawyers are the target of the disqualification. In other words, a lawyer who is not “associated” with a firm presumably is not disqualified – even if that lawyer knows that another lawyer employed by the same law firm is individually disqualified. It is difficult to imagine that the ABA intended that result, but that is where the language leads.

ABA Model Rule 7.1 cmt. [5] ABA Model Rule 7.1 cmt. [5] addresses “firm names, letterhead and professional designations.”

ABA Model Rule 7.1 cmt. [5]’s second sentence assures that “[a] firm may be designated by the names of all or some of its current members, or by the names of deceased members where there has been a succession in the firm’s identity” In

other words, that ABA Model Rule 7.1 cmt. [5] sentence does not seem to require that a lawyer in the firm's name be, or have been, "associated" with the firm.

However, two sentences later, ABA Model Rule 7.1 cmt. [5] warns that "[a] law firm name or designation is misleading if it implies a connection with . . . a lawyer not associated with the firm or a predecessor firm" (emphasis added). Perhaps these sentences are intended to convey the same meaning, implying that a firm's "member" automatically is "associated" with her law firm colleagues.

D. Inconsistent Words: “Conflict(s) of Interest(s)”

The ABA Model Rules and Comments use several variations of the phrase describing a “conflict” or “conflicts” of “interest” or “interests” (of the client, the lawyer or a third party).¹

Ironically, the ABA Model Rules and its Comments rarely use the common sense term “conflict of interests” or “conflicts of interests.” That term would seem to be the proper term – acknowledging that clients, their lawyers or third parties: (1) have more than one interest, and (2) that there can either be one conflict between those interests, or multiple conflicts between those interests.

It would seem obvious that a conflict (or multiple conflicts) necessarily would involve more than one interest – that is why there is a conflict. But that logical formulation appears only a few times in the ABA Model Rules and Comments.

Given the long ABA Model Rule practice of avoiding what seems to be this logical formulation, these terms likewise do not appear in the ABA Model Rules General Notes, the ABA Model Rules Specific Notes, the Virginia Rules Summary, Analysis and Comparison document, the Virginia Rules General Notes or the Virginia Rules Specific Notes.

¹ Elsewhere, the ABA Model Rules General Notes address the ABA Model Rules’ and Comments’ use of different words to describe the existence and effect of conflicts of interests.

ABA Model Rules Titles

The confusing use of singular and plural references begins with the ABA Model Rules' titles.

ABA Model Rule 1.7 and ABA Model Rule 1.8 use the singular words: "Conflict of Interest." ABA Model Rule 1.10 and 1.11 use the plural "Conflicts" but the singular "Interest": "Conflicts of Interest."

As this document explains elsewhere, the ABA Model Rules' titles frequently use the plural when referring both to clients and things. None of the pertinent ABA Model Rules use the plural "interests." But ironically, another ABA Model Rules title (ABA Model Rule 6.4) acknowledges that clients have multiple interests; "Law Reform Activities Affecting Client Interests."

Singular References to Clients' "Interest"

The ABA Model Rules and Comments frequently use the singular "interest" when referring to a client's interest.

Some of the singular references are understandable, because they focus on "a" or "the" client interest. But, some of them are more generic, implying that a client has only one interest.

ABA Model Rule 1.1 cmt. [3]

ABA Model Rule 1.5 cmt. [5]

ABA Model Rule 1.6 cmt. [16]

ABA Model Rule 1.7 Title, (a), (b)

ABA Model Rule 1.13(b), cmts. [3], [4]

ABA Model Rule 1.14(b)

ABA Model Rule 2.1 cmt. [5]

ABA Model Rule 8.5 cmt. [3]

Plural References to Clients' "Interests"

The ABA Model Rules and Comments more frequently and understandably refer to clients' "interests" in the plural – because clients obviously have many interests.

Some of these plural references specifically list several client interests. But, others are more generic, logically implying that clients have several interests.

ABA Model Rule 1.3 cmts. [1], [3], [5]

ABA Model Rule 1.4 cmt. [5]

ABA Model Rule 1.7 cmts. [6], [15], [18], [19], [23], [24], [31]

ABA Model Rule 1.8 cmts. [11], [17]

ABA Model Rule 1.9(a) cmts. [2], [5]

ABA Model Rule 1.10 Title, (b), cmt. [5]

ABA Model Rule 1.11(c)

ABA Model Rule 1.13(f)

ABA Model Rule 1.14(c) cmts. [3], [5], [7], [8]

ABA Model Rule 1.16(b)(1), (d) cmts. [6], [7]

ABA Model Rule 1.17 cmt. [8]

ABA Model Rule 1.18(c), cmt. [6]

ABA Model Rule 2.3(b), cmt. [5]

ABA Model Rule 3.2

ABA Model Rule 3.3 cmt. [15]

ABA Model Rule 3.4 cmt. [4]

ABA Model Rule 4.3, cmts. [1], [2]

ABA Model Rule 4.4 cmt. [1]

ABA Model Rule 5.5 cmt. [16]

ABA Model Rule 5.7 cmt. [9]

ABA Model Rule 6.3 cmt. [1]

ABA Model Rule 6.4

ABA Model Rule 6.5 cmt. [4]

ABA Model Rule 8.3 cmt. [2]

References to “Conflict” (singular) of “Interest” (singular)

Several ABA Model Rules and Comments use the phrase “conflict of interest” (both in the singular), as in ABA Model Rule 1.7’s and ABA Model Rule 1.8’s titles.

Some of these phrases focus on “a” or “the” specific conflict, but others are generic.

ABA Model Rule 1.7 Title, cmts. [23], [24], [35]

ABA Model Rule 1.8 Title, cmt. [8]

ABA Model Rule 1.11(e)(2), cmts. [1], [5]

ABA Model Rule 1.16 cmt. [1]

ABA Model Rule 3.7 cmt. [4]

ABA Model Rule 5.7 cmt. [10]

References to “Conflicts” (plural) of “Interest” (singular)

Several ABA Model Rules and Comments use the phrase “conflicts of interest.”

That phrase thus contains the plural “conflicts” and the singular “interest.”

ABA Model Rule 1.6(b)(7), cmts. [13], [14]

ABA Model Rule 1.7, cmts. [1], [26], [35]

ABA Model Rule 1.9 cmt. [1]

ABA Model Rule 1.10 Title

ABA Model Rule 1.11 Title, cmts. [2], [3]

ABA Model Rule 2.4 cmt. [4]

ABA Model Rule 5.1 cmt. [2]

ABA Model Rule 5.7 cmt. [11]

ABA Model Rule 6.5 cmts. [1], [3], [4]

ABA Model Rule 7.2 cmt. [8]

ABA Model Rule 8.5 cmt. [5]

References to “Conflict” (singular) of “Interests” (plural)

Only a few ABA Model Rule Comments refer, directly or indirectly, to a “conflict” or “conflicts” of “interests.”

ABA Model Rule 4.3 cmt. [2]

ABA Model Rule 5.2 cmt. [2]

ABA Model Rule 5.5 cmt. [5]

ABA Model Rule 5.7 cmt. [1]

ABA Model Rule 6.3 cmt. [1]

Inconsistent References

Some ABA Model Rules and Comments have arguably inconsistent references.

ABA Model Rule 1.7 cmt. [15] addresses consents, noting that the “[c]onsentability is typically determined by considering whether the interests of the clients will be

adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest" (emphases added).

ABA Model Rule 1.7 cmt. [23]'s second sentence addresses "simultaneous representation of parties whose interests in litigation may conflict" (emphasis added). But its fifth sentence mentions the "[t]he potential for conflict of interest" in some circumstances (emphasis added). And its sixth sentence approves certain "common representation of persons having similar interests in civil litigation" (emphasis added).

ABA Model Rule 1.7 cmt. [24] addresses what is commonly called "positional adversity." ABA Model Rule 1.7 cmt. [24]'s second sentence contains both the plural "interests" and the singular "interest:" "[t]he mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest" (emphasis added). ABA Model Rule 1.7 cmt. [24]'s third sentence contains the singular "interest" while its fourth sentence contains the plural phrase "long-term interests."

