

**SELECTED ETHICS AND PROFESSIONALISM  
ISSUES FOR  
LABOR AND EMPLOYMENT LAWYERS**

**DENNIS P. DUFFY, ESQ.**

**2020**

## TABLE OF CONTENTS

<b>I.</b>	<b>CONFLICTS OF INTEREST .....</b>	<b>1</b>
A.	Simultaneous Representation of Potentially Adverse Clients.....	1
B.	Prospective Waiver of Conflicts of Interests. ....	5
C.	Conflict of Interest Concerning Attorney’s Personal Interests. ....	7
D.	Imputed Disqualification. ....	8
	1. Lawyer Changing Firms. ....	9
	2. Ethical Screening. ....	9
	3. Paralegals, Secretaries, and Other Non-Attorneys.....	13
E.	Accepting Fees from Sources Other than the Client.....	15
F.	Conflicts Involving Insurance.....	15
G.	Conflicts Regarding Former Clients. ....	20
	1. Former Employer Representatives as Plaintiffs.....	23
	2. Former Counsel for Employer Bringing Claims on Behalf of Plaintiffs. ....	27
	3. Former In-House Counsel Bringing Personal Claims Against the Employer.....	28
H.	Conflicts Arising From “Beauty Contests” and Other Pre-Retention Contacts.....	31
<b>II.</b>	<b>THE LAWYER AS WITNESS.....</b>	<b>37</b>
<b>III.</b>	<b>ISSUES INVOLVING CORPORATE/GOVERNMENTAL PARTIES .....</b>	<b>39</b>
A.	Attorney-Client Privilege.....	39
	1. The Tests for Determining Corporate “Client Confidences.”.....	39
	2. Waiver of the Privilege. ....	51
	3. Attorney-Client Privilege and Former Employees of the Organization. ....	82
B.	Ex Parte Communications With An Organization’s Employees. ....	83
	1. Current v. Former Employees.....	86
	2. Putative Class Members.....	92
	3. Party’s Physicians and Other Agents.....	93
	4. Ex Parte Contact by an Investigator or other Agent of the Attorney.....	94
	5. Client Communications With a Represented Party. ....	95
	6. Law or Rule Exception. ....	97
	7. Communicating With Unrepresented Persons. ....	102
<b>IV.</b>	<b>SPECIAL ISSUES REGARDING IN-HOUSE COUNSEL .....</b>	<b>104</b>
A.	Identifying the Corporate/Organizational “Client.”.....	104
B.	Responses to Unlawful Activity. ....	107
<b>V.</b>	<b>INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION OF CONFIDENTIAL INFORMATION OF THE OPPOSING PARTY .....</b>	<b>110</b>
A.	Tape Recording of Parties and Witnesses.....	110
B.	Inadvertent Disclosure and Improper Acquisition of Privileged Information .....	111
	1. Ethical Obligations of Recipient of Inadvertently Disclosed Documents. ....	112
	2. Improper Acquisition and Inspection of Information. ....	116
	3. Employee Communications Using Employer Computer Resources. ....	120
	4. Cellular and Cordless Telephones/Electronic Mail and Computer Communications. ....	123
	5. Examination of “Metadata” That Reveal Client Confidences. ....	125
C.	Lawyer Participation in Deception by Undercover Investigators and Testers.....	126
<b>VI.</b>	<b>ETHICAL OBLIGATIONS IN SETTLEMENT NEGOTIATIONS .....</b>	<b>128</b>

A.	Conditioning Settlement on Waiver of Attorneys’ Fees.....	128
B.	Settlements Affecting the Interests of Multiple Clients.....	128
C.	Settlements Limiting Attorney from Bringing Claims Against the Same Defendant.....	130
D.	Confidentiality Clauses.....	130
E.	Agreements Not to Report to Law Enforcement Authorities. ....	133
F.	Settlement-Related Misconduct. ....	133
G.	Duty of Candor and “Puffing” in Settlement Negotiations.....	134
<b>VII.</b>	<b>LAWYER PROFESSIONALISM ISSUES .....</b>	<b>135</b>

## I. CONFLICTS OF INTEREST

A lawyer owes his or her client a duty of zealous representation and loyalty, which may present problems when the client's interests are adverse or potentially adverse to those of the lawyer's present, former or prospective clients.<sup>1</sup>

