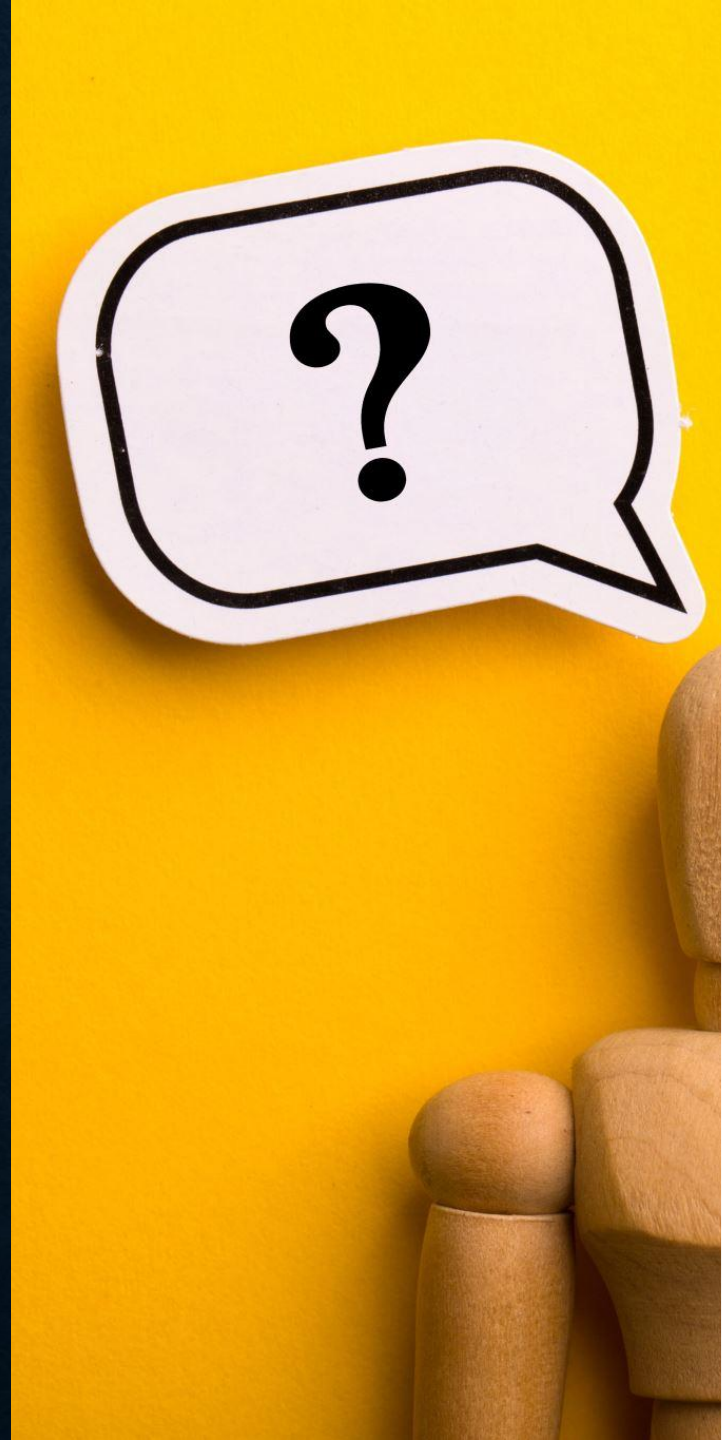
Conflicts of Interest:

