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Developments in Professional Responsibility—2026: Recent Developments in Identifying and Dealing with Conflicts

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Developments in Conflicts (2026: Part One) An Update on Identifying and Dealing with Conflicts

- **Current, Former, and Prospective Clients**
- **Lateral Movement, Long Ago Legal Work and Imputation**
- **When Screens Work – and When They Don't**

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FIRST, A FEW CONFLICTS BASICS
IN CONFLICT DISPUTES, NO HAPPY ENDINGS

- Basis or Part of Malpractice Claim – *Revolaze, LLC v. Dentons US LLP* (Ohio App. April 28, 2022) (review denied by Ohio Supreme Court in August, 2022) *Potter v. Cozen & O'Connor*, No. 21-2258 (3d Cir. March 13, 2022) (reinstating suit by shareholder based on alleged conflict of law firm representing corporation); Restatement (Third) of The Law Governing Lawyers § 121 (2000)
- Breach of Fiduciary Duty or "Constructive Fraud" Theories
  SAS Inst., Inc. v. Akin Gump Strauss Hauer & Feld, LLP, No. 5:10-CV-101-H, 2015 WL 1476818 (E.D.N.C. Feb. 6, 2015); *State ex rel. Swanson v. 3M Co*., 845 N.W. 2d 808 (Minn. 2014)
  - In both cases damage theories were sustained — including in one case an award of double compensatory damages—even though DQ had not occurred because of waiver or for other reasons
- Sanctions — *Madison 92nd St. Assocs. v. Marriott Int., Inc*., No. 13 Civ. 291(CM), 2013 WL 5913382 (S.D.N.Y. Oct. 31 , 2013), *aff'd sub nom. Boies Shiller & Flexner LLP v. Host Hotels & Resorts, Inc.*, 603 F. App'x 19 (2d Cir. 2015) ($270,000 sanction)
- Return of fees and forfeiture of unpaid fees — *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg*. Co., 425 P.3d 1 (Cal. 2018) (forfeiture and non-payment of almost $5 million in contractual fees, remanding on *quantum meruit*); *Jay Dietz & Assocs. of Nassau Cnty., Ltd. v. Breslow & Walker, LLP*, 153 A.D.3d 503 (N.Y. App. Div. 2017)
- Disciplinary proceedings — rare but can happen — *In re Hodge*, 407 P.3d 170 (Kan. 2017) (disbarment); *In re Rosanna*, 395 B.R. 697 (Bankr. D. Nev. 2008)
- Expensive and disruptive for firm and client, loss of clients, bad for reputation — *Western Sugar Coop. v. Archer-Daniels-Midland Co*., 98 F. Supp. 3d 1074 (C.D. Cal. 2015) (disqualifying law firm as a result of law firm merger after 20,000 hours of legal work and $12 million in fees); *Dynamic 30 Geosolutions LLC v. Schlumberger Ltd*., No. A-14-CV-1 12--LY, 2015 WL 4578681 (W.D. Tex. Sep. 12, 2016) (all plaintiff's counsel not only DQed but complaint dismissed)

No Happy Endings: Sheppard, Mullin, Richter & Hampton, LLP 425 P3d 1 (Cal. 2018)

One Firm lawyer represents a local utility U on employment issues including an arbitration for over a decade. Two pre-existing engagement letters have broad but general waivers of future and current conflicts.

March 5, 2010:

Other lawyers at Firm hired to represent pipe manufacturer P in major *qui tam* action; U is one of many intervenors with modest claim against P. Firm's representation of U disclosed in conflict check, but at time Firm had done no work for U for five months. Engagement letter with broad conflict waiver language entered with general counsel for P after negotiations and edits on fee provisions. Some discussion of Firm's representation of another intervenor but no discussion of representation of U.

March 29, 2010:

Firm commences small amount of work for U (12 hours of work over next year); relying on waiver letters, it does not discuss adversity in the *qui tam* action with either U or P.

