This is a very well-done answer.

Part II - Essay

① The lawsuit against Humungous Col., Inc. (HS)

When Sam files a lawsuit against HS, this might present a conflict of interest for Williamson + Jones law firm (W+J) & Pennfore, Sam.

A. Under the ABA Model Rules (MR)

Under MR 1.10, a law firm is considered as a single entity. It is presumed, that all lawyers including Sam working in the firm share their knowledge with the firm, that means that any confidences obtained by a lawyer are imputed to the firm. Therefore a law firm may not take a client if it would be prohibited for a member of the firm to take the client under the rules for conflict of interest (MR 1.7, 1.9).

Unless (1) personal to "tainted lawyer;" (2) Effective screening (Cal. different)

I. Conflict of Interest

(maybe Michael, too)

In the present case, HS was Helen's former client in her former law firm. There might be a conflict of interst under MR 1.9 (former clients) for Helen and if so, under 1.10 presumptively ~~necessarily~~ also for W+J (& Sam), rebuttable by (&) MR 2 effective screening (MR.) (& in Cal in State Cts)

The current representation of Deming Do (D) would present a conflict of interest to the former representation of HS, if the matters are the same or substantially related and the interests of the two clients are materially adverse. Not the same here, so must To determine whether the matters are subst. related, there exist a variety of tests. The common basis of all tests is that it constitutes a substantial relationship if the situation is factually or legally ~~the same~~ similar (which is why? unlikely in the present case), or there is a substantial likelihood that informa-

tion as it is normally obtained in such representation (of the former client) will be used by the lawyer to advance the current client's position. As Helen has often represented HS in various corporate matters, it is substantially likely that she obtained confidential client information that could now be useful to advance J's position in the lawsuit against HS.

What if she (& Michael) did ~~no~~ IP work for them? Playbook thing?

As to the second requirement, the interests of former and current client are materially adverse if the representation of both would present a conflict to the lawyer between keeping the former client's confidentialities and providing effective representation, including investigation of all available facts to the ~~ten~~ new client ("Hobson's choice").

Here, it is likely that Helen during her representation of HS (Michael's?) obtained knowledge about facts that would help J in his patent infringement claim against HS. See my earlier comment Therefore the interests of the clients are materially adverse and a ~~to~~ conflict of interest exists.

A conflict between a former and a current client is always conventable, so W+J could proceed in representing J if the former client - HS - would give informed, written consent. Here HS already filed a motion to disqualify, so there is no consent. As a result, W+J (Sam) would be presumptively disqualified in this case.

II. Screening

However, the presumption of shared confidences within the lawfirm - here between Helen and Michael on the one side and W+J on the other side - can be rebutted, under MR's. & Cal state ct. law. if the "infected" lawyers are timely and effectively screened from any involvement regarding the ~~ne~~ current client.

That means either before taking J as a client or before or immediately after hiring Helen and Michael (under the presumption of MR 1.10, Helen's knowledge was also spread to Michael and he probably worked for them, too in their old firm), W+J would have to erect a "Chinese wall", No longer politically correct - Play it safe, use "screen" preventing Helen and Michael from sharing any information about HS (through documents, communication, etc.) with other W+J-lawyers.

For such screening to be effective, the size of law firm must be taken into consideration. Good. a small firm it might be difficult to effectiv Excellent screen "infected" lawyers. Also, the facts do Good. establish that such screen was erected at let alone timely to prevent the imputation of ledge. HS's consent to the screening would n been needed, but notice including procedures, etc. must be given [some requi

In the present case it is likely that HS's to disqualify will be successful. re: firm & Sam

~~III. "Hot potato doctrine"~~

~~Another solution to "get rid" of the conflict was~~

~~withdraw~~

B. Under California Law

The presumption of the imputation of knowledge upon the whole lawfirm as well as the conflict of interest between the representation of J and HS would not differ under the California Rules. Also, the conflict could be resolved if HS gave informed, written consent, which did not happen. In addition, J had to be informed of the conflict.

Rules are silent, but feds say inevitable

As to the screening, Cal. courts are split about whether such screening can ever be effective. State courts have held screening to be effective in some good cases (Kirk), whereas federal courts hold that screening can good never be effective (Beltran; very narrow exception). for govt lawyers transitioning to priv. firms

(2) Helen's Blog

Helen's blog may contain some advertising for her practice as a lawyer when she uses her past successes to illustrate her points. Although the blog is aimed at other counsels, this does not mean that it is not publicly available or that these counsels might not be in the situation of seeking legal advice themselves. (See, Hunter v. Va. Bar) Attorney advertising is not generally prohibited (Constitutionally protected commercial speech - intermed. scrutiny on restrictions) (Bates) but must comply with certain restrictions stated in the MR and the Cal. Rules. (if not unconstitutionally restrictive: See, e.g., Shapero) Under both, the ad may not contain false or misleading statements. (No constitutional protection for such)

When Helen talks about her past successes, this might lead people to think she would be able to obtain grod the same result for their lawsuit. Absent a dis-

claimer, stating that the results depend on the particular facts and such past successes do not guarantee a similar result to every lawsuit, Helen's statement is misleading. Under the MR as well as under Cal. law she has to include a disclaimer.

The Cal. rules are much more detailed as the MR concerning ~~potentially~~ presumably misleading statements. Helen also has to state the name of a person who is responsible for the ad. Her link to her email account might be sufficient for this. What abt. Cal Standards re: "advertisement" in 12-point type?

