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Developments in Professional Responsibility—2026: Recent Developments in Identifying and Dealing with Conflicts (Part 2)

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Developments in Conflicts (2026: Part Two) Beyond the Basics

- **Material Limitation Conflicts.**
- **Thrust upon Conflicts.**
- **Problems in Joint Representation.**
- **Client Guidelines, Engagement Letters, and More.**

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First Source of Emerging Conflict Issues Positional and Material Limitation Conflicts

- *Bridgepoint Const. Servs., Inc. v. Newton*, 237 Cal. Rptr.3d 598 (Cal. Ct. App. 2018) (affirming disqualification of counsel from representing corporation and business associate, who both sought damages from same pool of money).
- *Oxbow (In re Rail Freight Fuel Surcharge Antitrust Litigation),* 965 F. Supp. 2d 104 (D.D.C. 2013) — No conflict even though position lawyer would take in class action for defendant would be detrimental to a client with parallel opt-out case; separate conflicts counsel retained for opt-out case
- But *see Celgard, LLC v. LG Chem, Ltd.,* 594 Fed. Appx. 669 (Fed. Cir. 2014) (citing *Freedom Wireless, Inc. v. Boston Commc'ns Grp., Inc.*, Nos. 2006-1020 et al., 2006 WL 8071423 (Fed. Cir. Mar. 20, 2006))
  - Firm represented client with IP position entitling it to injunctive relief which would affect many industry players, one of which (Apple) was also a client
  - As in *Oxbow,* firm stipulated it would not appear or negotiate against Apple, but in non-precedential opinion Fed. Circuit disqualified firm because of inevitable adverse effect.

Positional and Material Limitation Conflicts

- An emerging issue in IP where parties with competing technologies represented by same firm end up with opposing positions in the PTO or other contexts
- Continuing to act could lead to state malpractice or similar theories of liability.
- *Maling v. Finnegan, Henderson, Farabow, Garret, and Dunner, LLP,* 473 Mass. 336 (2015): simultaneous prosecution of patents for two entities in same tech area not per se violation of Rule 1.7 or ground for malpractice.
  - BUT rule different if interference declared, if opine for one client on another client's patent position, or if become involved in "patent claim shaving." *See Vaxiion Therapeutic, Inc v. Foley & Lardner LLP*, 07CV280 — IEG (RBB), 2008 WL 5122196 (S.D. Cal Dec. 4.2008) (denying much of summary judgment motion by patent lawyers accused of breach of fiduciary duty when they prosecuted patents for plaintiff and a competitor)
  - Conflict may be found from undertaking invalidity or non-infringement opinion regarding a patent owned by or licensed to another firm client absent waiver by both clients. *Andrew Corp. v. Beverly Mfg*., 415 F. Supp.2d 919 (N.D. Ill. 2006); VA. Legal Ethics Op. 1774 (2003)
- Could also be liability based on non-disclosure or fiduciary duty breach, even when no DQ — *SAS Inst., Inc. v. Akin Gump Strauss Hauer & Feld, LLP,* No. 5:10-CV-101-H, 2015 WL 12861349 (E.D.N.C. Feb. 6, 2015)

ABA FORMAL OPINION 497 (Feb. 10, 2021)

- Material Adverse Interest Standard for Conflicts Involving Former and Prospective Clients
  - Encompasses more than direct conflicts
  - Mere harm to economic interest not enough – not “materially” adverse
  - BUT suing or negotiating against former client on same or substantially related matter is materially adverse (a familiar concept)
  - SO is attacking or undermining lawyer’s (or firm’s) own prior work – an important and useful clarification
- N.B. For prospective clients, relationship must be not only materially adverse but use of information must be significantly harmful to prospective client

Underlying Concern: Pulling Punches When Lawyer's or Firm's Client or Former Client Becomes a Witness in Litigation for Another Client

- Recent DC Bar Opinions 380 and 381
  - Subpoenaing current or former client not a per se conflict – but non-waivable if that party objects to becoming a witness (see also ABA Op. 497, supra).
- When former client does become involved, even voluntarily, potential conflicts may arise
  - Can sometimes be waived – if ramifications can be anticipated and confidentiality obligations to both parties permit disclosures.
  - But, as with claim shaving in patent prosecution, counsel must be wary of pulling punches against one client out of loyalty to the other
  - Can be personal interest conflict (e.g. lawyer doesn't want to jeopardize future work from major client that becomes a witness).
  - But this could mean conflict not always imputed to all other lawyers at the firm
  - Opinions do endorse use of conflicts counsel to cure many of these problems