Sheppard, Mullin, Richter & Hampton, LLP 425 P.3d 1 (Cal. 2018) (Continued)

16 months later:

U gets Firm DQed on ground that former engagement letters did not constitute informed consent to new, actual conflict. Court won't accept Firm's proposal to drop U as a client (hot potato doctrine). Possible bifurcation and use of separate counsel for issues involving U suggested but rejected by counsel representing U and other intervenors.

In intervening 16 months Firm does 10,000 hours of work on *qui tam* action for P; bills it $3.8 million. P refuses to pay last $1.1 million and demands forfeiture of fees from inception of relationship.

Firm seeks to preserve its fees:

Firm sues P and moves for arbitration under arbitration clause in engagement letter. Distinguished panel of arbitrators finds Firm's conduct not so serious or egregious as to make disgorgement or forfeiture of fees appropriate. Trial court confirms award.

Intermediate appellate court reverses: advance waiver language unenforceable under California law because not based on informed consent; known actual or imminent conflicts must be disclosed. Relying on waiver in these circumstances violates public policy, making the entire contract (including the arbitration clause) unenforceable. Fee forfeiture sustained.

Sheppard, Mullin, Richter & Hampton, LLP 425 P.3d 1 (Cal. 2018) (Continued)

Firm appealed to California Supreme Court, with 51 firms, ACCA, several companies, association of disciplinary counsel, law professors and malpractice insurers filing amicus briefs.

California Supreme Court:

- California Supreme Court agreed that Firm's broad and non-specific waiver would be ineffective because it failed to disclose a known existing conflict, and as a result voided Firm's entire engagement agreement
- With two dissenting justices, the Court found that the Firm might still be allowed to create a record to establish a quantum meruit entitlement to some lower amount of fees, and remanded
  - "[B]efore the trial court may award compensation, it must be satisfied that the award does not undermine incentives for compliance with the Rules of Professional Conduct. Although the law firm may be entitled to some compensation for its work, its ethical breach will ordinarily require it to relinquish some or all of the profits for which it negotiated."
- The parties ultimately settled before trial in 2019

Review of Basic Conflict Rules and Some Recent Examples
Current Client Conflicts (Rules of Professional Conduct 1.7)

- A lawyer or *Firm* cannot represent a current client against another current client having adverse interests in a transaction or legal proceeding without informed consent of both affected clients (regardless of whether proceedings are related)
  - Duty of loyalty
  - Duty of confidentiality
- Substantial or indeed *any* relationship among matters not required in any U.S. jurisdiction other than Texas - different from many European and other jurisdictions
- Cannot represent clients having “differing interests” (NY standard) or “materially adverse interests” (ABA Model Rules and most other states) without informed consent

Former (Successive) Client Conflicts (Rule 1.9)

- Cannot represent interest adverse to former client in “the same or a substantially related matter”
- Cannot represent new, adverse client if the lawyer (whether at present or former firm) acquired “material” confidential information of former client. *Cypress Holdings III, LP v. Sport-BLX, Inc.* No. 22 C.V. 1243 (LGS) (S.D.N.Y. Aug, 23, 2022); *In re Estate of Krivikula,*No. A-0S63-20 (Sup. Ct. N.J., Aug, 22, 2022); *Kitchin v. Bridgeton Land Fill, LLC*, No. 4:183 CV 672 CDP (E.D. Mo. Sep. 18, 2022) (ordering disqualification after in camera review of documents)
- *Jane Doe v. JP Morgan Chase Bank*, No.22-CV-10019 (JSR) (S.D.N.Y. May 11, 2023): Law firm’s prior submission of an amicus brief in support of a certiorari petition on behalf of an anti-sex trafficking organization seeking to set aside Jeffrey Epstein’s non-prosecution agreement not substantially related to its representation of JP Morgan in a class action seeking to hold it to account for knowingly or recklessly supporting Epstein’s activities.

