

## Professional Responsibility

Eric M. Fink  
Elon Law School  
Fall 2019

# Conflicts of Interest

## 1 Conflicts Between Current Clients

### 1.1 Existence of a Conflict

#### Rule 1.7(a)

- Representation of one client is directly adverse to another
  - *GSI v. Babycenter* (Firm disqualified from representing plaintiff in suit against wholly-owned subsidiary of corporation that firm currently represented in other unrelated matters. Operational commonality, including legal affairs, and financial interdependence supports treating subsidiary as identical to parent for purposes of attorney-client relationship)
  - *Dresser Industries* ()
- Significant risk that representation will be materially limited by lawyer's responsibilities to another client, former client, third person, or personal interest of the lawyer
  - *Mendoza-Toro v. Gil* (D.P.R.) (Assistant U.S. Attorney's personal beliefs about defendant's civil disobedience was not a conflict under R. 1.7(a)(2) justifying refusal of assignment to prosecute criminal case)
  - *Brown v. Kelton* (Ark. 2011) (Attorney employed by defendants' insurance carrier disqualified where representation of defendants would be materially limited by lawyer's responsibilities to employer)

### 1.2 Waiver

#### Rule 1.7(b)

- Conflict is waivable if:
  - Lawyer reasonably believes that she will be able to provide competent and diligent representation to each client,
  - Dual representation not otherwise prohibited by law
  - No claims by one client against another represented by same lawyer in same litigation or proceeding, and
  - Informed written consent by each client

#### Examples

Lawyer represents A in a pending automobile accident lawsuit against X. B has made an offer to buy A's house. B asks Lawyer to represent B in the closing.

- Lawyer may NOT represent B in the closing, unless both clients consent in writing and neither client will be adversely affected (which may well be true if both give informed consent).

Lawyer represents A in a pending automobile accident lawsuit against X. X asks Lawyer to represent X in the same lawsuit.

- Lawyer may NOT represent X, even if both clients consent.
  - Because one client is asserting a claim against the other client *in the same action*.
  - The result is the same if another lawyer in the same firm represents X.
    - Lawyer's conflict is imputed to all other lawyers in the firm, and
    - The conflict is not waivable under Rule 1.7(b), because it involves the assertion of a claim by one client of the firm against another client of the firm *in the same action*.

Lawyer represents A in a pending automobile accident lawsuit against X. While A's case is pending, W asks Lawyer to represent W in an unrelated real estate lawsuit against A.

- Lawyer may NOT represent W, even if both clients consent.
  - Because Lawyer cannot reasonably believe they could provide competent and diligent representation to both clients.
  - But it might be permissible for another lawyer in the same firm to represent W.
    - Lawyer conflict is imputed to all other lawyers in the firm, but
    - The conflict might be waivable under Rule 1.7(b)
      - Neither client is asserting claims against the other *in the same action*.
      - The lawyers might adopt protective measures (screening) to protect each client's confidential information.
      - The Model Rules don't provide for screening in the case of concurrent client conflicts.
      - But screening might make it reasonable for each lawyer to believe they can provide competent and diligent representation to their respective client.
      - Each client must also give informed consent, confirmed in writing. The clients might insist on screening as a condition of giving consent.
      - In practice, this is more likely to be permissible in a large firm.

### **GSI Commerce Solutions v. Babycenter (2d Cir. 2010)**

Law firm disqualified from representing plaintiff where firm also represented parent corporation of defendant in other matters

## **1.3 Special Rule: Aggregate Settlements or Pleas**

### **Rule 1.8(g)**

- Each client must give informed consent, in writing and signed by client
- Must disclose
  - Existence and nature of all claims/pleas involved, and
  - Each client's share of settlement

## 2 Conflict Between Current & Former Client

### 2.1 Disqualification

#### Rule 1.9(a)

- Lawyer may not represent a client in a matter if
  - Lawyer formerly represented another client in the same or substantially related matter, **and**
  - Current clients interests are materially adverse to the former
- Conflict is waivable if former client gives informed consent, confirmed in writing

#### Examples

L represented A, a physician, in an automobile accident lawsuit against X. The lawsuit concluded five years ago, and L has not represented A since that time. B asks L to represent B in a medical malpractice case against A.

- L may represent B, since the two matters are not substantially related.