Personal Interest Conflicts

- Avoid risk that “professional judgment” could be affected by lawyer's financial or personal interests (Comments [10-12] to Rule 1.7; Rule 1.8) N.J. Advisory Committee on Professional Ethics Op. 743 (June 23, 2002) (lawyer’s ownership of 50% of client creates conflict imputed to lawyer’s law firm)
- Third party payment of fees can’t override duty of loyalty to client
- Neither can lawyer’s own interest — whether property interest or concern for potential liability
- *Flatworld Interactives LLC v. Apple Inc.,* No. 12-cv-01956, 2013 WL 4039799 (N.D. Cal. 2013) (partner’s wife a principal in company suing firm’s client for IP infringement); *SAS Inst., Inc. v. Akin Gump Strauss Hauer & Feld, LLP,* No. 5:10-CV-101-H, 2015 WL 12861349 (E.D.N.C. Feb. 6, 2015) (adverse pecuniary interest created by possible percentage recovery from non-targets of suit, including one then-current client on unrelated matters); *Att’y Grievance Comm’n of Maryland v. Powell*, 192 A.3d 633 (Md. 2018) (conflict between attorney and client found jointly and severally liable for commencing frivolous litigation, since attorney’s incentive to lessen his liability would increase his client’s)

Personal Interest Conflicts (cont'd)

- *AG-18 v. Draft Kings* (Civ. Action 21-15737 (KN) (JSA) (D. N.J. Oct. 4, 2022 Mag. Letter opinion): No. DQ in patent case of pro hac counsel for plaintiff suing Draft Kings for patent infringement though they were owner-inventors of another company in the technological space that Draft Kings considered a competitor; court did not consider this a material limitation arising from competing fiduciary duties as lawyers but did require an order limiting sharing of confidential information with the lawyer-inventors.)

Possible Personal Interest Conflicts Arising From Personal Relationships

- ABA Op. 494 on Rule 1.7(a)(2) details recommendations for assessing and responding to potential personal conflicts
- Acquaintances – may but do not need to disclose the relationship
- Friendships – disclosure and informed consent depend on the closeness of the friendship
  - "[Lawyers who] exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues . . . [or] share confidences and intimate details of their lives."
- Intimate relationships – "cohabiting, engagement, exclusive intimate relationships" must be disclosed and require written informed consent

Bankruptcy Conflicts and "Disinterestedness"

- In addition to normal conflict rules, an attorney seeking to represent a debtor or trustee in bankruptcy must be "disinterested" within meaning of 11 U.S.C. § § 101(14), 327(a) and Rule 2014(a)
  - Cannot hold interest adverse to estate
  - Must disclose all actual or potential conflicts in terms of creditors or others who may have claims adverse to estate
  - Court must approve; affidavit reviewed by U.S. Trustee's office; debtor's or trustee's consent does not resolve issue (though of course, as with any conflict, consent of both clients is required)
  - Consequences of failure to disclose can be severe (attorney from prominent firm disbarred several years ago; forfeiture of $1.5 million in fees by another New York firm in 2013).
  - E.g. *In re Vascular Access Ctrs., L.P.,* 613 B.R. 613 (E.D. Pa. 2020) (although finding no actual conflict, sanctioning attorney for failure to disclose by denying portion of fees).
  - Use of separate, conflict-free counsel widely accepted as cure

Conflict Issues in Joint Representations

- Joint representations are problematical whenever the lawyer may be unable to provide fully effective representation of clients' differing or adverse interests
- Joint representation is possible if potential differences are not so severe that lawyer cannot objectively and subjectively represent both
  - But may not be possible if severely competing interest, if confidentially prevents lawyer from making full disclosure or if lawyer would have a material limitation conflict.
  - And lawyer must obtain actual, informed, written consent. *See In re Flint Water Cases*; No. 5: 16-CVV-10444 (JEL) (E.D. Mich April 15, 2022)

Settlement of Aggregate and Interdependent Claims Against Limited Assets

- *Bridgepoint Const. Servs.,* 237 Cal. Rptr.3d 598 (affirming disqualification of counsel from representing corporation and associate, who both sought damages from same pool of money).
- Rule 1.8(g) requires each client's written informed consent for aggregate settlement of claims, with disclosure of the "existence and nature of all the claims or pleas involved and of the participation of each person in the settlement"
- "Aggregate settlement" not defined
  - Grouping together of separate but related lawsuits for purpose of settlement qualifies as aggregate settlement
- NYC Bar Op. 2020-3: Disclosure also required for settlement of one lawsuit dependent on or capable of significantly impacting another lawsuit handled by the lawyer for a different client with written informed consent from each client
  - NY Rule 1.8(g) court-approval exception should be used only where client consent not feasible *e.g.* class or derivative action settlement