Former (Successive) Client Conflicts (Rule 1.9) (cont'd)

- Presumed that attorney on a matter had access to some confidential client information from former client and that it will be used or shared with new client – question is whether material confidential information *could have been* shared
  - Virtually irrebuttable in some jurisdictions (5th cir.); may be rebuttable under "modified substantial relationship" or similar approach on a DQ motion in some jurisdictions but not others.
  - *Moray v. UFA Indus., Inc.*, 156 A.D.3d 781 (N.Y. App. Div. 2017) (associate was formerly paralegal to estate of late principal of defendant; irrebuttable presumption that associate must be disqualified as plaintiff's counsel and rebuttable presumption that entire firm must be disqualified); *Staton Teclya LLC v. Samsung Elec Co., Ltd.*, No. 2:21-LV-00413-JRG-RSA (E.D. Texas, Nov. 16, 2022) (lawyer-owners of plaintiff company who were formerly in house counsel of defendant screened from sharing information with counsel).
  - *Gartner, Inc., v. HCC Specialty Underwriters, Inc*., 20-cv-4885 (JGK) (S.D.N.Y, Jan. 14, 2022) (No likelihood confidential information shared so no need for DQ for current client conflict where DQ motion seemed tactical and DQ would prejudice client).

Imputation of Conflicts (Rule 1.10)

- Basic rule: if one lawyer at a firm is conflicted, all lawyers "associated in the firm" are deemed conflicted, absent consent by all affected clients
- If a lawyer leaves and takes the client, old firm remains conflicted if the firm still "has" confidential information that is "material to the matter"
  - "has" means actual access by remaining lawyers, not information in electronic storage non-accessible to most of them, according to New Jersey case — *Estate of Kennedy v. Rosenblatt,* 149 A.3d 5 (N.J. App. Div. 2016). See also *AmLaur Resources, LLC v. Crescend Asset Management LLC,* No. 652975/2022 (Supp. Ct. NY Co. May 4, 2023) (lawyer who formerly represented opposing party had left firm and files had been sent to new firm).
- If a lateral individually has confidential information "material to the matter," the new firm may not be adverse to the former client of the lateral in the same or a substantially related matter absent consent. *Sierra v. Costco Wholesale Corp.,* 22-CV-01444 JSW (Sep. 23, 2022) (plaintiff's counsel in slip and fall case DQed because of lateral's representation of defendant at prior firm and no timely screen).

Imputation of Conflicts (Rule 1.10) (cont'd)

- *Revolaze, LLC v. Dentons US LLP,* No. 109742 (Ohio App. April 28, 2022): Conflict of lawyers at Canadian member of verein imputed to U.S. firm; Firm disqualified in the midst of intensive ITC proceedings and found liable for malpractice.
- Exception to imputation in most sates for many personal interest conflicts – adopted only last year in New York.

Prospective Client Conflicts (Rule 1.18)

- Conflict if lawyer actually receives information both material to the same or a substantially related matter and that could be significantly harmful to person disclosing it. *In re MMA Law Firm, PLLC, 660 B.R. 128* (Bankr. S.D. Tex. 2024).
  - "significantly harmful": more stringent test than confidentiality standard under former rule. *See* NY State Bar Ops. 960 (2013) and 1067 (2015); *Mayers v. Stone Castle Partners,* 1 N.Y.S.3d 58 (App. Div. 1st Dep't 2015)
  - ABA Op. 492: "significantly harmful" depends on duration of communication, topics discussed, whether lawyer reviewed documents, whether information is known by others, and relationship between information and other matter
  - Examples of "significantly harmful" information include views of prospective client on litigation management strategy, trial or settlement issues such as amounts or timing, personal accounts of relevant events, or sensitive personal or financial information
- Both client and prospective client must waive
- Interested lawyer can be screened in most states but only if lawyer took reasonable measures to avoid exposure to more information than reasonably necessary, screen is timely, and prospective client receives prompt written notice (AND N.B. all too often the screened lawyer is the one lawyer at the firm that client wants to hire)