ABA Model Rule 1.13(b), as well as that ABA Model Rule's cmts. [3] and [4] contain the phrase "best interest" when addressing lawyers' duties to their organizational clients. But ABA Model Rule 1.4 cmt. [5] and ABA Model Rule 1.14 cmt. [5] use the more common phrase "best interests" of their clients. That parallels the commonly-used "best interests of the child" standard in family law matters.

ABA Model Rule 1.14(b) mentions a scenario in which a client with "diminished capacity . . . cannot adequately act in the client's own interest" (emphasis added). But ABA Model Rule 1.14(c) assures lawyers that they may take "protective action . . . to the extent reasonably necessary to protect the client's interests" (emphasis added). ABA

Model Rule 1.14 cmt. [3] similarly reminds lawyers that they “must keep the client’s interests foremost” (emphasis added).

ABA Model Rule 2.1 cmt. [5] assures that “a lawyer may initiate advice to a client when doing so appears to be in the client’s interest” (emphasis added). ABA Model Rule 2.4 cmt. [4] mentions “[t]he conflicts of interest” (emphasis added) that can arise when a lawyer serves as a third-party neutral and later represents the client. But ABA Model Rule 2.3(b) requires lawyers to obtain client consent “[w]hen the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely” (emphasis added). ABA Model Rule 2.3 cmt. [5] uses the same plural phrase “client’s interests” twice.

ABA Model Rule 5.7 cmt. [1] mentions the “prohibitions against representation of persons with conflicting interests” (emphasis added). ABA Model Rule 5.7 cmt. [9] begins by referring to “[a] broad range of economic and other interests of clients” (emphasis added). ABA Model Rule 5.7 cmt. [10] warns lawyers that they must “heed the proscriptions of the Rules addressing conflict of interest” (emphasis added).

ABA Model Rule 6.5 cmt. [4]’s first sentence mentions “the risk of conflicts of interest” (emphasis added). But its third sentence mentions lawyers “undertaking or continuing the representation of a client with interests adverse to” another client (emphasis added).

ABA Model Rule 8.5 cmt. [3]’s second sentence mentions “the best interest of both clients and the profession” (emphasis added). But its third sentence mentions the “appropriate regulatory interests of relevant jurisdictions,” (emphasis added).

Seemingly Proper References

A handful of ABA Model Rules and Comments seem to take the common sense view that clients have several interests, and that lawyers representing those clients might face a singular conflict or multiple conflicts of those multiple interests. Somewhat ironically, some of those logical references appear in Rules that do not address conflicts.

ABA Model Rule 1.8 cmt. [9] addresses lawyers' acquisition of "literary or media rights concerning the conduct of the representation," – warning that it "creates a conflict between the interests of the client and the personal interests of the lawyer" (emphasis added). Thus, ABA Model Rule 1.8 cmt. [9] recognizes that clients and lawyers have multiple interests that can conflict.

ABA Model Rule 3.7 cmt. [4] addresses the witness-advocate rule. Among other things, ABA Model Rule 3.7 cmt. [4] points to ABA Model Rule 3.7(a)(3) as "recogniz[ing] that a balancing is required between the interests of the client and those of the tribunal and the opposing party" (emphasis added). Thus, ABA Model Rule 3.7 cmt. [4] recognizes that clients have multiple interests, as do others in the litigation context.

ABA Model Rule 4.3 warns that a "lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client" (emphasis added). Thus, ABA Model Rule 4.3 recognizes that clients have multiple interests that might conflict with other persons' interests. ABA Model Rule 4.3 cmt. [2]'s first sentence describes a scenario in which an unrepresented person's "interests are not in conflict with the client's" (emphasis added) – presumably referring to "the client's interests." Its second sentence also refers to unrepresented "person's interests" in the plural.

ABA Model Rule 5.2 cmt. [2] addresses subordinate lawyers' responsibilities. Among other things, ABA Model Rule 5.2 cmt. [2] allows a subordinate to defer to "the supervisor's reasonable resolution" of "a question [which] arises whether the interests of two clients conflict under [ABA Model] Rule 1.7" (emphasis added). Thus, ABA Model Rule 5.2 cmt. [2] recognizes that clients have multiple interests that might conflict.

ABA Model Rule 5.7 cmt. [1] addresses the possible expectation that recipients of law-related services "may expect" "the protection of . . . prohibitions against representation of persons with conflicting interests" (emphasis added). Thus, ABA Model Rule 5.7 cmt. [1] recognizes that clients have multiple interests that might conflict with those of other clients.

ABA Model Rule 5.7 cmt. [9]'s first sentence notes that lawyers "engaging in the delivery of law-related services" might serve "[a] broad range of economic and other interests of clients" (emphasis added). Thus, ABA Model Rule 5.7 cmt. [9] recognizes that clients have multiple interests.

ABA Model Rule 6.3 cmt. [1] warns lawyers participating in legal services organizations that "there is potential conflict between the interests of such persons [served by the legal services organization] and the interests of the lawyer's clients" (emphasis added). Thus, ABA Model Rule 6.2 cmt. [1] recognizes that lawyers' clients have multiple interests that might conflict with the interests of other clients.

Conclusion

It would seem appropriate to refer to either a singular "conflict" or plural "conflicts" of plural "interests" rather than singular "interest." Unless there is more than one "interest," it would seem illogical that there could be either one or more "conflict."

E. Inconsistencies: Other Words and Phrases

The ABA Model Rules and Comments contain several inconsistent words and phrases. Unlike language differences that are stylistic and unlikely to cause any confusion, some of the inconsistencies might have substantive impact.

This analysis addresses these inconsistencies in roughly alphabetical order.

Adversity: Type and Intensity

The ABA Model Rules contain several different descriptions of adversity, when describing: lawyers' adversity to clients or former clients; actions or interests that might be otherwise adverse to clients or former clients; law or facts that might be adverse to clients, etc.

Lawyers or their actions can be adverse to: (1) a person; (2) the interests of a person; (3) the position of a person; or (4) the lawyer's representation of a client.

Adversity to a person presumably differs from adversity to a person's interests. The former circumstance seems more direct than the latter. For instance, a lawsuit against a person obviously is adverse to that person. A lawsuit against a company owned by a person (or in which the person has an interest) is not directly adverse to that person, but might be adverse to that person's interests.

And such adversity can vary by type, degree, and intensity. As explained below, the ABA Model Rules and Comments use several adjectives in describing adversity to a person or a person's interests: "directly;" "materially;" "seriously;" "prejudicial;" "adverse effect;" "hardship." The word "directly" seems to describe the type of adversity. The words

“materially,” “seriously,” “substantial,” etc. seem to describe the intensity or magnitude of the adversity.

Adversity presumably can be direct without being material and can be material without being direct. For instance, a lawsuit against a person seeking one dollar in damages is “directly adverse” to that person, but is not material. A lawsuit against a third party that will cause a person’s company to declare bankruptcy is not directly adverse to the person, but “materially adverse” to the person’s interests.

To make matters more complicated, all of these adverse effects can impact a person, a person’s interest (in the singular), a person’s interests (in the plural), a representation, a position, etc. And the effects can be material or not, serious or not, etc.

The following discussion follows generally in numerical ABA Model Rule order.

ABA Model Rule 1.2 ABA Model Rule 1.2 cmt. [2]’s third sentence explains that lawyers “usually defer” to their clients’ judgment (among other things) “concern for third persons who might be adversely affected” (emphases added). Thus, that provision focuses on adversity to persons rather than those persons’ interests.

ABA Model Rule 1.3 ABA Model Rule 1.3 cmt. [3]’s second sentence explains that “[a] client’s interests often can be adversely affected” by delay or change in conditions (emphases added). Thus, that provision focuses on adversity to clients’ interest rather than the clients themselves.

ABA Model Rule 1.3 cmt. [4]’s fifth sentence describes a proceeding that “produced a result adverse to the client” (emphases added). Thus, that provision focuses on adversity to clients, not to the clients’ interests.