### A. Simultaneous Representation of Potentially Adverse Clients.

There is no per se prohibition against representing multiple parties in litigation, and the propriety of such representation requires a case-by-case analysis.<sup>2</sup> After full disclosure of the inherent risks of simultaneous representation, clients may consent to such representation. If, however, an actual conflict materializes, the attorney may be precluded from representing either side.<sup>3</sup> Multiple representation issues frequently arise in cases involving the potential joint representation of a corporate employer and an employee whose alleged conduct against the plaintiff employee forms the basis for the lawsuit. In most cases, if the corporation acknowledges that the employee was acting within the scope of his duties, no conflict exists and multiple representation is appropriate.<sup>4</sup> Similar conflict issues may arise when the lawyer is asked to

---

<sup>1</sup> See ABA MODEL RULES OF PROF'L CONDUCT 1.7 [hereafter ABA MODEL RULES] (absent informed consent, a lawyer shall not represent a client if the representation of that client will be directly adverse to another client or there is a significant risk that the representation of one or more clients will be materially limited by the lawyers' responsibilities to another client, a former client or a third person or by a personal interest of the lawyer). *Accord*: ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 [hereafter ABA MODEL CODE].

<sup>2</sup> See, e.g., *Chavez v. New Mexico*, 397 F.3d 826 (10th Cir. 2005) (district court did not abuse its discretion by refusing to disqualify defendants' attorney for potential conflicts resulting from the fact that one defense attorney represented both the agency and the multiple individual defendants in their individual and official capacities in employment discrimination action); Ill. Ethics Op. 12-12 (2012) (A lawyer may not continue to represent a school district against which the lawyer's partner has initiated an adverse proceeding. However, the school board may give informed consent to the lawyer's continued representation in unrelated matters if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation despite the conflict of interest.); Ohio Ethics Op. 2019-1 (2019) (Absent informed consent, a lawyer may not undertake representation of an adverse party in an unrelated matter when the lawyer represents current clients with claims pending against the adverse party. A lawyer may not withdraw from the representation of a current client in order to undertake representation of an adverse party, even if the matters are unrelated. Absent informed consent, a lawyer may not represent a former adverse party in a new matter against a former client if the new matter is the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. A lawyer who is unable to undertake representation of a prospective client due to a conflict may recommend another lawyer or list of lawyers, so long as the lawyer does so in good faith); N.Y.C. Ethics Op. 2019-4 (2019) (A lawyer serving in the role as "pool counsel" (i.e., where the corporation offers to compensate a single lawyer (or law firm) to represent a pool of multiple employees (or several law firms to each represent different pools of employees)) may concurrently represent multiple individuals in connection with a governmental investigation or corporate internal investigation, subject to the rules governing conflicts of interest and confidentiality. Among other things, the lawyer/firm should obtain informed consent for actual/potential conflicts that may arise. Before interviewing a prospective client in the "pool," counsel must secure the individual's informed consent to allow disclosure of the individual's confidential information to others and use of the information with respect to representation of others in the pool). *Cf. Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015) (Law firm's prior representation of two shareholders and officers of corporation in litigation brought against them by the corporation while at the same time advising the corporation's board of directors regarding other litigation did not create an actual conflict of interest requiring disqualification of law firm from representing several shareholders and officers, including the two former clients, in shareholder derivative suit; it was not clear that law firm represented the corporation when it advised the board about the other litigation, and any actual conflict extended only to that other litigation, and not to the subsequent derivative suit).

<sup>3</sup> See *In re Vaile*, 707 P.2d 52, 55 (Ore. 1985); *Marguiles v. Upchurch*, 696 P.2d 1195, 1204 (Utah 1985).