Receipt of Confidential Information from Prospective or Implied Client Relationship (cont'd)

- In *Application of VUZ-BANK JSC,* NO. 1:21-8V-0404-VMC-JCH (N.D.Ga. Aug. 31, 2022) procedures of Rule 1.18 were not followed with respect to brief preliminary discussions and a prominent law firm was disqualified from representing a client seeking discovery against closely related parties.
- *HP Ingredients Corp. v. Sabinsa Corp.,* No. 21-CV-16800 (GC) (RLS) (D.N.J. Aug. 10, 2022). Attorney disqualified under Rule 1.9 based on attorney-client relationship arising from discussions with principal of formerly represented LLC
- *Ozavar v. Louttit,* No. 24-11448 SDW-AME (D.N.J. Oct. 28, 2025) (unpublished Mag Judge Opinion) (same; DQ based on party's reasonable expectation never expressly disclaimed by counsel)
- *Bancor Group, Inc. v. Rodriguez,* No. 22-CV-2021 (S.D. Fla. May 18, 2023) (attorney who represented beneficial owner of corporate plaintiff at former firm DQed from representing defendant though firm allowed to continue)
- *Veritas Legal Plan, Inc., v. Freedom Legal Plans, Inc.,* No. 23-CV-80636-AMC (S.D. Fla. June 30, 2023) (lateral at firm representing defendants who were being sued for violating non-compete clauses had helped draft those clauses at former firm. DQ motion denied without prejudice when defendant represented it was not challenging the validity of the clause but simply whether its terms had actually been violated.)

A Key Question: What Is "Confidential" and "Material to the Matter" Information (Rule 1.6)

- "Confidential" in NY includes attorney-client communications and anything that could be "embarrassing or detrimental" if disclosed
- "Material to the matter" is not defined
- The "Game Plan" issue — knowing a client's general strategic approach rather than information about a particular case
  - *See* Comment [3] to Rule 1.9 (general knowledge of organization's policies and procedures ordinarily will not preclude a subsequent adverse representation)
  - *But see*, *e.g.*, *Kim Funding LLC v. Chicago Title Co.*, No. 37-2019-00066633 (Cal. Super. Ct. Aug. 31, 2020) (knowledge of insurer's approach to settlement and strategy considered material); *Costco, supra Slide 9* (company's approach to settlement of slip and fall cases).

Sometimes - - But Only Sometimes - - Courts Find a Prior Representation Immaterial

- *Riaz v. Nadeem*, No. A-3313-23 (N.J. App. Dec. 6, 2024) (helping owners establish retail businesses deemed not materially related to representation of some owners in ownership dispute against others)
- *Care Point Health Mgmt. Assoc. v RWJ Barnabas Health, Inc.*, No. 22-5421 (Enp) (CW) (D.N.J. Dec. 27, 2024) (Magistrate Judge Decision) (general advice to hospital chain about client related party transaction not material or substantially related to claims by a competitor that chain abused specific related party transactions to force claimant out of business)
  - In both the above cases, delay bringing the DQ motion to the courts suggested it was made for tactical reasons.
  - But see *FaceTec Inc. v. Jumio Corp*. (Major firm DQed from being adverse to FaceTec in patent infringement suit. Some lawyers at firm had provided general corporate/ IP advice to FaceTec early in its history and had also prosecuted some patents not related to those in the litigation. Firm DQed because of the general work not the patent prosecution work. Ethics screen disregarded because not discussed with client. Infectious imputation of co-counsel firm was argued but denied).