ABA Model Rule 1.6 ABA Model Rule 1.6 cmt [6] is preceded by the heading “Disclosure Adverse to Client” (emphases added). Thus, that heading focuses on adversity to clients rather than to clients’ interests.

ABA Model Rule 1.6 cmt. [16]’s third sentence discusses “a disclosure adverse to the client’s interest” (emphases added). Thus, that provision focuses on adversity to clients’ interest (singular), not to the clients.

ABA Model Rule 1.6 cmt. [18]’s third sentence mentions “the extent to which [certain] safeguards adversely affect the lawyer’s ability to represent clients” (emphases added). That provision focuses on adversity (without an intensity standard), but to lawyer’s “ability to represent clients” – not adversity to the clients’ interests or to the clients themselves.

ABA Model Rule 1.7 ABA Model Rule 1.7(a)(1) prohibits lawyers in most circumstances from representing a client if the representation “will be directly adverse to another client” (emphases added). Thus, that provision focuses on adversity (a certain type – “directly”) – to clients rather than clients’ interest or interests.

ABA Model Rule 1.7(a)(2) describes a circumstance when there is a “significant risk” that a lawyer’s “representation” of one or more clients “will be materially limited” by the lawyer’s other responsibilities (emphasis added). That could be characterized as a type of adversity, because the lawyer faces competing responsibilities, some of which are presumably adverse to the client—thus limiting the lawyer’s ability to represent that client.

ABA Model Rule 1.7 cmt. [6]’s first sentence explains that lawyers may not undertake a “representation directly adverse to that client” the lawyer currently

represents (emphases added). Thus, that provision focuses on adversity to clients rather than to clients' interests – but only adversity of a certain type (“directly”).

ABA Model Rule 1.7 cmt. [6]'s third sentence explains that a client might feel betrayed if the lawyer's representation is “directly adverse” to that client (emphases added). Thus, that provision also focuses on adversity to clients rather than to clients' interests, and applies if the adversity is direct.

ABA Model Rule 1.7 cmt. [6]'s fifth sentence describes a scenario in which “a directly adverse conflict may arise” (emphasis added). Thus, that provision also contains the adjective “directly” to describe the type of adversity, but without explaining whether the adversity is to clients or to clients' interests.

ABA Model Rule 1.7 cmt. [6]'s concluding sentence refers to “simultaneous representation in unrelated matters of clients whose interests are only economically adverse” (emphases added). Thus, that provision focuses on adversity to clients' interests, rather than to clients.

ABA Model Rule 1.7 cmt. [7]'s first sentence refers to “[d]irectly adverse conflicts” (emphasis added)—without explaining whether the adversity is to clients or to clients' interests.

ABA Model Rule 1.7 cmt. [8]'s first sentence describes a scenario in which “there is no direct adverseness” (emphasis added). That term does not explain whether the direct adversity is to clients or to clients' interests.

ABA Model Rule 1.7 cmt. [8]'s concluding sentence describes the so-called “material limitation conflict.” But it contains a separate description of the intensity of the possible adversity: “materially interfere.”

ABA Model Rule 1.7 cmt. [10]'s first sentence warns lawyers that their "own interests should not be permitted to have an adverse effect on representation of a client" (emphases added). So that provision describes adverse effects on a representation, rather than adversity to clients or clients' interests.

ABA Model Rule 1.7 cmt. [18]'s first sentence describes "ways that the conflict could have adverse effects on the interests of that client" (emphases added). Thus, that provision focuses on adversity to clients' interests (plural), not to the clients themselves.

ABA Model Rule 1.7 cmt. [22]'s third sentence describes "the actual and reasonably foreseeable adverse consequences of those representations" (emphasis added). Thus, that provision does not explain whether the adversity is to clients or to clients' interests.

ABA Model Rule 1.7 cmt. [24] addresses what is commonly called "positional adversity." ABA Model Rule 1.7 cmt. [24]'s second sentence refers to "precedent adverse to the interests of a client represented by the lawyer in an unrelated matter" (emphases added). Thus, that provision focuses on adversity (without mentioning the type or intensity of such adversity) to clients' "interests" (plural), rather than to clients themselves.

ABA Model Rule 1.7 cmt. [24]'s third sentence describes a conflict as a situation "if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case" (emphases added). That provision adds a degree element ("materially") to the "risk" and refers to the possible limit on lawyers' representation (rather than adversity to clients or their interests). ABA Model Rule 1.7 cmt. [24] then provides an example: "when a decision favoring one client will create a precedent likely to seriously weaken the position

taken on behalf of the other client” (emphasis added). Thus, that provision refers to weakening (using the adverb “seriously” to describe the intensity) of a lawyer’s representation – rather than adversity to clients or clients’ interests.

ABA Model Rule 1.7 cmt. [26]’s second sentence mentions “directly adverse conflicts in transactional matters” (emphasis added). Thus, that provision adds the adjective “directly” to describe the adversity’s intensity.

ABA Model Rule 1.7 cmt. [28]’s penultimate sentence explains that a “lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests” (emphasis added). Thus, that provision focuses on clients’ “interests” (plural), rather than clients.

ABA Model Rule 1.7 cmt. [29]’s first sentence refers to “the potentially adverse interests” (emphasis added) – thus focuses on adverse “interests” (plural) rather than adversity to clients.

ABA Model Rule 1.7 [31]’s concluding sentence describes a scenario in which lawyer’s conduct “will not adversely affect representation” (emphases added). Thus, that provision focuses on adversity’s effect on a representation, not adversity to clients or their interests.

ABA Model Rule 1.7 cmt. [34] second sentence mentions lawyers “accepting representation not adverse to an affiliate” of a client (emphases added). Thus, that provision focuses on adversity to a corporation or other entity, rather than to its interests.

ABA Model Rule 1.7 cmt. [34]’s concluding sentence explains that lawyers “will avoid representation adverse to the client’s affiliates” (emphasis added). Thus, that

provision focuses on adversity (without describing the type or intensity) to those persons, not to those persons' interest or interests.

ABA Model Rule 1.8 ABA Model Rule 1.8(a) describes scenarios in which lawyers interact with their clients in some business transaction – in which a lawyer's interest is “adverse to a client” (emphasis added). Thus, that provision focuses on adversity to clients, not to clients' interest or interests.

ABA Model Rule 1.8(a) specifically prohibits lawyers from entering into business transactions with a client that are “adverse to a client,” except under certain circumstances (emphasis added). Thus, that provision focuses on adversity to clients rather than to their interests. One might have thought that an ABA Model Rule addressing lawyers doing business with clients would focus on whether lawyers' “interests” are adverse to the client's “interests”—rather than “adverse” to clients themselves.

ABA Model Rule 1.8(b) contains a different standard. ABA Model Rule 1.8(b) prohibits lawyers from using information “relating to representation of a client to the disadvantage of the client” (emphasis added).

ABA Model Rule 1.9 ABA Model Rule 1.9 addresses lawyers' duties to former clients.

ABA Model Rule 1.9(a)'s adversity to former clients prohibits (absent consent) lawyers from representing a client on certain matters “in which that [client's] interests are materially adverse to the interests of [a] former client “(emphases added).” Thus, that provision focuses on adversity to the former client's interests, rather than to the former client herself. And that provision contains the “materially” intensity standard.

ABA Model Rule 1.9(b)(1) prohibits a lawyer representing a client in certain matters in which the lawyer's former firm previously represented a client "whose interests are materially adverse" (emphases added) to the lawyer's client. Thus, that provision also contains a "materially" intensity standard. But strangely, it does not describe the lawyer's client's interests being "materially adverse" to the former law firm's client's interests – instead describing that former client's interests as being "materially adverse" to the lawyer's new client – not to the new client's "interests."

ABA Model Rule 1.9(c) prohibits lawyers from using (not just disclosing) information relating to the representation of a former client "to the disadvantage of the former client" (except in certain circumstances) (emphasis added). That provision parallels ABA Model Rule 1.8(b)'s "disadvantage standard" – eschewing any intensity standard, and focusing on a "disadvantage" to the former client, rather than to the former client's interests. It is unclear what the "disadvantage" standard means, or how it differs from previous ABA Model Rule 1.9 provision's "materially adverse" standard. Among other things, the word "disadvantage" is not preceded by any intensity element, and not followed by a reference to the client's "interests" – but instead focuses on the "disadvantage" (presumably even immaterial) to the third client herself rather than to her interests.

