

Ethics Panel

California Minority Counsel Program-Kaiser Permanente 8th Annual CLE Marathon
Wednesday, January 16, 2019 (10:15 a.m. to 11:15 a.m.)

Panel Introduction

- Belinda Luu
 - Senior Counsel, Corporate & Commercial Law, Kaiser Foundation Health Plan, Inc.

Ethics Issues Related to Transactions

- Mayda Prego
 - Senior Counsel, Negotiations and Legal, Chevron Upstream

Issues Under the New Ethics Rules for In-House and Outside Counsel

- Melissa C. O'Sullivan
 - Senior Counsel, Litigation, Kaiser Foundation Health Plan, Inc.
- Raffi V. Zerounian
 - Partner, Hanson Bridgett LLP



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Ethics Issues Related to Transactions

California Minority Counsel Program

16 January 2019

Presented by

Mayda Prego



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Topics

- ▶ WHO IS THE CLIENT?
- ▶ DUAL ROLE OF ATTORNEY
- ▶ ETHICS IN NEGOTIATIONS
- ▶ DISCLOSURES OF MATERIAL INFORMATION AND CONFIDENTIALITY

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Who is the Client?

- ▶ Identify who is the client
 - ▶ Parent company
 - ▶ Subsidiary
 - ▶ Management
 - ▶ Directors
 - ▶ Shareholders
 - ▶ Employees

- ▶ Avoid potential conflicts of interest
 - ▶ Joint representation may be fine if the interest of the parties to be jointly represented are aligned. Parties may waive a conflict.
 - ▶ Joint representation may provide efficiency and may streamline the process to complete the transaction
 - ▶ If the interests of the parties are adverse, then separate representation is necessary

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Dual Lawyer Role

- ▶ In-House Transactional Lawyers May Have Dual Roles
 - ▶ Lawyer as legal counsel
 - ▶ Lawyer as business advisor

- ▶ Importance of preserving attorney-client privilege in transactions
 - ▶ Business advice is not covered by the attorney-client privilege
 - ▶ Client communication for the purpose of obtaining legal advice is privileged

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ETHICS IN NEGOTIATIONS

- ▶ Negotiation and advocacy in transactions
 - ▶ Honesty and candor
 - ▶ Truthfulness

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ETHICS IN NEGOTIATIONS

- ▶ When we think about lawyers and ethics often times, litigators appearing in court come to mind
- ▶ Transactional lawyers must engage honestly with others during negotiations
- ▶ Stated differently, while negotiating, a transactional lawyer must negotiate truthfully
- ▶ How can a lawyer negotiating a deal on behalf of a client achieve the best results without running afoul of ethics considerations?

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ETHICS IN NEGOTIATIONS

Rule 4.1(a) of the California Rules of Professional Ethics states that

“In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person;”

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ETHICS IN NEGOTIATIONS

Comments to Rule 4.1 provide in relevant part that

- ▶ “A lawyer is required to be truthful when dealing with others on a client’s behalf, but generally has no affirmative duty to inform an opposing party of relevant facts.”
- ▶ “A nondisclosure can be the equivalent of a false statement of material fact or law under paragraph (a) where a lawyer makes a partially true but misleading material statement or material omission.”

Importantly, the comments further states:

- ▶ “This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. For example, in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”

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ETHICS IN NEGOTIATIONS

- ▶ The comments to the rule describe what a deal lawyer can say during a negotiation without violating the requirement of truthfulness.
- ▶ Specifically, negotiating lawyers may make statements about
 - ▶ Estimates of price and value
 - ▶ Intentions of Settlement
 - ▶ Existence of undisclosed principal (absent fraud)
- ▶ As these types of statements are not considered factual statements, these kinds of statements may be generally allowed during negotiations.

