

Superhuman Ethics: The Ethics of Industry and Issue Lawyering

Conflict Issues¹

When a lawyer is engaged to represent a group, coalition, consortium, or other unincorporated association without an independent legal existence, the lawyer must manage conflict issues from two primary perspectives. First, the lawyer must anticipate and address the potential for diverging interests and disagreements between and among the members of the client group. Second, the lawyer must address conflicts that may arise with respect to third parties whose interests may be adverse to the group (or potentially its members) or otherwise materially limit the lawyer's representation of the group (or potentially its members).

Identifying and managing conflicts starts with knowing to which entities and at what level you owe fiduciary duties and duties under the professional rules, including the duty to avoid conflicts of interest. At the simplest level, if a lawyer represents the group and not the individual members, the lawyer must avoid conflicts vis-à-vis the group acting through its duly authorized constituents. Rule² 1.13. If the lawyer represents the aggregate of members, the lawyer must analyze and address conflicts both between and among the members themselves as to the group's positions and courses of action as well as vis-à-vis third parties.

- **Summary of Most Pertinent Rules:**

- **1.7:** "Current client" conflict rule prohibits representation (i) of one client directly adverse to another or (ii) when there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person, or by the lawyer's personal interest.
- **1.7 (D.C.):³** In "thrust upon" situations, the lawyer does not need to withdraw unless the representation will be adversely affected by representation of another client, representation of another client will be adversely affected by such

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² References to "Rule" means the ABA Rules of Professional Conduct unless otherwise noted.

³ D.C. is the only jurisdiction to expressly address thrust upon conflicts in its ethics rules.

representation, or the lawyer's professional judgment may be adversely affected.

- **1.9:** "Past client" conflict rule prohibits representation of client with interests materially adverse to the interests of a former client relative to a substantially related matter.
- **1.16(b):** Allows lawyer to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.
- **Between and Among Issues**

If the group has established clear decision-makers and a process for making decisions to which all members have agreed, the lawyer should not have conflict issues between and among the members just because the members may disagree with each other on the group's positions or course of action. The conflict-resolving process is built in.

Absent authorized decision-makers and a process for making decisions, group member disagreements on a position or course of action may give rise to a conflict issue that could stymie the lawyer's ability to take action for the group. This situation can be analogized to corporate governance disputes within a corporation and threaten the view that the lawyer's client is the "group." The lawyer's role may be to advise what the group's organizational documents say or do not say about how to get a decision, but if there is disagreement even as to that question, the lawyer may be sidelined from action for the group while members or factions within the group resolve the governance battle using counsel other than the group's lawyer if the lawyer wishes to maintain the position that the group is the client and not individual members or factions within the group.

When a lawyer instead represents the aggregate of individual members in a common representation, the emergence of conflict over the position or course of action may be more problematic than in the "group" representation scenario. Rule 1.7, comment 29, warns about the potential for diverging interests in that scenario:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the

lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

When the lawyer represents the “group” and not the members in their respective individual capacity, the lawyer should be able to represent the group or other clients against current or past members if the lawyer can do so without material limitations arising from responsibilities to another client, a former client or a third person or by a personal interest of the lawyer responsibilities to another client. Rule 1.7(a)(2). The most likely limitation would arise from a duty to keep information confidential, though whether that duty is owed only as to the group or to current or former group members individually may depend on what information was shared and the terms that govern the information sharing. As highlighted below, the group has the ability to address the terms for information use and sharing in its organizational documents or the lawyer may do so through an engagement letter or common interest agreement.

When the lawyer represents the aggregate of members, the duty to avoid conflicts attaches to each of the members. Rules 1.7 and 1.13. By default and under the rules of states that follow the ABA Model Rule approach on conflicts, that means the lawyer must avoid representing the group or other clients directly adverse to group members whether the issues are related or unrelated to the representation of the group or individual members. This significantly broadens the scope of the lawyer’s obligation to avoid conflicts because it multiplies the number of clients, increasing the chances that other clients’ interests may intersect with those of the members on a broad set of issues. Only when a member ceases to be a client does the conflicts analysis shift to the standard based on relatedness under Rule 1.9.