ABA Model Rule 1.9 cmt. [2]'s second sentence refers to a lawyer's representation of a client "with materially adverse interests" in a transaction (emphasis added). Thus, that provision contains a "materially" intensity standard, but focuses on adversity to clients' "interests" (plural) rather than to clients.

ABA Model Rule 1.9 cmt. [2]’s fourth sentence refers to “a position adverse to the prior client” (emphases added). Thus, that provision focuses on adversity to clients rather than to clients’ interests – which was the focus two sentences earlier.

ABA Model Rule 1.9 cmt. [3]’s first sentence addresses information that “would materially advance the client’s position in the subsequent matter” (emphases added) — presumably adverse to the “position” of a former client. Thus, that provision focuses on adversity to clients’ “position” – not adversity to clients’ “interest” or “interests,” or adversity to former clients themselves. And the provision contains an intensity standard (“materially”).

ABA Model Rule 1.9 cmt. [3]’s fourth sentence describes information disclosures “adverse to the former client” (emphases added). Thus, that provision refers to adversity to clients rather than to clients’ interests, but without an intensity standard.

ABA Model Rule 1.10 ABA Model Rule 1.10 focuses on a different type of adversity.

ABA Model Rule 1.10(a)(1) essentially precludes imputation of an individual lawyer’s disqualification if that individual lawyer’s disqualification is based on her personal interest, and “does not present a significant risk of materially limiting the representation” of other clients by her colleagues (emphasis added). So that provision contains both a “significant risk” element, a materiality element, and a focus on a “representation” – rather than on a former client or her interests.

Interestingly, ABA Model Rule 1.10(a)(1) refers to a lawyer’s “personal interest” (singular). That matches ABA Model Rule 1.8(a)’s word “interest” (singular) in describing lawyers’ financial or pecuniary interest when doing business with a client, and in similar

settings. But it contrasts with ABA Model Rule 1.9(a)'s and ABA Model Rule 1.9(b)(1)'s word "interests" (plural) in describing lawyers' current and former clients' interests.

ABA Model Rule 1.10(b) explains that a law firm's lawyers may represent a client adverse to a client who had been previously represented by a lawyer who is no longer with that firm. The firm's lawyers may undertake such a representation even if its client has "interests materially adverse to those" of the law firm's former client (emphasis added). So that provision contains a "materially" intensity standard, and focuses on adversity between the firm's current clients and former clients' "interests" (plural)—not adversity to the former clients themselves.

ABA Model Rule 1.10 cmt. [5] provides guidance for interpreting ABA Model Rule 1.10(b). As mentioned above, black letter ABA Model Rule 1.10(b) allows a law firm to represent a client with "interests materially adverse" to one of the firm's former clients (emphasis added) - who had been represented by a lawyer who has since left the firm.

But ABA Model Rule 1.10 cmt. [5]'s first sentence contains a totally different standard – explaining that "a law firm, under certain circumstances [may] represent a person with interests directly adverse" to such a former client (emphasis added). Thus, that provision describes one type of adversity ("directly") and focuses on adversity to a former client, not adversity to the former client's "interest" or "interests."

ABA Model Rule 1.11 ABA Model Rule 1.11(c) contains two descriptions of adversity.

ABA Model Rule 1.11(c) prevents former government-employed lawyers (absent some exceptions) from representing a private client "whose interests are adverse" to a person about whom that lawyer gained specified information while working in the

government. – if that lawyer could use such information “to the material disadvantage” of the person (emphases added).

First, a lawyer’s private client must have “interests... adverse to” the person about whom the lawyer acquired such information (emphasis added). That adversity standard does not include a “materially” intensity standard, and focuses on adversity to the person’s interests rather than to the person themselves.

Second, ABA Model Rule 1.11(c) describes information that “could be used to the material disadvantage” of that person about whom the lawyer acquired information while a government employee (emphasis added). That standard has a “materially” intensity standard, but contains the word “disadvantage” rather than the word “adverse.” This contrasts ABA Model Rule 1.9(c)(1)’s word “disadvantage”—without a materiality element (discussed above).

ABA Model Rule 1.11 cmt. [3]’s first sentence describes a scenario “regardless of whether a lawyer is adverse to a former client” (emphasis added). That provision focuses on adversity to clients rather than to clients’ interests.

ABA Model Rule 1.13 ABA Model Rule 1.13 addresses lawyers’ interactions with organizational clients.

ABA Model Rule 1.13 cmt. [10]’s first sentence explains that “[t]here are times when the organization’s interest may be or become adverse to those of one or more of its constituents” (emphases added). Thus, that provision focuses on an “interest” (singular) and adversity (without an intensity standard) to persons’ or organizations’ interests, not to them.

ABA Model 1.13 cmt. [10]'s second sentence takes the same approach – explaining that a lawyer “should advise any constituent, whose interest the lawyer finds adverse to that of the organization” of certain consequences (emphases added).

ABA Model Rule 1.14 ABA Model Rule 1.14 addresses lawyers' interactions with clients of “diminished capacity”.

ABA Model Rule 1.14 cmt. [4]'s concluding sentence includes a scenario in which a guardian represented by the lawyer “is acting adverse to the ward's interest” (emphases added). Thus, that provision focuses on adversity to persons' “interest” (singular), rather than to persons themselves.

ABA Model Rule 1.14 cmt. [8]'s first sentence addresses a scenario in which disclosure “could adversely affect the client's interests” (emphases added). Thus, that reference addresses adversity to clients' “interests” (plural). ABA Model Rule 1.14 cmt. [8]'s penultimate sentence takes the same approach.

ABA Model Rule 1.16 ABA Model Rule 1.16 addresses lawyers' mandatory or discretionary withdrawal.

ABA Model Rule 1.16(b)(1) allows lawyers to withdraw if the withdrawal “can be accomplished without material adverse effect on the interests of the client” (emphases added). Thus, that provision contains a “materially” intensity standard, and focuses on adversity to clients' “interests” (plural), not to clients themselves.

ABA Model Rule 1.16 cmt. [6] describes a scenario where a “severely diminished capacity” client may discharge the lawyer, which “may be seriously adverse to the client's interests” (emphases added). Thus, that provision contains the adjective “seriously” to

describe the adversity's intensity, and focuses on adversity to clients' "interests" (plural), not to clients themselves.

ABA Model Rule 1.16 cmt. [7]'s second sentence explains that lawyers may withdraw if "it can be accomplished without material adverse effect on the client's interests" (emphases added). Thus, like the preceding ABA Model Rule Comment, this provision focuses on adversity to clients' interests rather than to clients themselves. But it contains a different intensity standard ("material"), in contrast to the preceding Comment's "seriously" intensity standard.

ABA Model Rule 1.18 ABA Model Rule 1.18 addresses lawyers' duty to prospective clients and would-be clients.

Black letter ABA Model Rule 1.18(c)'s first sentence describes circumstances in which a lawyer may not represent a client with "interests materially adverse to those of a prospective client" (emphasis added). Thus, that provision contains a "materially" intensity standard, acknowledges plural "interests" rather than a singular "interest," and focuses on adversity to the "interests" of prospective clients—not adversity to prospective clients themselves.

ABA Model Rule 1.18 cmt. [6] supposedly describes that same scenario, but refers only to a lawyer "representing a client with interests adverse to those of the prospective client" (emphasis added) – without black letter ABA Model Rule 1.18(c)'s "materially" intensity standard.

ABA Model Rule 2.1 ABA Model Rule 2.1 addresses lawyers acting as advisors.

ABA Model Rule 2.1 cmt. [5]'s second sentence describes a scenario that is likely to "result in substantial adverse legal consequences to the client" (emphases added).

Thus, that provision includes the adjective “substantial” to describe the adversity’s intensity, and mentions adversity to persons rather than to persons’ interests.