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ETHICS IN NEGOTIATIONS

- ▶ What is puffery and is it permitted?
 - ▶ While Rule 4.1(a) makes clear that truthfulness is a requirement in deal negotiations, puffery is allowed.
 - ▶ Formal Opinion No. 2015-194 of the Standing Committee on Professional Responsibility and Conduct provides that
 - ▶ “dishonesty, deceit or collusion . . . false statements of fact or implicit misrepresentations of material fact during negotiations” are not allowed
 - ▶ But “puffery and posturing, such as statements about a party’s negotiating goals or willingness to compromise, are generally permissible because they are not considered statements of fact.”
 - ▶ Transactional lawyers can be zealous advocates but within limits

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ETHICS IN NEGOTIATIONS

- ▶ The California Standing Committee on Professional Responsibility and Conduct looked to the American Bar Association’s Formal Opinion 06-439 to explain puffery.
- ▶ In its formal opinion, the ABA stated that:
 - ▶ “Statements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation “puffing,” ordinarily are not considered “false statements of material fact” within the meaning of the Model Rules.”
 - ▶ “Of the same nature are overstatements or understatement of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation.”
 - ▶ “Puffing” or posturing are “statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely.”

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ETHICS IN NEGOTIATIONS

- ▶ In understanding how far a lawyer can go in taking positions in a negotiation without that would characterized as deceitful, the Restatement (3d) of the Law of Governing Lawyers (2000), Section 98 provides in relevant part that
 - ▶ “Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law. Whether a statement should be so characterized depends on whether the person to whom the statement is addressed would reasonably regard the statement as one of fact or based on the speaker’s knowledge of facts reasonably implied by the statement, or instead regard it as merely an expression of the speaker’s state of mind.”
 - ▶ “A lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer’s client, ... the lawyer is not privileged to make misrepresentations”

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DISCLOSURES OF MATERIAL INFORMATION AND CONFIDENTIALITY

- ▶ In transactions (such as share sales or asset sales), disclosure of material information is critical for a number of reasons beyond ethics.
- ▶ Disclosures limit potential liabilities arising from Warranties and Representations given to induce the other party to enter into the deal.
- ▶ Failure to disclose negative material information could be a violation of Rule 4.1(a) as a nondisclosure of material information could constitute a false statement.




Kaiser Permanente / California Minority Counsel Program 8th Annual CLE Marathon

Issues Under the New Ethics Rules for In-House and Outside Counsel



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**Use your smartphone, tablet or computer's
browser and go to the Live Poll/Survey at:**

www.pollev.com/cmcppoll

WiFi: "Kaiserguest"

The survey will begin shortly.
Answers to this poll are anonymous.

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California's new professional responsibility rules

- The new rules approved by the California Supreme Court have an effective date of November 1, 2018
- The first comprehensive revision to the California Rules of Professional Conduct since 1992
- There are more rules:
 - 69 rules replaced the 48 rules that previously governed attorney conduct in California
- New number system for rules that is in line with the ABA Model Rules

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Some of California's new professional responsibility rules

- Duty of diligence becomes an independent rule (Rule 1.3)
- Communication of settlement offers (Rule 1.4.1)
- Unconscionability standard for fees (Rule 1.5)
- Fee division/referral fee arrangements among lawyers (Rule 1.5.1)
- Conflicts of interest: current clients (Rule 1.7)
- Business Transactions with a Client and Pecuniary Interests Adverse to the Client (Rule 1.8.1)
- Use of Current Client's Information (1.8.2)
- Sexual relations with clients (1.8.10)
- Duties To Former Clients (Rule 1.9)
- Imputation of Conflicts of Interest: General Rule (Rule 1.9)
- Ethical screening (Rule 1.10)
- Special Conflicts of Interest for Former and Current Government Officials and Employees (Rule 1.11)
- Advanced fee deposits (Rule 1.15)
- Duties to Prospective Client (Rule 1.18)
- Delay of Litigation (Rule 3.2)
- Communication with Represented Person (Rule 4.2)
- Communication with an Unrepresented Person (Rule 4.3)
- Prohibitions against discrimination, harassment, and retaliation (Rule 8.4.1)

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California's new professional responsibility rules

- Rules cite “firm” or “law firm” but apply more broadly to in-house counsel too (see Rule 1.0.1).
 - (c) “Firm” or “law firm” means a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization.