Basic Examples of Joint Representations Gone Wrong

Office of Disciplinary Counsel v. Baldwin, 225 A.2d 817 (Pa. 2020) (Penn State GC, a former state Supreme Court judge, publicly reprimanded for appearing for two school officials as well as university in grand jury investigation with result that indictments had been dismissed because of inadequate, compromised representation)

Yanez v. Plummer, 221 Cal. App. Div. 180 (3d Dist. 2013) (rejecting summary judgment for defendant attorney in malpractice action stemming from having represented both employer and employee in personal injury case; attorney had taken steps detrimental to employee in preparation for testimony. Attorney also received a private admonition from California bar).

Joint Representations Gone Wrong

Even when possible, all clients must consent and consent must be knowing and voluntary and based on a full understanding of facts and possible consequences

Interests of parties can change in sometimes unpredictable ways and situation must be reevaluated

- Initial consent might not be deemed informed or sufficient if circumstances have changed materially. In *Baldwin* and *Yanez*, circumstances were not explained adequately and individuals could not knowingly evaluate the possible adverse consequences.

Participation in JDAs with actual or potential co-defendants can sometimes lead to DQ. See *U.S. v. Vuteff,* No. 22-20306 – CR-*GAYLES Torres* (S.D. Fla. June 27, 2023) (Lawyer's possession of confidential information from non-waiving non-client who will be government witness).

Special Care Required in Representing Employee Witness and Company in Litigation

- In addition to cases of prejudice such as Baldwin and Yanez, courts do not like use of possibility of joint representation as means of keeping lower-level fact witnesses away from adversary
  - *E.g., Smart Insurance* Co. *v. Benecard,* No. 15-CV-4384 (KBF), 2016 WL 3620789 (S.D.N.Y. June 29, 2016) (trial court subsequently vacated penalties against lawyers but had prohibited attorneys from telling witnesses not to talk to adversary's counsel)
  - *Newman v. Highland School District No. 203,* No. 90194-5 (Wash. Oct. 20, 2016) (lawyer for school district purporting to represent former high school football coaches in concussion case)
- Issues compounded by *Rivera v. Lutheran Med. Cent.*, 73 A.D. 3d 891 (N.Y. App. Div. 2010), *affirming* 866 N.Y.S.2d 520 (Sup. Ct. 2008)
  - Prohibiting lawyer for hospital from reaching out to lower level former and current employees en masse to offer representation under solicitation and advertising rules
- See NYCLA Ethics Op. 747 and NY City Bar Op. 2016-2 for steps to avoid the pitfalls
  - *Adkisson v. Jacobs Engineering,* No.: 3:13-CV-505, 2016 WL 6534273 (E.D. Tenn. Nov. 1, 2016) (firm formally admonished by court for not following procedures such as those outlined in above opinions).
- *Compare*, *Big Lots Stores, Inc. v. Super. Ct.*, No. 37-2019-00024738, 2020 BL 452544 (Cal. Ct. App. Nov. 20, 2020), *with Wellons v. PNS Stores, Inc.*, No. 18-CV-2913, 2020 U.S. Dist. Lexis 110030 (S.D. Cal. May 11, 2020).

Some Ground Rules for All Joint Representation Issues

- Spell out what happens if conflict develops — which side, if either, will lawyer then represent
- Client always has the right to terminate and retain and consult with separate counsel
- Spell out privilege and confidentiality risks; information confidential and privileged vis a vis third parties but, absent very specific agreement, not as between parties to joint representation
- Guidance in Comments [29] - [33] to Rule 1.7 and NY State Bar Ops. 823, 903, and 1070
- May consider additional (conflict) counsel for particular issue or aspect of matter
- Similar Issues in real estate, family, estate planning, criminal and other contexts
  - *In re Symkowicz*, 195 A.3d 785 (D.C. 2018) (publicly censuring attorney who relied on mother's POA and failed to obtain informed consent for joint representation of mother and son in estate planning matter).
  - *U.S. v. Assad*, No. 2:18-CR-140 (E.D. Tenn. Nov. 20, 2020) (finding knowing waiver of conflict among criminal defendants represented by same attorney in successive cases; court usefully noted possible use of separate, conflict-free counsel for cross-examination as curative measure).