ABA Model Rule 2.3 ABA Model Rule 2.3 addresses lawyers creating evaluations for third persons’ use.

ABA Model Rule 2.3(b) describes a scenario that “is likely to affect the client’s interests materially and adversely” (emphases added). Thus, that provision focuses on adversity to a clients’ interests (plural) rather than to clients themselves. And it contains a “materially” intensity standard.

ABA Model Rule 2.3 cmt. [5]’s second sentence contains the same terminology.

ABA Model Rule 3.3 ABA Model Rule 3.3(a)(2) describes lawyers’ duty under certain circumstances to advise courts of adverse law.

ABA Model Rule 3.3(a)(2) prohibits lawyers from knowingly failing to disclose to the court “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client” (emphases added). Thus, that provision contains the term “directly adverse” (referring to the type of adversity), which also appears in ABA Model Rule 1.7(a) — but which contrasts with other ABA Model Rules containing a “materially adverse” intensity standard. And understandably, ABA Model Rule 3.3(a)(2) focuses on adversity to the client’s “position” (not to clients’ “interests,” or to clients themselves).

ABA Model Rule 3.3(d) addresses lawyers’ duty to disclose to the court certain facts in ex parte proceedings. Thus, ABA Model Rule 3.3(d) governs disclosure of facts, not bad law. ABA Model Rule 3.3(d) requires lawyers in specified circumstances to disclose “material facts” – “whether or not the facts are adverse” (emphases added).

Thus, that provision contains the word “adverse” without the type-identifying adjective “directly” contained in ABA Model Rule 3.3(a)(2)’s requirement that lawyers disclose adverse law under the specified conditions.

ABA Model Rule 3.3 cmt. [4]’s third sentence addresses lawyers’ “duty to disclose directly adverse authority” (emphasis added). Thus, that reference parallels black letter ABA Model Rule 3.3(a)(2)’s use of the type-identifying adjective “directly.”

ABA Model Rule 3.3 cmt. [15]’s first sentence describes a scenario in which “the representation of a client whose interests will be or have been adversely affected by the lawyer’s disclosure” (emphases added). Thus, that provision focuses on adversity to clients’ interests rather than to the clients themselves. But it does not contain an adjective describing the type of adversity (such as ABA Model Rule 3.3(a)(2)’s or ABA Model Rule 3.3 cmt. [4]’s word “direct”).

ABA Model Rule 3.4 ABA Model Rule 3.4 addresses lawyers’ dealings with opposing parties and their lawyers.

ABA Model Rule 3.4(f)(2) addresses a scenario in which a third person’s “interests will not be adversely affected” if that person does not voluntarily provide information to another party” (emphases added). Thus, that provision focuses on adversity to persons’ interests rather than to the persons themselves, and does not contain a type or intensity standard.

ABA Model Rule 3.6 ABA Model Rule 3.6 addresses trial publicity.

ABA Model Rule 3.6(c) addresses what could be considered a self-defense provision allowing lawyers to disclose information. ABA Model Rule 3.6(c)’s concluding

sentence refers to “adverse publicity” – presumably referring to an adverse effect on the client.

ABA Model Rule 3.6 cmt. [7]’s second sentence describes such self-defense disclosure as “lessening any resulting adverse impact on the adjudicative proceeding” (emphases added). Thus, that provision describes adversity in “the adjudicative proceeding” – in contrast to black letter ABA Model Rule 3.6(c)’s apparent reference to adversity to the client rather than adverse impact on the proceedings.

ABA Model Rule 3.6 also contains the word “prejudice.” ABA Model Rule 3.6 cmt. [7]’s first sentence describes an exception allowing pre-trial publicity “in order to avoid prejudice to the lawyer’s client” (emphasis added). Thus, that provision focuses on “prejudice” to the client, rather than to the client’s interest or interests, position, representation, etc. But ABA Model Rule 3.6 cmt. [7]’s concluding sentence allows such self-defense trial publicity only if it contains “such information as is necessary to mitigate undue prejudice created by the statements made by others” (emphasis added). Thus that provision applies a “prejudice” standard – but adds the undefined “undue” intensity standard (which contrasts with ABA Model Rule 3.6 cmt. [7]’s first and second sentences, neither of which contain an “undue” intensity standard).

ABA Model Rule 3.7 ABA Model Rule 3.7 addresses what is called the witness – advocate rule.

ABA Model Rule 3.7(a)(3) contains an exception to normal application of the witness-advocate rule: if “disqualification of the lawyer would work substantial hardship on the client” (emphasis added). Presumably, “hardship” is synonymous with “prejudice”

or “adverse.” It is unclear how “substantial” hardship (the intensity standard) differs from regular “hardship”.

ABA Model Rule 4.3 ABA Model Rule 4.3 addresses lawyers’ communications with unrepresented persons.

ABA Model Rule 4.3’s third sentence prohibits lawyers from giving advice (other than the advice to “secure counsel”) if the lawyer knows or reasonably should know “that the interests of such [an unrepresented] person are or have a reasonable possibility of being in conflict with the interests of the client” (emphases added). Thus, that provision focuses on a “conflict” (rather than adversity) to clients’ interests (rather than to clients themselves).

ABA Model Rule 4.3 cmt. [1]’s second sentence similarly contains the phrase “the client has interests opposed to those of the unrepresented person” (emphasis added). That provision focuses on adversity (using the word “opposed” rather than the word “conflict”) to clients’ “interests” – rather than to clients themselves.

ABA Model Rule 4.3 cmt. [2]’s first sentence describes two scenarios: (1) those “involving unrepresented person whose interests may be adverse to those of the lawyer’s client;” and (2) those in which “the person’s interests are not in conflict with the client’s” interests (emphases added). Thus, that provision seems to consider synonymous “interests” (plural) that are “adverse” and “interests” (plural) that are “in conflict.” Both of those scenarios involve adversity or conflict with persons’ “interests” – rather than with persons themselves.

ABA Model Rule 6.3 ABA Model Rule 6.3 addresses lawyers’ membership in legal services organizations.

ABA Model Rule 6.3 describes a scenario in which the legal services organization in which a lawyer plays a specified role “serves persons having interests adverse to a client of the lawyer” (emphasis added). Thus, that provision focuses on the organization’s served persons’ “interests” (plural), but does not define the type of adversity (such as “direct”) or the intensity (such as “materially”).

ABA Model Rule 6.3(b) prevents lawyers from knowingly participating in such organizations’ decisions or actions if those “could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer (emphases added). Thus, ABA Model Rule 6.3(b): (1) contains a “materially” intensity standard in one context, but not the others; and (2) refers to adverse impact on a “representation” in one context, and adversity to “interests” in another context.

ABA Model Rule 6.5 ABA Model Rule 6.5 addresses lawyers’ involvement with certain legal services programs.

ABA Model Rule 6.5 cmt. [4]’s penultimate sentence refers to a client with “interests adverse to a client being represented” under the program’s “auspices” (emphasis added). Thus, that provision focuses on adversity to clients rather than to clients’ “interests” (plural).

ABA Model Rule 8.3 ABA Model Rule 8.3 addresses lawyers’ reporting of others lawyers’ misconduct.

ABA Model Rule 8.3 cmt. [2]’s second sentence describes a scenario in which lawyers’ disclosure of another lawyer’s misconduct “would not substantially prejudice the client’s interests” (emphases added). Thus, that provision: (1) focuses on “prejudice” rather than “adversity,” (2) contains the intensity adjective “substantially” (rather than

“materially,” etc.), and (3) assesses “prejudice” to clients’ interests rather than to clients themselves.

Care and Compliance

The ABA Model Rules contain several different descriptions of a lawyer’s care.

Presumably the different formulations are intended to describe a different level of care, but no ABA Model Rule or ABA Model Rule Comment describes any difference.

Several ABA Model Rule provisions contain the word “care”: ABA Model Rule 1.13 cmt. [10]’s third sentence; ABA Model Rule 1.15 cmt. [1]’s first sentence; ABA Model Rule 1.18 cmt. [9]’s concluding sentence.