Confidentiality and Conflicts

- As noted, receipt or possession of confidential information from former or prospective client can create conflict
- Duty of confidentiality to client, former client or prospective client can prevent lawyer from making disclosures to seek consent of existing client (Rule 1.6)
- Duty of confidentiality may affect extent of disclosure in lateral movements and law firm merger discussions
  - Issue noted in ABA Model Rule 1.6(b)(7) and comments [13]-[14] adopted in 2012
  - Some limited guidance and discussion in Comments [18A-18F] to NY Rule 1.6 and Comments 9H and 9I to NY Rule 1.10 (e) adopted in 2014
  - Additional guidance in ABA Op. 489 on ethical obligation for orderly transition of client matters
  - Protocols or rules for informing client of lawyer's departure for a new firm now exist in FL, VA, and OH. The NY State Bar Association added extensive comments to Rules 5.6 and 1.4 to set ground rules in this area. NY City Bar Op. 2023-1 (June 30, 2023) further elaborated these ground rules.

Potential Conflict When Any Lawyer in Firm Has Ever Worked on Same or Substantially Related Matter Anywhere or At Any Time

- Concern is Access to Confidential Information which is presumed to Exist if there Is a Substantial Relationship. *FDIC v. Ernst & Young LLP*, No. 20-1259 E.D. La. June 15, 2023 (Counsel for FDIC DQed because of access to information later deemed privileged during bank liquidation.)
  - Conflict can arise from work many years before, early in a lawyer's career (J2 Glob. Commc'ns Inc. v. Captaris Inc., No. CV 09-04150, 2012 WL 6618272 (C.D. Cal. Dec. 19, 2012) — seven years); *EON Corp. IP Holdings LLC v. Flo TV Inc.*, No. 10-812- RGA, 2012 WL 4364244 (D. Del. Sept. 24, 2012) — unrelated work for parent by different lawyers in a different office 20 years before)
  - Law firm merger (*W. Sugar Coop. v. Archer-Daniels-Midland Co.*, 98 F. Supp. 3d 1074 (C.D. Cal. 2015): Squire Sanders/Patton Boggs merger)
  - Arguments sometimes made – not always successfully – that participation in joint defense or information sharing agreement creates material limitation on counsel in subsequent litigation between parties to the agreement. (*Centripetal Networks, Inc. v. Palo Alto Networks, Inc.*, No. 2-21-CV-137 (PCY) (ED Va. March 1, 2022)
  - In NJ substantial relationship test requires "fact-sensitive analysis to ensure…congruity of facts, not merely similar theories." *Atlantic City v. Troup*, 201 N.J. 447, 467 (2010). Courts in California apply "Modified Substantial Relationship" test on DQ motions with screening to determine whether access to material confidential information was likely. *Master Objects, Inc. v. Amazon.Com, Inc.* No. C-20-8103 (WHA) (N.D. Cal. June 13, 2022).

“Infectious” Imputation

- Imputation sometimes extended to any attorney “associated” in matter: can include co-counsel or local counsel. See *Westinghouse Electric Co. v. Curtis-Wright*, SIC v 2021 (059) (Procedural Order II in Swedish arbitration). (rehearing denied) See also *Mirch Law Firm, LLP v. Nakhleh,* No. 20-56207 (9th Circuit, May 12, 2022) (knowledge of witness for law firm whom adversary had relied on as counsel imputed to firm and firm DQed).
- Same issue with inside counsel. *Dynamic 30 Geosolutions, LLC,* 2015 WL 4578681
  - Same issue with consultants, experts, even paralegals; screening may cure but not provided for in rules and some inconsistent rulings (*O’Gara Coach Co., LLC v. Ra*, 242 Cal. Rptr.3d 239 (Cal. Ct. App. 2019); *Moray*, 156 A.D.3d 781, *supra slide 8*; *Hodge v. UFRA-Sexton LP,* 758 S.E.2d 314 (Ga. 2014); NY State Bar Op. 905; Texas State Bar Op. 644; Ohio State Bar Op. 2016-4)
- Some seemingly arbitrary results
  - *CMH Homes,* 2013 WL 2446724
  - Lead counsel firm DQed because company's liaison counsel from another firm had worked with adverse party 7 years before at yet a third firm (*J2 Glob. Commc'ns Inc.,* 2012 WL 6618272)