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Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- Lawyers cannot discriminate, harass or retaliate against a client, employee, intern, volunteer, applicant or contractor based on a “protected characteristic”
 - The rule prohibits: (1) discrimination regarding **representation of clients**, (2) discrimination regarding **law firm operations**, and (3) discrimination in the **termination or refusal to represent clients**.
- “Protected characteristic” includes race, religion, color, national origin, ancestry, disability, medical condition, marital status, sex, gender, gender identity or expression, sexual orientation, age, military or veteran status, or other category.
 - Whether the category is **actual or perceived**.

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Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- (b) In relation to a law firm's operations, a lawyer shall not:
 - (1) on the basis of any protected characteristic,
 - (i) unlawfully discriminate or knowingly* permit unlawful discrimination;
 - (ii) unlawfully harass or knowingly* permit the unlawful harassment of an employee, an applicant, an unpaid intern or volunteer, or a person* providing services pursuant to a contract; or
 - (iii) unlawfully refuse to hire or employ a person*, or refuse to select a person* for a training program leading to employment, or bar or discharge a person* from employment or from a training program leading to employment, or discriminate against a person* in compensation or in terms, conditions, or privileges of employment; or
 - (2) unlawfully retaliate against persons.*

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Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- (2) “knowingly permit” means to fail to advocate corrective action where the lawyer knows* of a discriminatory policy or practice that results in the unlawful discrimination or harassment prohibited by paragraph (b);
- (3) “unlawfully” and “unlawful” shall be determined by reference to applicable state and federal statutes and decisions making unlawful discrimination or harassment in employment and in offering goods and services to the public; and

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Issues Under the New Ethics Rules for In-House and Outside Counsel

Use your smartphone, tablet or computer's
browser and go to the Live Poll/Survey at:

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WiFi: "Kaiserguest"

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Hypothetical #1

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- Partner A, who is on the firm's management committee, is in her office and has overheard Partner B, the firm's managing partner, state on several occasions that Partner B does not like to hire employees who are believed to have a certain religion.
 - **Has Partner B potentially violated any ethical rules because of these statements?**
 - (A) No, because there is no evidence that Partner B actually based his decision not to hire someone on their religion.
 - (B) No, because Partner B is not the only partner responsible for hiring decisions.
 - (C) No, because Partner A and Partner B work for a firm which represents only clients of that certain religion.
 - (D) Yes, Partner B's statements violate Rule 8.4.1 (at least!).
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Hypothetical #2

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- Partner A, who is on the firm's management committee, is in her office and has overheard Partner B, the firm's managing partner, state on several occasions that Partner B does not like to hire employees who are believed to have a certain religion. Partner A does not disclose what she has overheard to anyone.
- *Has Partner A potentially violated any ethical rules?*
 - (A) No, because Partner A has done nothing wrong.
 - (B) No, because Partner A would not have heard Partner B's statements if she had kept her office door shut and had not been eavesdropping on a senior partner.
 - (C) No, because Partner B is only in charge of hiring unpaid interns or volunteers.
 - (D) Yes. Partner A is knowingly permitting unlawful discrimination in violation of Rule 8.4.1.

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Hypothetical #2

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation (Comments)

[1] In relation to a law firm's operations, this rule imposes on all law firm* lawyers the responsibility to advocate corrective action to address known* harassing or discriminatory conduct by the firm* or any of its other lawyers or nonlawyer personnel.

[5] What constitutes a failure to advocate corrective action under paragraph (c)(2) will depend on the nature and seriousness of the discriminatory policy or practice, the extent to which the lawyer knows* of unlawful discrimination or harassment resulting from that policy or practice, and the nature of the lawyer's relationship to the lawyer or law firm* implementing that policy or practice. For example, a law firm* non-management and non-supervisory lawyer who becomes aware that the law firm* is engaging in a discriminatory hiring practice may advocate corrective action by bringing that discriminatory practice to the attention of a law firm* management lawyer who would have responsibility under rule 5.1 or 5.3 to take reasonable* remedial action upon becoming aware of a violation of this rule.

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Hypothetical #3

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- Partner A, who is not on the firm's management committee, is in her office and has overheard Partner B state on several occasions that Partner B does not like to hire employees who are believed to have a certain religion. Partner A does not disclose what she has overheard to anyone.
- **Has Partner A potentially violated any ethical rules?**
 - (A) No, because Partner A is not part of the firm's management.
 - (B) No, because Partner A should mind her own business.
 - (C) No, because members of the management committee likely heard Partner B make such comments, and it doesn't look like they have taken any corrective action.
 - (D) Yes. Non-management lawyers must advocate for corrective action by bringing discriminatory practices to the attention of law firm management.