Several ABA Model Rule provisions similarly contain the word “careful”: ABA Model Rule 2.3 cmt. [3]’s third sentence; ABA Model Rule 3.8 cmt. [1]’s fourth sentence.

But several ABA Model Rule provisions contain the term “reasonable care” (emphasis added): ABA Model 3.8(f); ABA Model 3.8 cmt. [6]’s third sentence. It is unclear how “reasonable care” differs from “care.”

And several ABA Model Rule provisions contain the term “special care” (emphasis added): ABA Model Rule 5.7 cmt. [8]’s first sentence; ABA Model Rule 5.7 cmt. [10]’s first and concluding sentences. It is unclear how “special care” differs from “care” or “reasonable care.”

ABA Model Rule 5.7 cmt. [10] contains differing standards of “compliance” with the ABA Model Rules.

ABA Model Rule 5.7 cmt. [10]’s first sentence not only contains the term “special care” (which presumably differs from regular “care”), it also contains the term “scrupulously adhere” in addressing lawyers’ duty to “adhere to the requirements of [ABA Model] Rule 1.6 relating to disclosure of confidential information” (emphases added). It

is unclear how the term “scrupulously adhere” differs from the requirement to “adhere.” ABA Model Rule 5.7 cmt. [10]’s last sentence not only contains the term “special care,” it also requires that lawyers “comply with [ABA Model] Rule 7.1 through 7.3” – “in all respects” (emphases added). It is unclear how compliance “in all respects” differs from “compliance.”

Conflicts

The ABA Model Rules and Comments contain inconsistent descriptions of lawyers’ conflicts.²

ABA Model Rule 1.7(a) contains the phrase “involves a concurrent conflict of interest” (emphasis added). ABA Model Rule 3.7 cmt. [1] and ABA Model Rule 3.7 cmt. [6]’s second sentence similarly contains a form of the phrase “involve a conflict of interest” (emphasis added). And black letter ABA Model Rule 6.5(a)(1) addresses a situation “if the lawyer knows that the representation of the client involves a conflict of interest” (emphasis added).

But ABA Model Rule 1.4 cmt. [5]’s concluding sentence addresses a scenario in which “a lawyer asks a client to consent to a representation affected by a conflict of interest” (emphasis added).

It is unclear whether a situation that “involves” a conflict of interest is different from a representation “affected by” a conflict of interest – and whether one or both of those is different from a situation in which a lawyer might undertake a representation because of a conflict.

² Another ABA Model Rules General Note discusses a different aspect of lawyers’ conflicts – the inconsistent use of “conflict” in the singular or plural and the inconsistent use of “interest” in the singular and plural.

“Consent” or “Waiver”

ABA Model Rule 1.0(e) defines “informed consent” (emphasis added). ABA Model Rule 1.0 cmts. [6] and [7] provide guidance about the phrase “informed consent.” Other ABA Model Rules and Comments use the word “consent” appropriately 160 times. Presumably, the word “consent” is intended to be synonymous with the defined term “informed consent.”

But approximately fourteen ABA Model Rule provisions use a different word: “waiver.” That is not a defined term, and it is unclear whether that word is intended to have a different meaning from the word “consent” or the defined term “informed consent.” In substantive law, “waiver” can occur through inaction, while “consent” normally requires some affirmative conduct (distinguished from the phrase “implied consent,” which presumably could also occur through inaction)

Several ABA Model Rule Comments contain both of those words.

ABA Model Rule 1.7 cmt. [22]’s first sentence contains the word “waive,” and its second sentence contains the word “waivers” and the word “waiver.” ABA Model Rule 1.7 cmt. [22]’s fourth, fifth, sixth, and seventh sentences all contain the word “consent.”

ABA Model Rule 1.10 cmt. [6]’s first and second sentences contain the term “informed consent.” ABA Model Rule 1.10 cmt. [6]’s third sentence contains the word “consent.” ABA Model Rule 1.10 cmt. [6]’s concluding sentence contains the amalgam term “client waivers of conflicts.”

Several ABA Model Rules and Comments contain the presumably synonymous words “secure” or “obtain” when addressing lawyers’ request for consent (or waiver). But ABA Model Rule 1.7 cmt. [25]’s second sentence uses the ineloquent phrase “get the consent” (emphasis added).

“Course of Action” and “Action”

The ABA Model Rules Comments inconsistently use the term “course of action” and the word “action.” The ABA Model Rules and Comments use these differing terms in describing both clients’ actions and lawyers’ actions.

In common use, an “action” denotes one action – in contrast to “course of action,” which denotes more than one action. ABA Model Rule 1.2 cmt. [10]’s first sentence reflects this common sense view. Describing a scenario “[w]hen the client’s course of action has already begun and is continuing.” That scenario presumably involves more than one action.

The distinction between the word “action” and the term “course of action” can be highly significant.

For instance, under ABA Model Rule 1.16(b)(4) “a lawyer may withdraw from representing a client if...the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement” (emphasis added). But just three provisions earlier, ABA Model Rule 1.16(b)(2) states that “a lawyer may withdraw from representing a client if...the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent” (emphases added). In other words, that permissible withdrawal scenario on its face does not allow a lawyer to withdraw if the client takes just one action – even if the lawyer “reasonably believes [it] is criminal or fraudulent.” This is surprising.

ABA Model Rule 1.16 cmt. [7] reflects black letter ABA Model Rule 1.16(b)(2)’s and (b)(4)’s dichotomy. ABA Model Rule 1.16 cmt. [7]’s second sentence contains the term “course of action,” and ABA Model Rule 1.16 cmt. [7]’s fourth sentence contains the word “action.”

One would have thought that ABA Model Rule 1.16(b) would take exactly the opposite approach – allowing lawyers to withdraw if the client engages in just one “criminal or fraudulent” action, but allowing such discretionary withdrawal only if the client engages in a “course of conduct” the lawyer considers “repugnant” or seriously disagrees with (but is not “criminal or fraudulent”).

So it is worth examining the ABA Model Rules and Comments containing the word “action” and the term “course of action” (when referring either to the client’s action or the lawyer’s action).

The following ABA Model Rules and Comments (among others) contain the word “action”:

ABA Model Rule 1.1 cmt. [3]’s second sentence (lawyer)

ABA Model Rule 1.2(a)’s second sentence (lawyer)

ABA Model Rule 1.2 cmt. [1]’s third sentence (lawyer)

ABA Model Rule 1.2 cmt. [3]’s first sentence (lawyer)

ABA Model Rule 1.2 cmt. [6]’s concluding sentence (client or lawyer)

ABA Model Rule 1.6 cmt. [6]’s third sentence (lawyer)

ABA Model Rule 1.6 cmt. [16]’s second sentence (client)

ABA Model Rule 1.7 cmt. [24]’s third sentence (lawyer)

ABA Model Rule 1.13(b)’s first sentence (client)

ABA Model Rule 1.13(c)(1) (client)

ABA Model Rule 1.13(e) (lawyer)

ABA Model Rule 1.13 cmt. [3]’s third sentence (client)

ABA Model Rule 1.13 cmt. [9]’s fourth sentence (client)

ABA Model Rule 1.14(b) (lawyer)

ABA Model Rule 1.14(c)'s second sentence (lawyer)

ABA Model Rule 1.14 cmt. [3]'s third sentence (lawyer)

ABA Model Rule 1.14 cmt. [5]'s first sentence (lawyer)

ABA Model Rule 1.14 cmt. [7]'s concluding sentence (lawyer)

ABA Model Rule 1.14 cmt. [8]'s fourth sentence (lawyer)

ABA Model Rule 1.16(b)(4) (client)

ABA Model Rule 1.16 cmt. [6]'s second sentence (lawyer)

ABA Model Rule 1.16 cmt. [7]'s concluding sentence (client)

ABA Model Rule 1.17(c)(3) (client)

ABA Model Rule 6.3's second sentence (client)

ABA Model Rule 6.3(a) (client)

ABA Model Rule 6.3(b) (client)