Imputation Rules and Screening

- Rules do not permit screening to cure intra-firm conflict other than for discussions with prospective client
- Screening of laterals with notice to former client may sometimes cure conflicts under ABA Model Rule 1.10 but *not yet* provided for in rules of all states
  - Detailed new version of Rule 1.10 screening requirements in District of Columbia
  - NY State Bar last year adopted lateral screening rule similar to New Jersey's - - screening can be used to cure conflicts for most laterals but not attorneys with substantial responsibility for litigation.
  - Firm disqualified in San Bernardino Bankruptcy when five attorneys representing Calpers moved to firm representing adversary; court would not accept screening in case of "side-switching" attorneys. *In re City of San Bernardino,* Case No. 6, 12-bk-28006-MJ (Bankr. C.D. Cal. 2013) Accord*, Helton v. The Geo D. Warthen Bank,* Civ. Action No. 5:21-CV-404 (MTT) N.D. Ga. Nov. 3, 2022) (screening does not cure side-switching conflict under Georgia rules)
  - Screen must be discussed with clients and implemented ASAP.
- Courts may go beyond ethics rules in exercising discretion to permit (or not permit) screens in particular cases. *E.g., Intellicheck, Inc. v. Tricom Card Technologies, Inc.,* No. 03 CV 3706, 2008 WL 4682433 (E.D.N.Y. Oct. 21 , 2008). *Metro Container Group, supra Slide 15; Manassa v. NCAA,* No. 1:20-CV-03172-RLY-MJD (U.S.D.C. S.D. Ind, June 16, 2022) (Mag. Judge decision) (denying DQ where,unknown to firm employing him, associate became contract reviewer for adversary's outside document review firm but had no opportunity to share any confidences); *FaceTec, Inc. v. Jumio Corp.* No. 3:24-cv-03623 RFL (N.D. Cal. March 18, 2025) (DQ because screen and conflict issue never discussed with client).

Ethics Screen That Worked: Maxwell, Ltd. V. Apple Inc., Civ. Action No. 5:19-cv-00036 (Mar. 2, 2021)

- Attorney involved in Maxwell's IP matters at Firm 1 transferred to the Washington D.C. office of Firm 2. Six months later, CA and TX teams of Firm 2 began representing Apple in litigation and related matters adverse to Maxwell.
- Court began with Fifth Circuit rebuttable presumption that lateral attorney shares confidences with other members of firm but rejected Maxwell's motion to disqualify Firm 2 weeks before trial.
- Firm 2 instituted its ethics screen as soon as it discovered the conflict and the screen was fully in place before it was retained by Apple in the matter.
- Court rejected Maxwell's argument that the screen was ineffective, finding lateral attorney's comment to a lawyer at Firm 2 that members of Firm 1 "were good lawyers" did not reveal confidential information.
- Although lateral attorney inadvertently took Maxwell emails as part of unrelated client file transfer, Court gave weight to Firm 2's IT investigation confirming that those document were never accessible or accessed by anyone at Firm 2.

Another Court Takes A Realistic Approach to Imputation

- Attorney served as chair of firm health care department, participating in defense of employers in Self-Insurer's Fund collection action, and becoming privy to communications discussing common defense strategy with other defendants
- Attorney leaves firm to join Nixon Peabody, counsel for Self-Insurers Fund
- At Nixon, attorney was employed at an office different from the one where the team representing the Self-Insurers Fund was located, Nixon put up an ethical screen, and attorney left Nixon several weeks later and before filing of DQ motion
- California Court of Appeals rejected automatic DQ of Nixon:
  - "Gone are the days when attorneys (like star athletes) typically stay with one organization throughout their entire careers….Individual attorneys today can work for a law firm and not even know, let alone have contact with, members of the same firm working in a different department across the hall or a different branch across the globe."

