Transactional Conflicts of Interest

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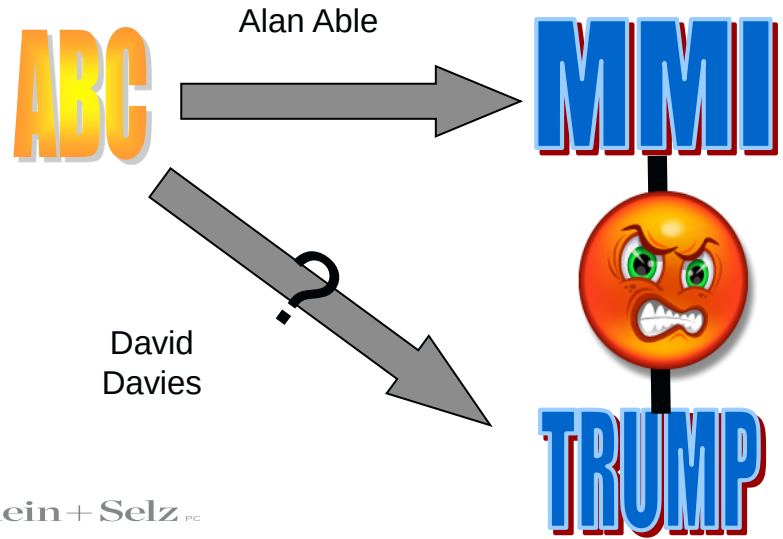
Introduction

Hypothetical No. 1.

ABC's biggest client is Multi-Millions, Inc. ("MMI"), a nationwide real estate conglomerate. Alan Able, the firm's founding partner, has been representing MMI for 20 years. One day, young partner David Davies gets his first big transactional matter, representing the Trump Organization in the purchase of land owned by MMI in order to build a golf course. None of the terms have been agreed upon, and the negotiations between business people have been contentious. MMI has already asked Able to handle the matter. Can Davies represent Trump against MMI?

Current Client Conflicts
Hypothetical No. 1



Analyzing Conflicts

Question 1: Is there a conflict?

Question 2: Is the conflict consentable?

Question 3: Do you have a proper waiver?

Question 1: Is there a conflict?

Rule 1.7

- Lawyer shall not represent a client if a **reasonable lawyer** would conclude that:
  - the representation will involve the lawyer in representing **differing interests**

“Differing Interests”

Rule 1.0 (f)

- Includes every interest of a client that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

Question 2: Is the conflict consentable?

Rule 1.7 (b)

1. Lawyer **reasonably believes** can provide **competent and diligent** representation

2. Not **prohibited by law**

3. Not an **assertion of a claim** by one client against another in same **litigation**

4. **Informed consent**, confirmed in **writing**

Imputation of Conflicts

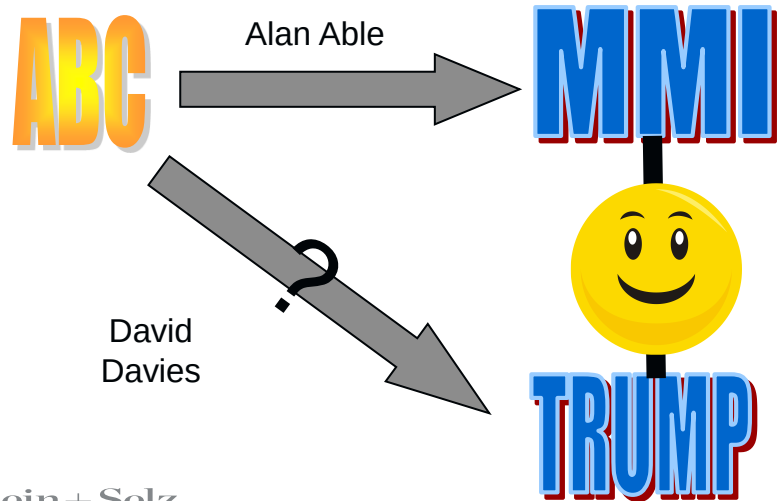
Rule 1.10(a)

- Lawyers associated in a firm shall not knowingly represent a client when anyone of them practicing alone would be prohibited from doing so

Hypothetical No. 2.

