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CONFLICTS OF INTEREST

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CONFLICTS OF INTEREST[1]

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.[2]

I. Adverse Representation Against a Current Client.

Absent waiver, if an attorney represents multiple parties in litigation and facts develop indicating that one of the parties has a cause of action against another party, the attorney may have to withdraw from representing both clients.[3] This may be true even where the two representations involve completely distinct and unrelated claims.[4] The prohibition encompasses all types of representation,[5] and does not depend on the relative importance of the lawyer's representation.[6]

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[1] This paper is excepted from ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS (29th Ed. 2025) (D. Duffy, Editor in Chief), with permission of the Author.

[2] *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].

[3] *See* Tex. Disciplinary R. Prof'l Conduct ("Tex. DRPC") 1.06; N.Y. Ethics Op. 1224 (2021) (when a lawyer is jointly representing two clients as joint purchasers in a transaction and one of them no longer wishes to proceed, the lawyer cannot continue to represent both clients without violating Rule 1.7). *Cf.* N.Y. Ethics Op. 1130 (2017) (nonconsentable conflict exists when one member of a law firm acts as Town Attorney on planning and zoning matters while another lawyer in same law firm seeks to represent an applicant before the Town's planning board.); N.Y.C. Ethics Op. 2024-1 (2024) (representing two or more bidders competing for the same asset will generally create a conflict of interests; for law firms, the conflicts may be waivable particularly where separate teams of lawyers represent the different bidders and appropriate information walls prevent the sharing of the respective bidders' confidential information. Lawyer firms may be able to obtain advance consent from clients to certain defined conflicts arising from the representation of multiple bidders competing for the same asset).

[4] ABA MODEL RULE 1.7 cmt.6. *See* N.J. Ethics Op. 679 (1995) (no per se ban on representing in a matter an attorney-adversary in an unrelated contract case for non-public entity clients, where the attorney reasonably believes representation will not be adversely affected, both clients consent after full disclosure and consultation).

[5] *See* N.C. 2019 Formal Ethics Op. 1 (2019) (lawyer may not jointly represent opposing clients in divorce case and prepare a separation agreement); *Disciplinary Bd. v. Stoller*, 879 N.W.2d 199 (Iowa 2016) (Attorney violated conflict of interest rules by representing new client in lawsuit, while knowing that lawsuit would eventually become adverse to existing client, who was in process of selling farm property to new client, and who attorney was representing in small claims matter, without obtaining written informed consent from either party); *Bryan Corp. v. Abrano*, 52 N.E.3d 95 (Mass. 2016) (Firm's defense of corporation in action for unpaid fees and representation of shareholder regarding corporation's alleged violation of Wage Act were directly adverse and thus violated prohibition against simultaneous representation of directly adverse clients; firm should have known when it agreed to represent shareholder that his interests were adverse to, or were likely to become adverse to, those of corporation, and it was apparent that firm was aware of potential for conflict, as it advised that changes in board's structure could have resulted in conflict of interest that would require it to withdraw from representing shareholder and company).

[6] *See In re Johnson*, 84 P.3d 637 (Mont. 2004) (attorney publicly censured for representing directly adverse clients without their consent, where he agreed to represent a wrongful death plaintiff and continued to represent her after he and his firm determined that one of its corporate clients was a potentially responsible party and the firm continued to represent the corporate client on other matters, and later improperly terminated the corporate client); *Picker Int'l, Inc. v. Varian Assocs., Inc*., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) ("A law firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."). *Cf.* D.C. Ethics Op. 380 (2021) (examining various conflict of interest issues related to: (i) issuing subpoenas to current or former clients; (ii) advising current or

Title search: Conflicts of Interest

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