Thrust Upon Conflicts

- Recognized in some jurisdictions and ethics opinions including especially D.C. A leading ethics opinion is New York City Bar 2005-05 (stressing that doctrine requires future conflict could not reasonably have been forseen).
- *Harbour Antibodies B.V. v. Tenobio, Inc.,* C.V. No. 21-1807 (D. Del. 1807 (MN) (Oct. 3, 2022)
- Firm not DQed from continuing to represent a plaintiff against newly-acquired subsidiary of the Firm's long-time client, Amgen. Arguably Amgen and sub could be considered same client and no conflict waiver letter was directly in point. The court did not find thrust upon conflict because the merger was foreseeable from the time of a public announcement. Nevertheless, the court did not DQ because there was no substantial relationship between matters and those lawyers who represented Amgen on other matters had been screened as soon as merger announced.

How Far Do Client Interests Extend? Affiliates, Competitors, Client Guidelines and Engagement Letters

- An Illustration of the Basic Problem: *Baby Center*. 618 F3d 204 (2d Cir. 2010)
  - Firm did patent work for Johnson & Johnson and thought it could sue an indirect subsidiary on an unrelated matter
  - Engagement Letters with J&J stated that Firm represented "only the client named" in the letter – J&J itself
  - The indirect sub was BabyCenter, which shared corporate infrastructure with J&J (legal, accounting, etc.)
  - Judge Rakoff disqualifies with strong criticism of Firm
  - "We are unpersuaded" by Firm's argument was the 2d Cir.'s more polite way of saying that BabyCenter in fact was "the client" because of "operational commonality" with J&J
  - Two-part test
    - Sharing functions such as HR, IT, treasury
    - Sharing or direct reporting to in-house lawyers
    - *Gartner, Inc. v. HCC Spec. Underwriters, Inc.*, 20-CV-4885 (JGK) (S.D.N.Y. Jan 14, 2022) (though denying DQ despite finding conflict)
    - 100% ownership not enough in itself. *Zappia v. Myovant Sciences Ltd.*, No. 24-253 (2nd Cir. Summary Order Jan. 30, 2025)

Baby Center, L.L.C., 618 F.3d 204: Why the Waiver Did Not Work

- Engagement letters waived specific types of future conflicts, focusing on patent litigation and generic drugs
- Express waivers limited to the described situations
- Catch-all affiliate waiver did not work
- 2d Cir: if the “only the named client” clause permits any and all affiliate adversity, this would raise a “serious ethical problem”
- BabyCenter was very small affiliate with part-time J&J lawyer who reported to J&J GC

Engagement Letters Advice and the Question of Who is the Client (Rule 1.7(b))

- Corporate Affiliates vis a vis parent or other affiliate: See Comment [34] to Rule 1.7 and Comments [34 and 34A-B] in New York Rules for Professional Conduct rule 1.7
- As *BabyCenter* illustrates, advance waivers permissible but do not resolve all issues (Comment [22] to Rule 1.7). For example, waivers often carve out substantially related matters like European waivers rules, and these waivers are strictly enforced. See *X Corp v. Bright Data Ltd., 2024 WL3408220* (N.D. Cal. July 12, 2024).
- Some cases find parent and affiliates one entity and waivers ineffective. Others do not regard all affiliates as part of same client and uphold advance waiver language in letters with sophisticated clients having their own general counsel. *Compare GSI Commerce Solutions, Inc. v. Baby Center, L.L.C.*, 618 F.3d 204 (2d Cir. 2010), *McKesson v. Duane Morris LLP*, No. 2006 CV 12210 (Ga. Super Ct. 2006), and *Celgene Corp. v. KV Pharm. Corp.*, Civil Action No. 07-4819, 2008 WL 2937415 (D.N.J. July 29, 2008) (subsidiaries and parent considered same entity), with *Galderma Labs,. L.P. v. Actavis Mid Atlantic LLC*, 927 F. Supp. 2d 390 (N.D. Tex. 2013) and *Macy's Inc. v. J.C. Penney Corp.*, 968 N.Y.S. 2d 64 (App. Div. 2013)
- Some authority for treating affiliates as vicarious clients and applying the substantial relationship test, much as if they were a former client. E.g., *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981)
- In litigation, waiver sometimes implied from delay in raising conflict. See *State ex rel. Swanson*, 845 N.W. 2d 808; *Robert Bosch Healthcare Systems, Inc., v. Cardiocom, LLC*, No. C-14-1575 EMC, 2014 WL 2703807 (N.D. Cal. June 13, 2014) (two year delay)

How Client Guidelines May Seek to Extend the Ethics Rules and Exacerbate Tensions in Lawyer-Client Relationships

Lawyers may sometimes go too far in seeking conflict waivers or justifying conflict, but current rules can also be exploited by large users of legal services to limit client choice and frustrate competitive, efficient methods of delivering legal services

