

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

**DENNIS P. DUFFY, ESQ.
BAKERHOSTETLER
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TABLE OF CONTENTS

Selected Ethics and Professionalism Issues for Labor and Employment Lawyers 1

I. CONFLICTS OF INTEREST 1

A. Simultaneous Representation of Potentially Adverse Clients..... 1

B. Prospective Waiver of Conflicts of Interests 4

C. Taking Opposing Stances on an Issue—Positional Conflicts..... 5

D. Conflict of Interest Concerning Attorney’s Own Interests..... 6

E. Accepting Fees From Sources Other than the Client 6

F. Conflicts Involving Insurance..... 7

G. Conflicts Regarding Former Clients 10

II. ISSUES INVOLVING CORPORATE/GOVERNMENTAL PARTIES 13

A. Attorney-Client Privilege 13

B. Ex Parte Communications With Organizational Employees..... 49

**III. INADVERTENT DISCLOSURE AND IMPROPER ACQUISITION
OF CONFIDENTIAL INFORMATION OF THE OPPOSING
PARTY 68**

**A. Ethical Obligations of Recipient of Inadvertently Disclosed
Documents 68**

**B. Surreptitious/Improper Acquisition and Inspection of
Information..... 72**

**C. Using Employer Computer Resources for Confidential
Communications 76**

Selected Ethics and Professionalism Issues for Labor and Employment Lawyers¹

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.²

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.³ 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; otherwise, the attorney would elect one client to the detriment of the other.⁴ 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 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.⁵ Similar conflict issues may arise when the lawyer is asked to represent its corporate

¹ This paper is adapted from Dennis P. Duffy, ETHICS AND PROFESSIONALISM HANDBOOK FOR LABOR AND EMPLOYMENT LAWYERS (15th Ed. 2017) and is reprinted with permission of the author.

² 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).

³ 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).

⁴ See *In re Conduct of 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).

⁵ 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).

client and a corporate affiliate that may have potentially divergent interests.⁶ 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.⁷ 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.⁸

Representation of multiple clients in a single matter is generally permissible so long as 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.⁹ Such informed consent should explain the nature of the potential conflict and describe advantages and disadvantages of common representation in sufficient detail so that each client can understand why separate counsel may be desirable.¹⁰ In

⁶ See N.Y.C. Ethics Op. No. 2007-3 (2007) (when a 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).

⁷ See *Johnson v. Board of Cty. Comm'rs*, 85 F.3d 489 (10th Cir. 1996) (attorney violated Colorado ethics rules by representing sheriff in official capacity only without informed consent of sheriff as an individual).

⁸ See D.C. Ethics Op. No. 248 (1997) (involving attorney representation of joint plaintiffs denied same position in discrimination case); Vt. Ethics Op. No. 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.).

⁹ See, e.g., D.C. Ethics Op. No. 140 (1984) (joint representation of potentially adverse interests permissible 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 by each at the time; (f) each party agrees that the attorney is free to disclose to the other party, at the attorney's discretion, all facts obtained by the attorney; (g) the attorney outlines potential pitfalls in multiple representation, and advises each party of the opportunity to seek the opinion of independent counsel as to the advisability of the proposed multiple representation; (h) each either consults separate counsel or advises that no separate consideration is desired; (i) each party acknowledges that the facts not mentioned now but later discovered may reveal differing interests, which, if they do not compromise these differences, may require the attorney to withdraw from the representation of both without injuring either; and (j) each party agrees that the attorney may represent both in the litigation).

¹⁰ See ABA Formal Ethics Op. No. 2008-450 (2008) (Absent informed consent, lawyer representing two clients in a matter and learns key information potentially damaging to one of the clients generally may not disclose the harmful secrets to the other one and may need to withdraw from representing one or both clients; at the outset of

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