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Hypothetical #4

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- A State Bar Investigation is commenced into whether Partner B discriminates against employees who are believed to have a certain religion. The law firm gets sued because of Partner B's discriminatory conduct. Partner B decides to wait to report the filing of this lawsuit to the State Bar in the hopes that the firm can reach a quick settlement with the plaintiff.
- **Has Partner B potentially violated any ethical rules?**
 - (A) No, because the law firm has not yet been served with the complaint.
 - (B) No, because the State Bar has no reason to be involved in the civil lawsuit.
 - (C) No, because the State Bar investigation is focused only on whether Partner B discriminates against employees for religious reasons, while the civil lawsuit focuses generally on Partner B's discriminatory conduct.
 - (D) Yes. Rule 8.4.1(d) requires prompt notification of the State Bar under these circumstances.

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Hypothetical #5

Rule 8.4.1 Prohibited Discrimination, Harassment & Retaliation

- Partner A joins a corporate law department as Corporate Counsel (non-management). At her welcome lunch, a co-worker whispers in her ear: “Hey, this is just between us, but you are really lucky you were hired. I heard the HR director and GC’s executive assistant discussing that they would not be hiring any more women for the Legal Department.” (HR Director and Exec. Asst. are not lawyers.) Corporate Counsel does not disclose what she heard to anyone.
- *Has Corporate Counsel potentially violated any ethical rules?*
 - (A) No, because she is not a member of management.
 - (B) Yes. Rule 8.4.1 requires that even non-managerial attorneys advocate for corrective action of discriminatory practices by reporting them to management.
 - (C) No, because neither the HR Director nor the Executive Assistant are lawyers.
 - (D) No, because Rule 8.4.1 only applies to law firms.

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New Rules on Conflicts of Interest

- Conflicts of Interest—Current Clients (Rule 1.7)
- Duties to Former Clients (Rule 1.9)
- Imputation of Conflicts of Interest (Rule 1.10)

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New Rules on Conflicts of Interest

- Conflicts of Interest—Current Clients (Rule 1.7)

(a) A lawyer shall not, without informed written consent from each client...represent a client if the representation is **directly adverse** to another client in the **same or a separate matter**.

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New Rules on Conflicts of Interest

- Conflicts of Interest—Current Clients (Rule 1.7)

(b) A lawyer shall not, without informed written consent from each client...represent a client if there is a significant risk the lawyer's representation of the client will be **materially limited** by the lawyer's responsibilities to or relationships with **another client, a former client or third person**, or by the lawyer's own interests.

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New Rules on Conflicts of Interest

- Conflicts of Interest—Current Clients (Rule 1.7)

(c) Even if no “significant risk” under paragraph (b), a lawyer shall not represent a client without written disclosure to the client of any relationship where:

(1) Another lawyer in the lawyer’s firm has a legal, business, financial, professional or personal relationship with or responsibility to a party or witness in the matter; or

(2) Another party’s lawyer has a personal relationship with the lawyer

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New Rules on Conflicts of Interest

- Conflicts of Interest—Current Clients (Rule 1.7)

- Rule 1.7 **may** require waivers in situations where firms may have in the past sent disclosures
- Rule 1.7 **does not** preclude informed written consent to future conflicts
- Rule 1.7 does not require informed written consent to represent competitors in unrelated matters
- Other rules – particularly regarding client confidentiality – may prevent firms from making disclosures that are adequate to obtain informed written consent
- If a firm obtains informed written consent, a change in circumstances may require the firm to make new disclosures and obtain new informed written consent

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New Rules on Conflicts of Interest

- Duties to Former Clients (Rule 1.9)

(a) A lawyer cannot represent another party in the same or a substantially related matter adverse to the former client without informed written consent

(b) A lawyer who has left a law firm may not represent a party adverse to the former firm's client if the lawyer has actual knowledge of protected confidential information, unless the former client gives informed written consent

(c) A lawyer who formerly represented a client, or whose present or former law firm has represented a client, may not:

- (1) Use protected confidential information except in limited circumstances
- (2) Reveal protected confidential information

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New Rules on Conflicts of Interest

- Imputation of Conflicts of Interest (Rule 1.10)

(a) Lawyers practicing together in a law firm may not undertake a representation when one of them practicing alone would be prohibited from doing so by Rule 1.7 or Rule 1.9 unless:

- (1) the prohibition is based on a personal interest and does not pose a significant risk of materially limiting the representation of the client or
- (2) The prohibition arises out of the prohibited lawyer's association with a prior firm and:
 - (i) the prohibited lawyer did not substantially participate in the same or substantially-related matter;
 - (ii) the prohibited lawyer is timely screened from the matter and fees from the matter; and
 - (iii) written notice is promptly given to any affected former client

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New Rules on Conflicts of Interest

- Imputation of Conflicts of Interest (Rule 1.10)

(b) When a lawyer has terminated an association with a law firm, the firm is not prohibited from representing a client adverse to the client represented by the terminated lawyer unless

(1) the matter is the same or substantially related to the matter handled by the terminated lawyer and

(2) one or more lawyers remaining at the firm has protected confidential information that is material to the matter

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Hypothetical # 6: Conflicts of Interest

- MegaFirm is defending a class action lawsuit on behalf of Company A. It needs to serve a subpoena on Company X, an unrelated third party company that is represented by another attorney in one of MegaFirm's out-of-state offices. An attorney from MegaFirm prepares and serves the subpoena on Company X.

- *Does the service of a subpoena in these circumstances potentially violate any ethical rules?*

- (A) No, as long as MegaFirm calls both Company A and Company X and gets their consent.
- (B) No, as long as both Company A and Company X provide informed written consent.
- (C) Yes, unless the out-of-state attorney is not a partner and therefore exercises no control over MegaFirm's operations.
- (D) Yes, Company A and Company X are adverse.

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Hypothetical # 7: Conflicts of Interest

- MegaFirm is defending a class action lawsuit on behalf of Company A. It needs to serve a subpoena on Company X, an unrelated third party company that is represented by another attorney in one of MegaFirm's out-of-state offices. MegaFirm associates with SmallFirm to serve the subpoena on Company X.
- *Does the service of a subpoena by associated counsel potentially violate any ethical rules?*
 - (A) No, because SmallFirm does not represent Company X.
 - (B) No, because conducting third-party discovery of a client is not adverse.
 - (C) Yes, because there is no way SmallFirm is truly independent from MegaFirm.
 - (D) No, because SmallFirm was hired after the class action lawsuit was already underway.

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Hypothetical # 8: Conflicts of Interest

- MegaFirm is defending a class action lawsuit on behalf of Company A. In the course of litigation, it determines that Company A has a cross-complaint against Company X, an unrelated third party company that is represented by another attorney in one of MegaFirm's out-of-state offices. MegaFirm associates in SmallFirm to handle the part of the case relating to the cross-complaint against Company X.
- *Does the association of another law firm to handle the cross-complaint against Company X avoid the potential conflict?*
 - (A) No, because SmallFirm will never be completely independent from MegaFirm.
 - (B) Yes, because the cross-complaint was filed after the original lawsuit was underway.
 - (C) No, unless both Company X and Company A provide informed written consent.
 - (D) Yes, as long as SmallFirm handles all issues relating to Company X.

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Hypothetical # 9: Conflicts of Interest

- MegaFirm is defending Company A in a lawsuit brought by Company B. Attorney A is an ESI attorney who worked for a document review vendor that was handling document review for Company B overseen by the law firm representing Company B. Before making a lateral move to MegaFirm, MegaFirm creates an ethical screen and completely walls off Attorney A from the attorneys working on the lawsuit on behalf of Company A (and all other screen procedures are followed to the letter).
- *Does the ethical screen in these circumstances avoid the potential conflict?*
 - (A) No, Attorney A's knowledge is imputed to the firm.
 - (B) Yes, as long as Attorney A is not sleeping with anyone at Company A.
 - (C) No, unless both Company A and Company B provide informed written consent.
 - (D) Yes, as long as Attorney A did not see any confidential information for Company B.