The following ABA Model Rules and Comments contain the term "course of action":

ABA Model Rule 1.2 cmt. [9]'s third sentence (client)

ABA Model Rule 1.2 cmt. [10]'s first sentence (client)

ABA Model Rule 1.2 cmt. [12]'s concluding sentence (client or lawyer)

ABA Model Rule 1.7 cmt. [8]'s first sentence and concluding sentence (lawyer)

ABA Model Rule 1.16(b)(2) (client)

ABA Model Rule 1.16 cmt. [7]'s third sentence (client)

ABA Model Rule 2.1 cmt. [4]'s concluding sentence (client)

ABA Model Rule 2.1 cmt. [5]'s second sentence (client)

ABA Model Rule 3.2 cmt. [1]'s concluding sentence (client)

ABA Model Rule 5.2 cmt. [2]'s second sentence and fourth sentence (lawyer)

ABA Model Rules and Comments also contain a less pervasive dichotomy between the word “conduct” and “course of conduct.” ABA Model Rule 1.2 cmt. [9]'s second sentence refers to “a client’s conduct” (emphasis added). ABA Model Rule 1.0(e) refers to “proposed course of conduct” (emphasis added). With the differing terms “action” and “course of action,” presumably the ABA Model Rules and Comments deliberately chose differing terminology. But there is no explanation about those differences.

Diminished Capacity

ABA Model Rule 1.14 addresses clients with “diminished capacity.”

ABA Model Rule 1.14 cmt. [1]'s second and fourth sentences contain the terms “diminished mental capacity” and “diminished capacity” (respectively). But in between those sentences, ABA Model Rule 1.14 cmt. [1]'s third sentence contains the presumably different standard “severely incapacitated” (emphasis added).

The term “diminished capacity” shows up again in: ABA Model Rule 1.14 cmt. [6]'s first sentence; ABA Model Rule 1.14 cmt. [7]'s second and third sentences; ABA Model Rule 1.14 cmt. [8]'s first and second sentences.

ABA Model Rule 1.14 cmt. [9] and [10] address lawyers' assistance to non-clients. ABA Model Rule 1.14 cmt. [9]'s first sentence and ABA Model Rule 1.14 cmt. [10]'s first sentence contain the phrase “seriously diminished capacity” (emphasis added). It is unclear in what way that term differs from the presumably less severe “diminished capacity.”

Matter

Various ABA Model Rule provisions use different words to describe a lawyer's relationship with a "matter" or a "representation."

ABA Model Rule 1.9(a) refers to a lawyer who had represented a client "in a matter" (emphasis added).

ABA Model Rule 1.9 cmt. [2]'s second sentence describes a "lawyer's involvement in a matter" (emphasis added). ABA Model Rule 1.9 cmt. [2]'s third sentence describes "a lawyer [who] has been directly involved in a specific transaction" (emphasis added). ABA Model Rule 1.12(b)'s first sentence describes a "person who is involved as a . . . lawyer for a party in a matter" (emphasis added).

ABA Model Rule 1.11(a)(2) and ABA Model Rule 1.12(a) contain a different phrase: "in connection with a matter" (emphasis added).

ABA Model Rule 3.6(a) describes "[a] lawyer who is participating or has participated in the investigation or litigation of a matter" (emphasis added). ABA Model Rule 6.1(b)(3) describes a lawyer's "participation in activities for improving the law" (emphasis added).

It is unclear whether those phrases are intended to be synonymous. Presumably, these different formulations are intended to describe a different level of relationship with a matter or a representation, but none of these ABA Model Rules or Comments describes any differences.

Lawyers' Representations

The ABA Model Rule 4 series contains presumably deliberately different descriptions of lawyers' actions while representing a client.

ABA Model Rule 4.1(a) applies to lawyers' conduct "[i]n the course of representing a client" (emphasis added). ABA Model Rule 4.2 applies to lawyers' conduct "[i]n representing a client (emphasis added). ABA Model Rule 4.3 applies to lawyers' conduct "[i]n dealing on behalf of a client" (emphasis added). ABA Model Rule 4.4(a) contains the same phrase as ABA Model Rule 4.2: "[i]n representing a client" (emphasis added).

It is unclear whether these different formulations in consecutive ABA Model Rules intend to have different meanings.

Lawyers' Services

ABA Model Rule 1.16 contains several different descriptions of lawyers' services, including clients' use or reliance on such services.

ABA Model Rule 1.16(b)(2) addresses "a course of action involving the lawyer's services" (emphasis added). ABA Model Rule 1.16(b)(3) and ABA Model Rule 1.16 cmt. [7]'s fourth sentence refer simply to "the lawyer's services." ABA Model Rule 1.16(b)(5) addresses client's "obligation to the lawyer regarding the lawyer's services" (emphasis added).

It is unclear to what extent these different words refer to different relationships between the client's action and the lawyer's services. But especially when the same ABA Model Rule contains different formulations, presumably they are intended to have a different meaning.

F. Inconsistent Phrases and Words: Stylistic Issues

ABA Model Rules and Comments contain a number of inconsistent words to describe what presumably are intended to mean the same thing. Although these are not likely to create any confusion, any inconsistency in ethics rules deserves attention.

Conflicts

ABA Model Rule 1.7(a) contains the phrase “involves a concurrent conflict of interest” (emphasis added). Black letter ABA Model Rule 6.5(a)(1) contains the same phrase: “involves a conflict of interest.” But ABA Model Rule 6.5 cmt. [3] contains a different phrase: “presents a conflict of interest” (emphasis added). ABA Model Rule 1.4 cmt. [5]’s concluding sentence contains a third phrase – describing a scenario in which “a lawyer asks a client to consent to a representation affected by a conflict of interest” (emphasis added). It is unclear whether the words “involves,” “presents” and “affected by” are intended to have different meanings, or if any of them is intended to have a different meaning from the simpler word “is.”

Consent or Waiver

ABA Model Rule 1.0(e) defines “informed consent” (emphasis added). ABA Model Rule 1.0 cmts. [6] and [7] provide guidance about the phrase “informed consent.” Other ABA Model Rules and Comments use the word “consent” appropriately 160 times. Presumably, the word “consent” is intended to be synonymous with the defined term “informed consent.”

But approximately 14 ABA Model Rule provisions use a different word: “waiver.” That is not a defined term, and it is unclear whether that word is intended to have a different meaning from the word “consent” or the defined term “informed consent.” In substantive law, “waiver” can occur through inaction, while “consent” normally requires some affirmative conduct (distinguished from the phrase “implied consent,” which presumably could also occur through inaction)

Several ABA Model Rule Comments contains both of those words.

ABA Model Rule 1.7 cmt. [22]’s first sentence contains the word “waive,” and its second sentence contains the word “waivers” and the word “waiver.” ABA Model Rule 1.7 cmt. [22]’s fourth, fifth, sixth, and seventh sentences, all contains the word “consent.”

ABA Model Rule 1.10 cmt. [6]’s first and second sentences contain the term “informed consent.” ABA Model Rule 1.10 cmt. [6]’s third sentence contains the word “consent.” ABA Model Rule 1.10 cmt. [6]’s concluding sentence contains the amalgam term “client waivers of conflicts.”

The ABA Model Rules and Comments clearly use the presumably synonymous words “secure” or “obtain” when addressing lawyers’ request for consent (or waiver). But

ABA Model Rule 1.7 cmt. [25]’s second sentence uses the ineloquent phrase “get the consent” (emphasis added).

Matter

Various ABA Model Rule provisions use different words to describe a lawyer's relationship with a "matter" or a "representation."

ABA Model Rule 1.9(a) refers to a lawyer who had represented a client "in a matter" (emphasis added). ABA Model Rule 1.9 cmt. [2]'s second sentence describes a "lawyer's involvement in a matter" (emphasis added). ABA Model Rule 1.9 cmt. [2]'s third sentence contains the phrase "a lawyer has been directly involved in a specific transaction" (emphasis added).

ABA Model Rule 1.11(a)(2) and ABA Model Rule 1.12(a) contain a different phrase: "in connection with a matter" (emphasis added).