Would your answer to (1) change if: (a) Able was handling the matter for MMI, but all material terms but price had been agreed to? (b) Same question, but the clients had agreed to the material terms of the deal?

Current Client Conflicts Hypothetical No. 2



Remember the Three Questions

Question 1: Is there a conflict?

Question 2: Is the conflict consentable?

Question 3: Do you have a proper waiver?

Reasons to have separate counsel

- Litigation contemplated
- Antagonism among the parties
- Material Issues in Dispute
- Lack of Impartiality
- Privilege and Confidentiality Concerns

Rule 1.7, Comments 29-31

Hypothetical No. 3.

Would your answer to (1) change if the ABC lawyers decided to set up two teams of lawyers, one headed by Able to represent MMI and the other headed by Davies representing Trump, with the two teams "screened" from each other? What if the clients agree to the screen?

Ethical Screens
Hypothetical No. 3



Alan Able

ABC

David
Davies

?

MMI

TRUMP

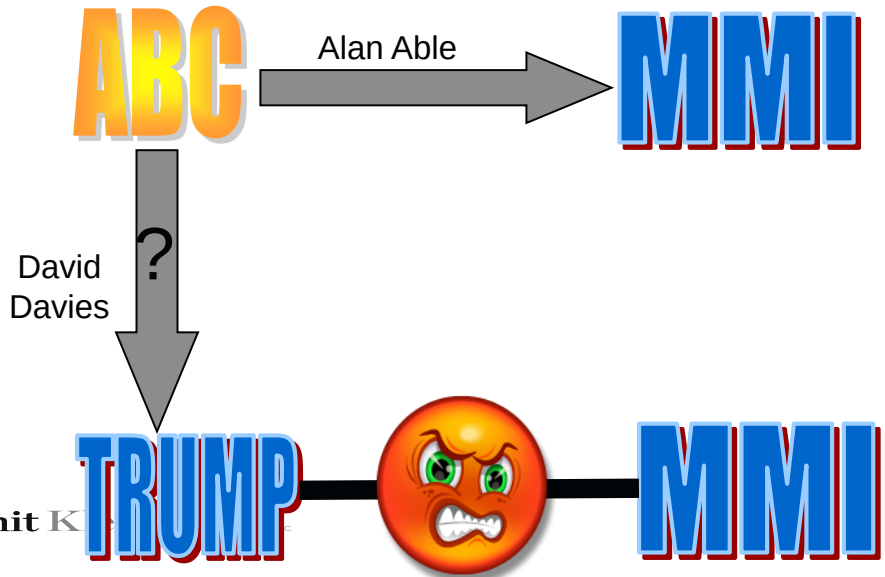
Rule 1.0(t): “Screen”

“the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law.”

Hypothetical No. 4.

Would your answer to (1) change if MMI asked neither Able nor any other ABC attorney to handle the Trump matter, though ABC continued to handle other, unrelated matters for MMI?