(3) Harry's request

When Harry contacts Helen, he ~~offers~~ requests a fee for referring a case to her. This might be a violation of MR 1.5 (e). Generally, referral fees are prohibited

under the MR. However, fees may be divided among lawyers of different firms, but only if the division is made in proportion to their work on the case or both lawyers assume joint responsibility, and if the client agrees in writing to the fee as well as to the shares of each lawyer, and if the total fee is reasonable (MR 1.5 (e)). In the present case Harry would not take part in the representation nor assume joint responsibility, but rather have a passive role. Compensating him for that is not allowed under the MR, although here the fee would be reasonable.

good

Under the California rules, however, there is no requirement of proportionality or joint responsibility.

A fee for Harry would be okay if it is not unconscionable (here: not unreasonable, therefore also not unconscionable) and if the fee is not increased only because of the referral (Helen may not charge Eloise more only because of the referral fee). Still, the client would have to agree to the fee dissim in writing.

good

(4) Violation of client confidentiality by Harry

In contacting Helen, Harry might have violated his duty to not reveal confidential information under MR 1.6 as well as under the Cal. rules.

Eloise sought advice from Harry, therefore there presumably exists an attorney- or prospective client -client relationship between Eloise and Harry. Harry obtained information from that relationship about Scheherazade (S).

Under MR 1.6 and Cal. rules, Harry may not reveal any information, unless the client consents or an exception applies.

good

Exception Implied? (1.6)(b)(4)

Exceptions to MR 1.6 concern client conduct resulting in physical injury or substantial harm to property, none of which is the case here. Also, the exception for a lawyer seeking advice about compliance with the Rules of Prof. Conduct does not apply.

good.

In general, lawyers may approach other lawyers to seek help in a field they are not specialized in. But here it would not have been necessary for Harry to reveal J's name for that purpose.

Harry might also argue that a name of a client is a fact and therefore not protected as information.

But here, he revealed J's name ~~together~~ in connection with the alleged misconduct. This "package" constitutes confidential information.

Under Cal. law, the exceptions that allow such disclosure are even more restrictive, so that Harry was prohibited from revealing the information.

However, it seems as Elise (Harry's client) impliedly consented to the disclosure, because she thereafter emails Helen. With the client's (implied) consent, the disclosure is no violation of MR or Cal. rules.

good

(5) Attorney-client relationship Elise - Helen?

Under <u>Kurtenbach v. Tekippe</u>, to establish an attorney-client relationship a client must have sought legal advice from an attorney within the attorney's

(5) lawyer implicitly or directly agreed to give requested advice

scope of expertise. Generally, this is determined by the expectations of the client.

In the present case, even if Eloise (E) only wanted some "quick general thoughts," and did not want to hire Helen, she was seeking legal advice. The matter also was within Helen's scope of expertise and specialization. E was maybe not expecting to establish a paid employment of Helen as a lawyer, but one could assume that she was expecting to have a relationship of confidence to Helen. Therefore an attorney-client relationship was established.

good.

good.

~~Potential~~ Properly? [Client duties even if no atty-cl. rela]

(6) Helen's advice to E

In giving advice to E before obtaining more information about the case, Helen violated her duty

What abt Michael?

to provide good diligent and competent representation. She should first have gathered more information about the situation of S, and if E did not contact her anymore, she should have personally approached her and scheduled a meeting. [Cal rules arguably require more bad conduct for a violation of the competence requirement] (Aha! Saw this later)

Also, ~~not all~~ most of her advice is correct. Excellent. DAHO Michael. What abt 5.1, 5.2 (duties of sups & subord?)

Note that it's illusory to the corporation! here talking about 1.6(b) (2)(3) may apply re: disclosing to protecting interests of 3rd party

1. E must report to higher authority (but not outside (that's permissive)) (good up ladder) → This advice is correct under the MR (1.13), at least in case E actually knows about the misconduct and does not only have some suspicion. (good) However, under the Cal. rules, ~~the reporting~~ (1) going up ladder is not mandatory but only permissive, and only after E has unsuccessfully addressed the matter to the person committing the misconduct & going outside is never allowed.

Be careful here, only Cal recognizes ladder towards withdrawal.

As S is a privately held corporation, the

What abt withdrawal issue? (Aha! Just saw next page!)

good

Sarbanes-Oxley Act (which would require reporting to higher authority w/i the corp.) does not apply.
(regs allow going outside)

2. If unsuccessful, E must report to outside auth.

→ This advice is not correct, because under the MR, reporting to outside authorities is only permissive.

good

Under Cal. rules it is not allowed at all (client confidentiality prevails), rather E might have to

good or may withdraw.

→ What abt. 1.6(b)(2) & (3)?

3. In addition, because the ~~suspects~~ CFO who is allegedly committing

good

the wrongful conduct is an attorney himself, E ~~would~~ might have a duty (needs to know etc.) under MR 8.3 (but not under Cal. rules) to report his misconduct.

↳ The facts say E only "suspects" - Not enough

Do Helen & Michael have this duty? No - don't know, etc. But apparently neither does Ethics.

(7) Helen's later blogging

As Helen did have an attorney-client relationship with E or at least potential (1.18)

(see above), she was not allowed to reveal confident. inf. about S (no exception applies here, no consent by E). She might argue, that she did not state the exact name, but depending on how many "online dating companies with romantic Persian names" there are, this hint might be enough.

There is no difference under the Cal. rules.

(8) Michael

In writing the email to E, Michael might also violate his duty to provide competent and diligent representation (reasons see above). If he knew that there was not enough information he is not shielded under MR 5.2 because he was acting on a supervisor's order. This would only be

Excellent

the case if there was an arguable question of professional conduct. Providing legal advice while not having enough information does not rise a question of prof. conduct that is arguable. Michael is therefore liable for his own conduct.