ABA Model Rule 1.12(b)'s first sentence describes a "person who is involved as a . . . lawyer for a party in a matter" (emphasis added).

ABA Model Rule 3.6(a) describes "[a] lawyer who is participating or has participated in the investigation or litigation of a matter" (emphasis added).

ABA Model Rule 6.1(b)(3) describes a lawyer's "participation in activities for improving the law" (emphasis added).

It is unclear whether those phrases are intended to be synonymous. Presumably, these different formulations are intended to describe a different level of relationship with a matter or a representation, but none of these ABA Model Rules or Comments describes any differences.

G. Inconsistent Punctuation

Several ABA Model Rules and Comments contain inconsistent punctuation.

Most of such inconsistencies would rarely if ever cause any confusion. But any inconsistencies in ethics rules may merit attention.

The following are some examples of seemingly inconsistent punctuation.

Hyphens

The ABA Model Rules and Comments inconsistently use hyphens.

ABA Model Rule 1.8 cmt. [13]’s second sentence contains the term “contingent-fee personal injury cases,” with a hyphen. But ABA Model Rule 1.5(c)’s second sentence contains the term “contingent fee agreement,” without a hyphen. Similarly, ABA Model Rule 1.5(c)’s concluding sentence contains the term “contingent fee matter,” without a hyphen.

ABA Model Rule 1.7 cmt. [13]’s first and second sentences contain the term “co-client,” with a hyphen. But ABA Model Rule 1.7 cmt. [23]’s second sentence contains the terms “coplaintiffs” and “codefendants,” as words without hyphens.

ABA Model Rule 1.17 cmt. [13]’s second sentence contains the term “non-lawyer,” with a hyphen. But ABA Model Rule 5.3’s title, Rule and several Comments contain the word “nonlawyer,” without a hyphen. These include ABA Model Rule 5.3 cmt. [4]’s first sentence’s term “nonlawyer service provider” (in which the word “nonlawyer” is used as an adjective).

ABA Model Rule 3.9 cmt. [3]’s second sentence contains the term “income-tax returns,” with a hyphen. But ABA Model 8.4 cmt. [2] first sentence contains the phrase “income tax return,” without a hyphen.

ABA Model Rule 5.7’s title, (a), (b) and several of that Rule’s Comments contain the term “law-related services,” with a hyphen. But ABA Model Rule 6.4’s title contains the term “Law Reform Authorities” and ABA Model Rule cmt. [1]’s second sentence contains the term “law reform program,” without hyphens.

ABA Model Rule 7.3 cmt. [5]’s fourth sentence contains the term “legal-service organizations,” with a hyphen. But ABA Model Rule 6.3’s title,

first sentence and cmt. [1]’s first and concluding sentences contain the term “legal services organization” or its plural, without a hyphen.

ABA Model Rule 7.3 cmt. [5]’s fourth sentence contains the term “legal-service organizations,” with a hyphen. But ABA Model Rule 7.3 cmt. [5]’s third sentence contains the terms “intellectual property lawyers” and “small business proprietors,” without hyphens. And ABA Model Rule 7.3 cmt. [5]’s fourth sentence contains the term “constitutionally protected activities,” without a hyphen.

Oxford Comma

The ABA Model Rules and Comments inconsistently use the so-called Oxford comma.

The ABA Model Rules’ and Comments’ inconsistent use of the Oxford comma is most noticeable when the same Rule or Comment contains different approaches.

ABA Model Rule 7.3(b)(2) contains the Oxford comma. But ABA Model Rule 7.3(c)(2) does not.

ABA Model Rule 5.4(c) contains the Oxford comma, referring to “a person who recommends, employs, or pays” a lawyer. ABA Model Rule 1.8 cmt. [14]’s concluding sentence refers to and purports to quote ABA Model Rule 5.4(c), but does not contain ABA Model Rule 5.4(c)’s Oxford comma – instead referring to a person who “recommends, employs or pays the lawyer.”

In nearly every situation, lawyers are not likely to be confused by the inconsistency.

But in some situations, there might be confusion.

ABA Model Rule 6.1 cmt. [3]’s second sentence contains the following list: “homeless shelters, battered women’s centers and food pantries” (emphasis added). It is unclear whether the “battered women’s” limitation applies only to “centers,” or also applies to “food pantries.” That seems unlikely, but a comma would eliminate any confusion.

ABA Model Rule 6.5 cmt. [1]’s second sentence contains the following list: “legal-advice hotlines, advice-only clinics or pro se counseling programs” (emphasis added). It is unclear whether the “advice-only” limitation applies only to “clinics,” or also applies to “pro se counseling programs.” That seems unlikely, but a comma would eliminate any confusion.

Capitalization

ABA Model Rules and their Comments contain inconsistent capitalization.

The following is an example:

ABA Model Rule 8.4(a) and (e) contain the capitalized term: “Rules of Professional Conduct.” But ABA Model Rule 8.5(b) contains the uncapitalized term: “rules of professional conduct.”

H. Inconsistencies: 2021 ABA Model Rule Book and Online Version

There are several inconsistencies between the ABA Model Rules of Professional Conduct 2021 Edition book and the ABA Model Rules online version.

Inconsistent ABA Model Rule Titles

There are inconsistent titles:

- ABA Model Rule 5.1's title in the 2021 Edition book is "RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS." The online version title is: "Responsibilities of a Partner or Supervisory Lawyer."
- ABA Model Rule 5.6's title in the 2021 Edition book is: "RESTRICTIONS ON RIGHT TO PRACTICE" (emphasis added). The online version title is: "Restrictions on Rights to Practice" (emphasis added).
- ABA Model Rule 7.1's title in the 2021 Edition book is "COMMUNICATIONS CONCERNING A LAWYER'S SERVICES" (emphasis added). The online version title is the same, but the online version table of contents title is "Communication Concerning a Lawyer's Services" (emphasis added).
- ABA Model Rule 7.6's title in the 2021 Edition book is: "POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES." The online version title is: "Political Contributions to Obtain Legal Engagements or Appointments by Judges."

Inconsistent Substance

There is inconsistent substance.

- ABA Model Rule 1.10 cmt [1] in the 2021 Edition book concludes with the following: "See Rule 1.0, Comments [2] - [4]." (emphasis added). The online version concludes with the following: "See Rule 1.10, Comments [2] - [4]" (emphasis added).
- ABA Model Rule 1.10 cmt. [3]'s first sentence in the 2021 Edition book is: "[t]he rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented" (emphasis added). The online version is: "[t]he rule in paragraph (a) does not prohibit representation whether neither questions of client loyalty nor protection of confidential information are presented" (emphasis added).

- ABA Model Rule 1.12 cmt. [1]’s fourth sentence in the 2021 Edition book is followed by the following reference: “[p]aragraphs C(2), D(2) and E(2) of the Application Section of the Model Code of Judicial Conduct.” The online version contains the following: “[c]ompliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct.”

Inconsistent Capitalization

There is inconsistent capitalization.

- ABA Model Rule 1.10(c) in the 2021 Edition book contains the following: “[a] disqualification prescribed by this Rule...” (emphasis added). The online version is: “[a] disqualification prescribed by this rule...” (emphasis added).
- ABA Model Rule 1.11(b)(2) in the 2021 Edition book contains the following: “...to ascertain compliance with the provisions of this Rule” (emphasis added). The online version contains the following: “...to ascertain compliance with the provisions of this rule” (emphasis added).
- ABA Model Rule 1.16(a)(1) in the 2021 Edition book contains the following: “the representation will result in violation of the Rules of Professional Conduct or other law” (emphasis added). The online version contains the following: “the representation will result in violation of the rules of professional conduct or other law” (emphasis added).

Inconsistent Punctuation

There is inconsistent punctuation. This is one example:

- ABA Model Rule 8.4 cmt. [3]’s concluding sentence in the 2021 Edition book contains the following: “substantive law of antidiscrimination and antiharassment statutes and case law” (emphasis added). The online version contains the following: “substantive law of antidiscrimination and anti-harassment statutes and case law” (emphasis added).