A lawyer representing a group on industry affecting or other specific issues has several ways to manage conflict issues.

	Group Representation	Aggregate of Members Representation
<ul style="list-style-type: none"> • Manage client identity issues⁴ 	Whether representing the “group” or the “aggregate” of members in a common representation, the group’s organizational documents or the lawyer’s engagement letter should identify who makes decisions for the group and how those decisions must be made.	
<ul style="list-style-type: none"> • Have the group adopt membership criteria 	Group organizational documents that specify attributes that a member must have or criteria for admission to the group will reduce (not eliminate) likelihood for divergence of opinion on position or course of action for the group.	In the “aggregate” of members representation, the lawyer will need consent of each member to the risks and benefits of the common representation. The lawyer will need to discuss the potential for conflict issues and how those issues will be resolved (including potential for need to withdraw from the common representation). This will practically allow for a case-by-case “screening” of members of the group, including an assessment of the likelihood of conflict issues.
<ul style="list-style-type: none"> • Carefully define scope of work 	Representation with a long-lived group will likely have a broader scope, but conflict issues can be better managed if lawyer identify categories of work (e.g., monitor specific rule-making or proposed legislation; prepare white papers on topics as directed, file amicus brief, etc.) and carve out what the lawyer will not do (e.g., will not represent members against each other in disputes over who makes decisions and how).	

⁴ See *Superhuman Ethics: The Ethics of Industry and Issue Lawyering: Who Is the Client and How Are Decisions Made?*

	Group Representation	Aggregate of Members Representation
<ul style="list-style-type: none"> Document how information will or will not be shared 	Whether representing the “group” or the “aggregate” of members in a common representation, the group’s organizational documents or the lawyer’s engagement letter should identify what information will be collected, with whom and how it will be shared or not shared, and the recipients’ respective duty to protect or rights to use shared information.	
	If the group is the client, the duty of confidentiality is owed to the group, which is also the privilege owner. However the establishment and protection of privilege will tie back to the duly authorized constituents acting in their capacity for the group as an aspect of the “in confidence” element of the privilege.	If the client is the aggregate of members, the duty of confidentiality is owed to each member, and the lawyer may not keep secrets of one from the other if material to the representation.
<ul style="list-style-type: none"> Have the group adopt terms that govern a member’s exit 	Whether representing the “group” or the “aggregate” of members in a common representation, the group’s organizational documents or the lawyer’s engagement letter should identify when and how a member exits the group (e.g., notice, non-payment, vote to remove, etc.); obligations of the group and the exiting member to return or protect information; rights to use information by the group and the exiting member; termination of the attorney-client relationship.	
<ul style="list-style-type: none"> Document consents to continued representation of the group or a member. 	If representing the group only, the lawyer should be able to continue representing the group notwithstanding the exit of a member, particularly if the lawyer and group have documented consents to the handling of confidential and privileged information.	If representing the “aggregate” of members, the lawyer should be able to continue representing non-exiting members but only if that representation is not materially adverse to the exiting member on substantially related matters. If the member exits the group due to a divergence of interests, the lawyer will need consent to continue representing the non-exiting members.

- **Conflicts with “Others”**

A lawyer faces a conflict of interest for which consent of the affected clients is needed if: the lawyer’s representation will be (a) “directly adverse” to another client or (b) materially limited by responsibilities to another client, a third person, or the lawyer’s own interests. If, notwithstanding the conflict of interest, the lawyer reasonably believes that there will not be an adverse effect on either the relationship or the representation, the lawyer may seek client consent to proceed in the face of the conflict. Consent must be “informed” and generally requires confirmation in writing.