- Rude surprises for long-time firm clients
- Firms reluctant to represent new clients on small or low bono/pro bono matters absent assurance they won't be conflicted out of future, unrelated matters

Clients have legitimate interests in ensuring confidences are protected and lawyers act with loyalty on matters on which they are retained

But professional responsibility rules already protect these interests

Some client guidelines may seek to go beyond rules in defining clients to include all affiliated entities, even unnamed ones, and in forbidding lawyer from representing any competitor or taking any position contrary to positions client may take or consider taking in other unrelated matters

Development on Client Guidelines

These restrictions can sometimes operate unreasonably, may not be negotiable, and risk interfering with other clients' ability to retain counsel of their choice

In essence, they seem to violate at least the spirit of Rule 5.6(a) in restricting a lawyer's freedom to compete for and offer fully effective service to other clients

D.C. Committee on Professional Conduct a few years ago issued a report recommending that the D.C. Court of Appeals adopt changes to a number of rules in light of the potentially overreaching nature of some client guidelines and their potentially perverse effect on the lawyer-client relationship. These include recommended changes to Rules 1.7 and 5.6 to prevent lawyers from agreeing to and, in the case of client's in house counsel, seeking to impose, provisions far broader than what the actual conflicts rules permit. D.C. Bar Comm. Professional Conduct Review Committee Report to the Board of Governors January 2022).

Development on Client Guidelines

Before the court acted on the DC Bar recommendations, the Bar issued an Opinion 383 raising ethics issues with some aspects of some client guidelines. These include:

- A lawyer being asked to agree to advise client of a request to represent a competitor or party raising an issue of potential concern to the client when confidences of the other client or prospective client (including the need or desire for representation on the issue) might be revealed.
- A lawyer being asked to provide a client audit or access rights to all its information and records which might include confidential information of other clients
- And most relevant to today's discussion, a lawyer being asked to agree in advance to drop another client in the event a conflict that was not reasonably foreseeable arises after an engagement has begun. The opinion warns that under the DC version of Rule 1.7(a) a lawyer is required to withdraw from these "midstream" conflicts only if there is an "adverse effect" on at least one of the clients and the lawyer *may not* withdraw from representation if the withdrawal would have a material adverse effect on the other client. Agreeing to anything else might therefore violate this rule.

Development on Client Guidelines

The DC court recently adopted the DC bar recommendations only in part as follows:

1. Comment [41] to Rule 1.6: Agreements that restrict subsequent use of non-confidential information can raise concerns about the ability of lawyers to represent other clients and "should be viewed with caution."

2. Comment [4] to Rule 5.6: Outside of agreements to work exclusively for a single client for a given period, lawyers should not agree to restrictions on ability to represent other clients that would "interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession."

3. Comment [25] to Rule 1.7: "Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under Rules 1.7 through 1.12 will not expand the scope of those rules."

Recent Case Law Dealing with Guidelines and Engagement Letters

- A magistrate Judge recently enforced broad advance waiver language in law firm engagement letter with major client. *Super Tech, Inc. v The Coca-Cola Company*, No. 6:23-CV-187 CEM-RMN (M.D. Fla. July 17, 2023). The Court found language of engagement letter permitted laterals to maintain a case involving deceptive conduct against Coca-Cola after joining a firm that did unrelated work for the company and was not superseded by the company's counsel guidelines. The Court engaged in extensive choice of law analysis and rejected application of Georgia law.
- *Dr. Falk Pharma GMBH v. Generico,* no. 17-2313 (Fed. Cir. 2019), applying NY ethics rules, read *Baby Center*, and client guideline language on affiliates broadly and DQed law firm in patent infringement case.
- *IBM Corp. v. Micro Focus (US), Inc.*, No. 22 CV9910 (VB) (S.D.N.Y. May 30, 2023). Not a parent-affiliate issue but court found a concurrent client conflict waived by broad language in firm's engagement letter executed by a sophisticated client. Court applied Delaware rules which in turn looked to NY as the forum state and found the conflict consentable. The court noted the absence of a substantial relationship and that the firm had promptly erected an ethical screen – and indeed had previously told the party that it could not discuss the matter because of the conflicts. Accord, *Masino Corporation v. Kiani et al*, No. 2:25-CV-03188-JVS-JDF (C.D. Cal. Sept. 24, 2025, minutes order)

Some Closing Observations

- Rules and agreements with clients should be concerned with real disloyalty and breaches of confidences, not trivial adversities or unlikely possibilities
- Loyalty is an important value but it should be reciprocal
- One client's choice of counsel for limited matters should not preempt other clients' choices for other matters or intrude on attorney's relationships with those clients.
- More professional approach by both law firms and in-house counsel