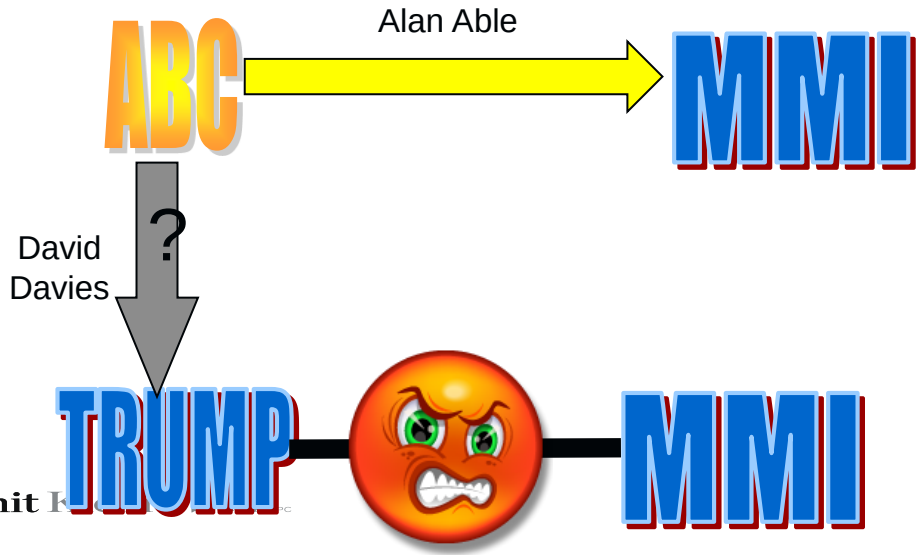
Unrelated Matters
Hypothetical No. 4



Hypothetical No. 5.

Would your answer to (1) change if ABC no longer represented MMI, had not done any work for MMI for a year, had sent MMI a document designated "Final Bill" at the time, but was still listed as the "contact" on executory contracts it had drafted for MMI? Assume further that the Trump deal was unrelated to anything ABC had ever done with MMI. What if MMI had a history of using ABC for two or three matters at a time, then not consulting ABC for a year or so, then coming back?

Former Client?
Hypothetical No. 5



Is there a conflict?

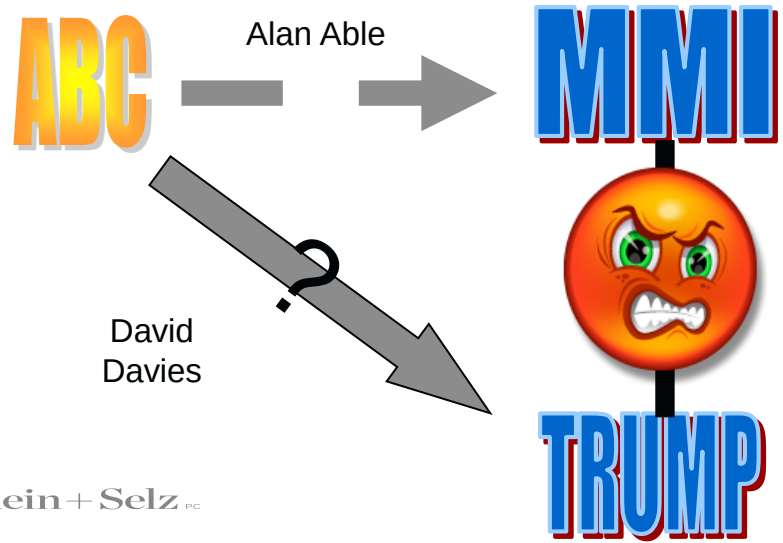
Rule 1.9

- The **same or a substantially related** matter
- In which interests are **materially adverse** to the interests of the former client
- Unless the former client gives **informed consent**, confirmed in **writing**

Is the conflict consentable?

Yes. Always.