1. *Recognizing Adversity*

Rule 1.7 defines conflicts of interest relative to current clients. Rule 1.7 defines two categories of conflicts: (a) representation “directly adverse” to another client and (b) representation materially limited by responsibilities to another client, a third person, or the lawyer’s own interests. The rule generally prohibits representation in both categories, although the attorney may, nonetheless, undertake representation in the face of a conflict if:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- the representation is not prohibited by law;
- the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- each affected client gives informed consent, confirmed in writing

It should be noted that under this exception, “informed client” consent alone will not be sufficient. There are some nonconsentable conflicts either because they are expressly identified or because the lawyer should not reasonably seek consent. *See* Comments 14-15 to Rule 1.7.

There is minimal elaboration in the commentary to Rule 1.7 on the distinction between direct adversity and representation materially limited by responsibilities to another client. *See* comments 6-8 to Rule 1.7. With respect to direct adversity, comment 6 focuses more on a litigation context, generally noting that clients whose interests “are only economically adverse” in unrelated matters is not ordinarily an ethical conflict. Comment 7 salutes “business negotiations” as a form of direct adversity as well. As to “material limitations,” comment 8 focuses on the “significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.”

Although the D.C. Rules of Professional Responsibility are different than Model or Virginia Rule 1.7, an opinion of the D.C. bar sets out five factors to consider in deciding whether an “adverse effect” will result from representation:

(1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either her representations or to be less aggressive on one client's behalf because of the other representation. In sum, we believe that the focus of analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients.

D.C. Bar Opinion 265 (Apr. 17, 1996). The ABA Standing Committee on Ethics and Professional Responsibility stated similarly that in determining whether or not representations of one client in one matter may be "materially undercut" by the lawyer's responsibilities to another client in another matter, the lawyer should consider, among other things, "(a) Is the issue one of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases? [and] (b) Is the determination of the issue in one case likely to have a significant impact on the determination of that issue in the other case?" ABA Formal Opinion 93-377 (Oct. 16, 1993).

As Comment 1 to Rule 1.7 makes clear, the heart of the matter is the lawyer's duty of loyalty to a client and ability to exercise independent judgment. No parsing of the rules or commentary should overlook the paramount importance of the duty of loyalty and need for independence. Conflicts of interest under Rule 1.7, moreover, pose risk to the lawyer's ability to preserve client confidences. A lawyer evaluating whether to pursue consent to a conflict under Rule 1.7(a) or (b) should do so with full focus on loyalty, independence of professional judgment, and confidentiality. A lawyer practicing in association with others also must realize that the inquiry must be conducted at the law firm, not the individual, level as a result of Rule 1.10's "imputed disqualification" rule.

2. *Getting Consents*

If consent is required, Rule 1.7(b)(4) specifies "informed consent" that must be "confirmed in writing."

As to the "informed" aspect of consent, Rule 1.0(e) and comment 18 to Rule 1.7 explains that to get informed consent the lawyer must communicate adequate information about the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. When representing multiple clients in a common representation, such as an industry or issue group, comment 18 makes clear that the "information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Accord, Restatement § 202 (lawyer must present the client with adequate information regarding the material risks of representation to the client.).

As to the “writing,” Rule 1.0(b) and comment 20 to Rule 1.7 make clear that it can be a document either from the client or one transmitted to the client if done promptly to confirm an oral consent. The writing can be a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications.

The informed consent, confirmed in writing, must manifest consent. The RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS (“Restatement”) states that the client must affirmatively consent to representation when the lawyer has a conflict of interest:

The requirement of consent generally requires an affirmative response by each client. Ambiguities in a client’s purported expression of consent should be construed against the lawyer seeking the protection of the consent. In general, a lawyer may not assume consent from a client’s silent acquiescence.⁵

One court has defined consent as the “‘client’s uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question.’”⁶ It is also the lawyer’s burden to prove that the client has consented before accepting representation.⁷

As with every other general rule in the law, there are exceptions. The Restatement points out:

Consent may be inferred from active participation by a client who has reasonably adequate information about the material risks of the representation after a lawyer’s request for consent.⁸

In some circumstances, when faced with motions to disqualify counsel, courts will infer consent or find that the client has waived, if there is an “inordinate and inadequately explained delay”⁹ Applying this exception to the general rule depends upon the particular facts of each case.