Cal. Self-Ins.' Sec. Fund v. Super. Ct., 228 Cal. Rptr.3d 546 (2018)

Sometimes a Screen Isn't the Answer

- *United States v. Minkkinen*, Crim. No. 2:22-C8-00163 (S.D. W. Va. May 22, 2023)
- Head of a U.S. Attorney office had represented a company that was investigated for receiving trade secrets stolen by two indicted defendants. DOJ removed that office and its head from the matter based on the potential conflict except for one attorney and one case officer who were to work on it under supervision of another U.S. Attorney Office while being screened from their original office. Court DQed that attorney because the original U.S. Attorney was likely to be a material witness, rendering the screen less than wholly effective, and because the screened attorney would, in effect, have to question and cross-examine his boss.
- The case officer was not disqualified because that office did not implicate the professional responsibilities of attorneys.

Termination or Hot Potato?
When Does Client Relationship Terminate?
Does Issue Involve a Current Client or Former Client?

- The expectation of continuing representation
- Termination letters; always a good idea but lawyers hate sending them
- Without letters a mixed question of law and fact that depends largely on reasonable expectations of client (NY State Bar Op. 1008 (2014))
- *Parallel Iron*, 2013 WL 789207 (series of unrelated opinion letters for one client disqualified firm from handling major litigation against it; last letter delivered five months before engagement for prospective new client)
- The "Hot Potato" Rule: Firm cannot suddenly shift allegiances from one client for sake of more substantial new engagement with another client. *Markham Concepts, Inc. v. Hasbro, Inc.*, 196 F. Supp.3d 345 (D.R.I. 2016); *Howell v. Morisy*, No. W2020-00343-COA-R9-CV, 2020 WL 6821698 (Tenn. Ct. App. Nov. 20, 2020).

BYU v. Pfizer, Inc., No. 2:06-cv-890, 2010 WL 3855347 (Sept. 29, 2010): Example of a Lateral Hot Potato

- Partner S represents BYU on non-IP matters while at Firm X
- BYU sues Pfizer over Celebrex patent; neither Firm X nor Y included initially.
- S then joins Firm Y, with BYU as a client, billing $450k over 5 years
- Pfizer taps other lawyers at Firm Y as lead defense counsel in Celebrex, a huge litigation with billions at stake
- Firm Y say's it will no longer represent BYU
- Court: Y cannot "suddenly shift all allegiances for the sake of monetary gain," Y is DQed

BYU v. Pfizer, Inc., No. 2:06-cv-890, 2010 WL 3855347 (Sept. 29, 2010): Why a Waiver Did Not Work

- When S joined Firm Y, the engagement letter with BYU contained an "advance patent waiver."
- Waiver covered clients in patent and IP matters that Firm Y "currently represents," termed the "Other Clients."
- Firm Y did represent Pfizer at the time, but not in patent and IP matters.
- Pfizer thus not an "Other Client" within the waiver.

An Example of How These Issues Can Play Out

- *Stevens v. Brigham Young University - Idaho*, No. 4:16-cv-00530-BLW (D. Idaho April 23, 2021)
- An issue in a sexual harassment case against BYU-I was the University's effort to obtain and use conversations between plaintiff and religious leaders of the church.
- BYU claimed any priest - penitent privileged had been waived; the Church had successfully intervened to support the privileged status of the communications.
- Four years into the litigation, attorneys from the firm representing the Church (but not themselves involved in that representation) moved to the firm representing BYU-I.
- The court found that a conflict existed but that the communication at issue was not central to the case and that the conflict could be cured with an ethics screen that counsel had promptly put in place.
- Court added a few additional precautions including a litigation hold, prompt reporting of any inadvertent disclosures of privileged information and a ban on dissemination, as well as use, of any privileged information. See also *Metro Container Group v. ACT & Co.,* No. 18-3623 (E.D. Pa. May 31, 2022) (screening allowed as remedy "proportionate" to any appearance of impropriety from former representation).