

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

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## 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>2</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>3</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>4</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 certain situations, the corporate employer, to avoid responsibility, must show that the employee in question was acting outside the scope of his official responsibilities. The employee, on the other hand, has an interest in establishing that he acted within the scope of his duties, especially where such a finding would entitle him to indemnity

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<sup>1</sup> This outline is derived from Dennis P. Duffy, ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS (17<sup>th</sup> Ed. 2018), with permission. © 2018 NELI and Dennis P. Duffy.

<sup>2</sup> See ABA MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003) [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); ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 [hereafter ABA MODEL CODE] (absent informed consent a lawyer shall decline proffered employment or continue multiple employment if the exercise of the lawyer's independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment or continuance of multiple employment, or if it would be likely to involve the lawyer in representing different interests).

<sup>3</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 of interests 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); *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 146 (4th Cir. 1992) (law firm for a union that is attempting to become bargaining representative for employees may also represent employees in suit against employer); 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.). 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); *Maling v. Finnegan, Henderson, Farrow, Garrett & Dunner, LLP*, 42 N.E.3d 199 (Mass. 2015) (simultaneous representation by a law firm in the prosecution of patents for two clients competing in the same technology area for similar inventions is not a per se violation of the Rules of Professional Conduct).

<sup>4</sup> See *In re Vaile*, 707 P.2d 52, 55 (Ore. 1985); *Marguiles v. Upchurch*, 696 P.2d 1195, 1204 (Utah 1985) (optional withdrawal from the client of attorney's choice would not cure the conflict of interest).

from the corporate employer. 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>5</sup> Similar conflict issues may arise when the lawyer is asked to represent its corporate client and a corporate affiliate that may have potentially divergent interests.<sup>6</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>7</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>8</sup>

Representation of multiple clients in a single matter is permissible 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>9</sup> Such informed consent should explain the nature of the potential conflict

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<sup>5</sup> See *Madison Cty. v. Hopkins*, 857 So.2d 43 (Miss. 2003) (no conflict of interest for lawyers representing 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>6</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.).

<sup>7</sup> See *Johnson v. Board of Cty. Comm'rs*, 85 F.3d 489 (10th Cir. 1996) (attorney violated ethics rules by representing sheriff in official capacity only without informed consent of sheriff as an individual); R.I. Ethics Op. 2007-08 (2008) (multiple representation of terminated agency employee in an employment matter against the agency and corporate client seeking a 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 between the parties).

<sup>8</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>9</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 based on the disclosed facts; (e) each party agrees to forego any claim or defense against the other based on the facts known

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