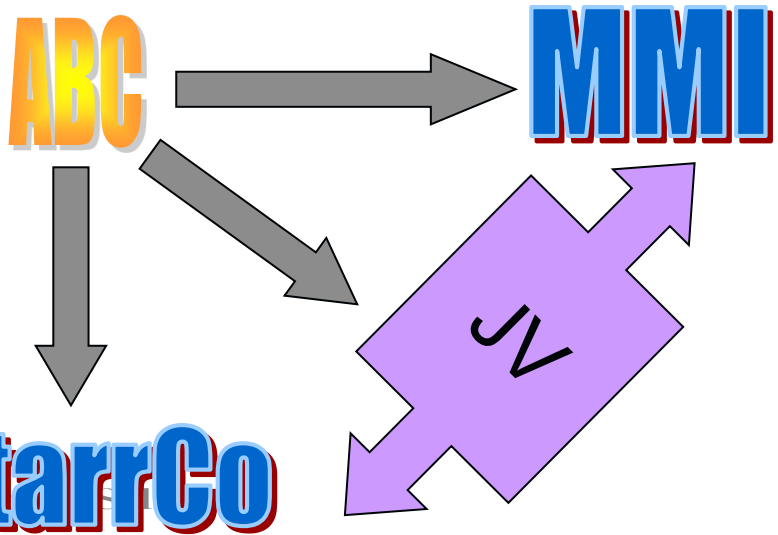
Intermittent Clients Hypothetical No. 5



Hypothetical No. 6.

Several months ago, MMI approached Able about handling a matter in which MMI would put together a joint venture with a small developer, StarrCo. MMI handled the creation of the joint venture, and represents the joint venture on several business deals. Suddenly, the contact person at MMI calls Able and says that the joint venture is not working out, and StarrCo is threatening to sue. May ABC represent MMI in the litigation?

Pre-formation Issues
Hypothetical No. 6



Three Views

View 1: The Entity Theory – Lawyer is deemed to represent entity, not individuals

View 2: Aggregate Theory – Lawyer represents entity and constituents jointly

View 3: *Ex Post Facto* Theory – Lawyer represents constituents until entity formed, and is then deemed to represent entity from the outset.

Entity Theory

Grounded in the Entity Rule (R. 1.13)

Jesse v. Danforth

- Lawyer is retained to organize the entity;
- All of the lawyer's involvement with the individual relates to the formation of the entity;
- The entity is eventually formed

Aggregate Theory

Lawyer represents the constituents and the entity collectively as joint clients during formation

- Lawyer should clarify at the initial meeting who the client is
- Aggregate representation is permitted where lawyer has disclosed potential conflicts
- After formation, clients must determine who lawyer will represent

Define Your Relationship

Decide at the outset who you will represent

Disclose conflicts & potential conflicts

Document clients' informed consent

Define what will happen when conflicts arise

Hypothetical No. 7.

Another up and coming ABC partner, Eric Erickson, has brought in a juicy new client, Suburban, Inc., which wants to make a deal with Transcontinental ("Transcon"), a subsidiary owned 60% by MMI Holding, Inc., the holding company for the MMI conglomerate. Transcon owns its own office building in L.A., far away from MMI's main headquarters, but it uses the MMI e-mail system, health insurance carrier, and travel department. Transcon has its own in-house legal department, but the head of that department reports to the General Counsel of MMI, who is based in N.Y. May ABC handle the transaction on behalf of Suburban?

Corporate Conflicts Hypothetical No. 7

Do you represent your corporate client's affiliates?

Can you be adverse to your corporate client's affiliates?

- New York case law approach
- New York Bar Opinion approach

Corporate Constituents

Confidentiality and Privilege – the *Bevill* Rule

Corporate Investigations

Corporate Miranda Warnings

Hypothetical No. 8.

Same as (6), but with these differences: At the outset of the engagement, ABC had the Presidents of MMI and StarrCo sign the following conflict waiver:

"StarrCo acknowledges that ABC has represented MMI for many years, and that MMI has a long-term attorney-client relationship with MMI. StarrCo further acknowledges that ABC represents MMI in a variety of contexts, including from time to time in the negotiation of the sale or transfer of intellectual rights to potential film properties for which StarrCo is also bidding or competing. StarrCo hereby agrees that it will not seek to disqualify ABC from handling any such representation, either now or in the future, because it represents MMI or any other client in a transactional matter adverse to StarrCo. For the avoidance of doubt, ABC will not represent any party, including without limitation MMI, in litigation with StarrCo as long as ABC continues to represent StarrCo."

Hypothetical No. 8

Advance Waivers

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