<sup>4</sup> See *Madison Cty. v. Hopkins*, 857 So.2d 43 (Miss. 2003) (no conflict of interest for lawyers representing

represent its corporate client and a corporate affiliate that may have potentially divergent interests.<sup>5</sup> Simultaneous representation issues may also arise where a government official is being sued in her official and individual capacities because in most cases the official's "employer" controls the litigation regarding the "official" capacity, and the government official has a separate (and potentially conflicting) interest regarding her "personal" exposure in the litigation.<sup>6</sup> Similar conflict issues may arise when a lawyer represents multiple plaintiffs since advancing the claim of one plaintiff might necessarily undermine or diminish the claim of the others.<sup>7</sup> A lawyer may represent multiple clients in a single matter if the lawyer reasonably believes he/she can competently and diligently represent each client, the representation does not involve assertion of claims by one client against another, and each client gives informed consent, confirmed in writing.<sup>8</sup> Such informed consent should explain the nature of the potential conflict

---

county and sheriff in his official capacity in FLSA suit against county and sued sheriff in his individual capacity seeking indemnification, and thus sheriff was not entitled to partial reimbursement for cost of retaining separate counsel to represent him, where sheriff, in his official capacity, had no stake in the outcome of the FLSA litigation).

<sup>5</sup> See N.Y.C. Ethics Op. 2007-3 (2007) (when law firm is approached to represent a client adversely to a corporate affiliate of a current corporate client, the firm should first determine whether its engagement letter with the current corporate client excludes affiliates as entities that the firm also represents, or whether the engagement letter contains an applicable advance conflicts waiver from the current corporate client; if not, the firm must determine whether there is a corporate-family conflict by considering whether (1) the circumstances of the firm's dealings with the affiliate during the firm's representation of the corporate client give rise to an objectively reasonable belief on the part of the affiliate that the law firm represented it, (2) there is a risk that the firm's representation of either client would be materially limited by the potential engagement, and (3) during the current representation the firm learned confidences and secrets from either the current client or the affiliate that would be so material to the adverse representation as to preclude the firm from proceeding; if any of the conditions exist, the firm must seek informed consent before accepting the engagement; firms may seek to avoid corporate-family conflicts by defining the scope of the engagement in advance and by employing advance waivers when appropriate); Ohio Ethics Op. 2008-2 (2008) (lawyer who sits on the board of directors of a corporation but not as corporate counsel has a material limitation conflict of interest prohibiting the lawyer from representing a client in a lawsuit against the corporation.). See *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, 916 F.3d 975 (Fed. Cir. 2019) (Due to shared high degree of operational commonality and financial interdependence between patentee and its affiliates, law firm's appellate representation of generic drug manufacturer in patentee's infringement action against manufacturer presented concurrent conflicts of interest as result of attorneys joining law firm after previously having represented patentee's affiliate, requiring disqualification due to corporate affiliate conflict; affiliates had common infrastructure whereby one provided administrative and general support services to other, including accounting, cash management, employee benefits, finance, human resources, travel, computer systems, insurance, and payroll services, they shared same in-house legal department, and one affiliate contributed over \$1 billion to other affiliate's reported revenues).

<sup>6</sup> See R.I. Ethics Op. 2007-08 (2008) (multiple representation of agency employee in an employment matter against the agency and corporate client seeking license from the same agency does not constitute a conflict of interest); Ill. Ethics Op. 01-07 (2002) (two lawyers in same firm may continue to simultaneously represent two government agencies where agencies' interests potentially conflict but there is no current direct adversity).

<sup>7</sup> See D.C. Ethics Op. 248 (1997) (involving attorney representation of joint plaintiffs denied same position in discrimination case); Vt. Ethics Op. 2006-5 (2006) (A lawyer may represent a former manager and a former employee in separate actions against the company that employed both, but if the former manager is later called as a witness by the company to testify against the former employee, such circumstance may require the lawyer to withdraw from further representation of one or both clients depending on the circumstances existing at the time and whether each client consents to the lawyer's continued representation of both clients.).

<sup>8</sup> See D.C. Ethics Op. 140 (1984) (joint representation of potentially adverse interests permitted if: (a) the co-parties agree to a single comprehensive statement of facts describing the occurrence; (b) the attorney reviews the statement of facts from the perspective of each of the parties and determines that it does not support a claim by one against the other; (c) the attorney determines that no additional facts are known by each party which might give rise to an independent basis of liability against the other or against themselves by the other; (d) the attorney advises each party as to the possible theories of recovery or defense which may be foregoing through this joint representation

Also available as part of the eCourse

[2020 Labor and Employment Law eConference](#)

First appeared as part of the conference materials for the  
27<sup>th</sup> Annual Labor and Employment Law Conference session  
"Ethics for Employment Attorneys - 2020"