L represented ABC Corp. in its negotiation of an employment contract with X. The contract negotiations were successful and concluded 5 years ago. L has not represented ABC Corp. since that time. X wishes to sue ABC Corp. for breach of his employment contract (the one drafted by L). X asks L to represent X in a suit against ABC Corp.

- L may NOT represent X, because the two matters are substantially related, unless ABC consents in writing.

*Carey v. Danis* (Mo. 2002) (attorneys indefinitely suspended from practice of law where they represented plaintiffs in class action suit substantially related to matter in which they had formerly represented defendant)

### 2.2 Information related to former representation

#### Rule 1.9(c)

- May not use information to former client's disadvantage, unless
  - The Rules would otherwise permit, or
  - The information has become generally known
- May not reveal information, except as Rules otherwise permit or require for client information

#### Example

Five years ago, L prepared a will for A. During this process, L learned a great deal about A's "secret" assets. X now asks L to sue A to collect a promissory note.

- L may not represent X because L has confidential information about A, L's former client, that L could use to the disadvantage of A

### 3 Conflicts Between Lawyer & Client

#### Rule 1.8(a)

- Business dealings with, or financial interest adverse to, a client

#### Rule 1.8(b)

- Use of client information to client's disadvantage

#### Rule 1.8(c)

- Gifts from clients
  - May not solicit
  - May not prepare instrument
  - Exception for close relatives

#### Rule 1.8(d)

- Literary or media rights based on information related to representation
  - May not negotiate or enter into agreement before representation is concluded

#### Rule 1.8(e)

- Financial assistance to client
  - In connection with litigation
  - But may advance costs and expenses
    - Repayment may be contingent on outcome
    - May pay costs and expenses for indigent client

#### Rule 1.8(h)

- Lawyer's liability to client
  - Agreement prospectively limiting malpractice liability
    - Client must have independent representation in making agreement
  - Settlement of malpractice claims with unrepresented client
    - Must advise client in writing that seeking independent legal counsel is desirable, and
    - Must give client reasonable opportunity to do so

#### Rule 1.8(i)

- Proprietary interest in cause of action or subject matter of litigation
  - Attorney's lien permitted
  - Contingent fee permitted

#### Rule 1.8(j)

- Sexual relationship with client
  - Unless relationship existed before representation

## 4 Lawyer Changing Firms

### 4.1 Conflicts that Follow the Departing Lawyer

#### Rule 1.9(b)

- Same or substantially related matter
- Current client's interests are materially adverse to client of former firm
- Lawyer had information protected by Rules 1.6 & 1.9(c) that is material to the matter

Waivable with informed written consent by *former* client

### 4.2 Conflicts that a Departing Lawyer Leaves Behind

#### Rule 1.10(b)

- Firm may not represent a person with interests materially adverse to former lawyer's client (not currently represented by Firm), if:
  - Same or substantially related matter, and
  - Any lawyer remaining in the firm has material information about the former client protected by Rules 1.6 and 1.9(c)

## 5 Imputed Conflicts

### 5.1 Scope of Restriction

#### Rule 1.10(a)

- Where one lawyer in firm is disqualified by conflict, all lawyers in the firm are disqualified
- Exception:
  - Conflict based on personal interest of lawyer, and
  - No significant risk that the lawyer's personal interest will materially limit representation by another lawyer in the firm

### 5.2 Conflicts Involving Client of Lawyer's Former Firm

- Not imputed to other lawyers in the current firm if:
  - Disqualified lawyer is timely screened and receives no portion of fee
  - Former client receives written notice
    - describing the screening procedures
    - stating firm's compliance with the Rules
    - stating that review may be available from tribunal
  - Firm agrees to respond to any written inquiries or objections by former client regarding screening procedures
- Not imputed to lawyers at former firm if former client is not currently represented by the firm, unless:

- Same or substantially related matter
- Any lawyer in the firm has material information protected by Rules 1.6 and 1.9(c)

### **5.3 Conflicts Between Attorney & Client**

#### **Rule 1.8(k)**

- Imputed
  - Conflicts under Rule 1.8(a)-(i)
- Not imputed
  - Conflicts under Rule 1.8(j)

### **5.4 Waiver**

Imputed conflicts under Rule 1.10(a) or (b) may be waived if conditions in Rule 1.7(b) are satisfied