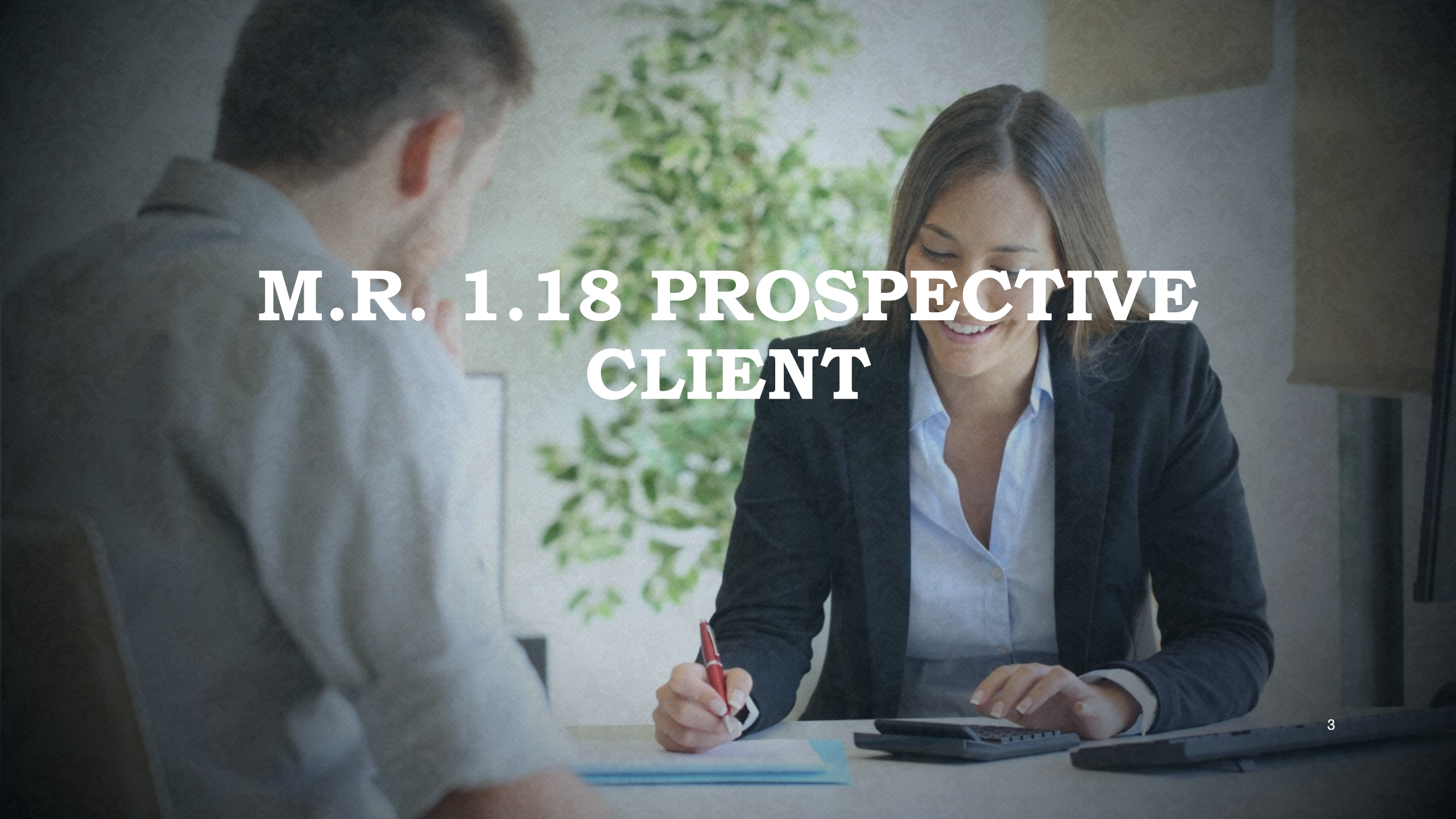
Former, Prospective, Imputed and Government Clients





INTRODUCTION: CONFLICTS OF INTEREST

- Rules appear deceptively simple.
- In difficult situations, seek independent, professional advice from another lawyer.



M.R. 1.18 PROSPECTIVE CLIENT

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(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

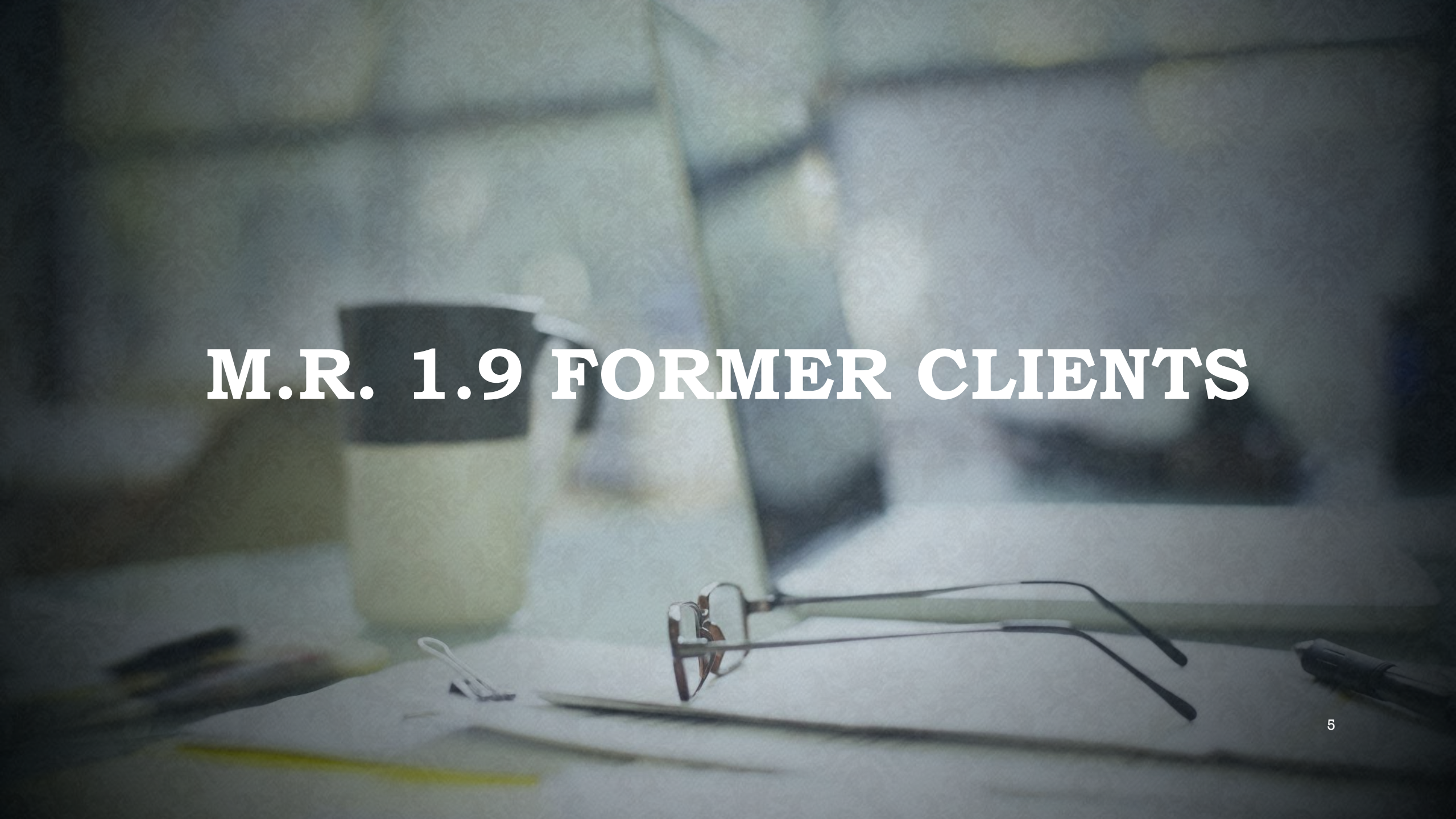
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned



M.R. 1.9 FORMER CLIENTS

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(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent 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

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

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

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

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.



M.R. 1.10 IMPUTED CONFLICTS

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(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RESOLUTION OF IMPUTATION



Consent (maybe)



Ethical Wall

STEP #1: DETECTING CONFLICTS

- Firm-wide database
  - Run a search for ANY entity involved in the matter, even non-parties and neutral parties

- Personal Conflict Identification (of the Lawyer)
  - The name and previous employment of each lawyer
  - A list of material interests (property, business, and financial) owned by that lawyer; and
  - Substantial property, business or financial interest of persons in the lawyer's household

DETECTING CONFLICTS (CONT.)

- Imputation from NON-LAWYER (get this info. upfront):
  - Identify clients, including subsidiaries, parents, agencies, or other affiliates, and control persons of entity clients
  - Describe the subject matter of each representation
  - Identify any third-party payers
  - The names of the law firms, lawyers, and law firm employees responsible for the matter.

STEP #2: IDENTIFYING CONFLICTS

- Check for client "hit" matches and adversity in database.
- Circulate a written conflicts memo throughout the firm;
- Summarize the results
- Review by neutral person too (conflicts of interest

STEP #3: RESPOND TO CONFLICTS

Consentable?

- If yes, is the consent informed?
  - Includes a description of both the material risks and reasonably available alternatives to the conflict in the written document.
  - Client given time to review, and raise concerns.

Do you need an ethical wall/screen?

- Is the firm large enough to be an effective screen?
- Implement written screening policy, including sanctions?
- Establish screen before lawyer joins the firm?
- Acknowledge in writing the screen and ethical wall
- Notify all firm personnel about the screen.
- The internal technology department ("IT") and other departments "wall" off the matter.
- Track the screen/wall internally and notify affected clients and former clients of the screen
- **Designated team or point person to do conflicts and screens, preferred and highly recommended!**

LAWYER KNOWLEDGE

Know both the conflicts rules and the requirements of screening if they are to have any hope of convincing a client to consent to a screen or a court to accept an involuntary substitute

The failure to discover a conflict is no defense to current or former client remedies, such as discipline, disqualification, or fee forfeiture

M.R. 1.11 GOVERNMENT CLIENT CONFLICTS

WHO IS THE CLIENT IF REPRESENT GOVERNMENTAL ENTITY?

- Client: agency official (authority to direct the government policy as the agent), the agency itself, a branch of government, the government itself, or the people served by the government (e.g., county attorney represents the county, not individual commissioners)

- Competence: diligent in recognizing special regulations that govern their conduct (e.g., accepting gifts, outside compensation, and other financial interests)

- Control and Communication: pursue up the ladder (R. 1.13, Corporate Miranda Warnings).

- Confidentiality: must not disclose governmental information about individuals because the gov't client itself has an obligation to keep such information secret

M.R. 1.11 GOVERNMENT CLIENT CONFLICTS

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

M.R. 1.11 GOVERNMENT CLIENT CONFLICTS (CONT.)

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

GOVERNMENTAL CONFLICTS

- **Conflicts of Interest Resolution**: lawyers that leave gov't service are subject to narrower former-client disqualification based on whether the lawyer "participated personally and substantially" in a "matter" rather than the broader substantially related matter protection for former private clients in M.R. 1.9(a).

- Prosecutors: duty to seek justice and not a professional obligation to "win".
  - M.R. 3.8 – duty to fairly execute the criminal law in disciplinary rules that require affirmative disclosures from prosecutors and prohibit actions that might damage a defendant's rights.
  - Risk of prosecutors overidentifying the police officers – need to remain independent.

FLOW CHART
(PROF. REFERENCE PG. 289)

FORMER CLIENT AND FORMER GOVERNMENT CONFLICTS


QUESTIONS