In *Brown & Williamson Tobacco Corp. v. Pataki*,¹⁰ the United States District Court for the Southern District of New York held that when the State of New York waited two months to

⁵ RESTATEMENT OF THE LAW (THIRD) THE LAW GOVERNING LAWYERS § 122, cmt. c.

⁶ *Griva*, 637 A. 2d at 845 (quoting D.C. App. R.X., app. A, Terminology at 1531 (1993)).

⁷ See, e.g., *In re Hansen*, 586 P. 2d 413, 415 (Utah 1978) (the lawyer represented a plaintiff in a civil suit and at the same time defended the defendant of the civil suit in a criminal action).

⁸ *Restatement*. § 122, cmt. c.

⁹ *British Airways, PLC v. Port Authority of New York and New Jersey*, 862 F. Supp. 889, 901 (E.D.N.Y. 1994); see also *Forrest v. Baeza*, 58 Cal. App. 4th 65, 77-78, 67 Cal. Rptr. 2d 857, 865 (Cal. Ct. App. 1997); *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F. 2d 85, 87-88 (9th Cir. 1983) (the objection was deemed waived when the objecting party waited two and a half years before seeking disqualification); *River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1311, 234 Cal. Rptr. 33 (Cal. Ct. App. 1987) (motion to disqualify denied when the former client claimed that plaintiffs’ attorney represented him 27-30 years before, waited more than three years to raise the motion in the current litigation, and waited until plaintiffs’ counsel amassed over 3,000 hours on the case).

¹⁰ 152 F. Supp. 2d 276 (S.D.N.Y. 2001).

disqualify counsel for Brown & Williamson, this delay was a factor in the court's denial of the State's disqualification motion.¹¹ The law firm representing Brown & Williamson, Covington & Burley, also represented the State of New York on several unrelated matters. Brown & Williamson hired Covington & Burley to represent it in a lawsuit it filed against New York State. During the course of Covington & Burley's representation of the State in those other matters, it had informed the State that it also represented the Tobacco Institute but the State never raised any objection. In the present lawsuit against New York State, the court established an expedited trial schedule at the State's request. Two months after Brown & Williamson filed its lawsuit, and after the court granted the State's request for an expedited schedule, the State sought to disqualify Covington & Burley because the firm had a conflict of interest. Because Brown & Williamson would be prejudiced by the disqualification, the Court considered the delay factor in denying the State's motion.¹²

Other courts have dismissed motions for disqualification solely on the basis of a waiver caused by delay. In *Alexander v. Primerica Holdings*,¹³ plaintiff, the party moving for disqualification, moved to disqualify defense counsel three years after the complaint was filed. The court dismissed plaintiff's motion for disqualification for undue delay.¹⁴ In *Commonwealth Ins. Co. v. Graphix Hot Line, Inc.*,¹⁵ the court dismissed the disqualification motion because it was brought two-years after the action was filed.¹⁶ In another waiver/delay case, *Piper Aircraft*, the United States Court of Appeals for the Ninth Circuit ruled that a two and a half year delay constituted a waiver.¹⁷ The court held that the Trust Corporation's failure to object timely to the law firm's prior representation of the deceased in an unrelated matter, along with the long delay in filing a motion to disqualify, constituted a "*de facto* consent" to the firm's continued representation of Piper Aircraft.¹⁸

The courts' treatment of this issue indicates that the party opposing the motion to disqualify on the theory that the conflict has been waived because of delay must make some showing that it will be prejudiced if the motion is granted. For instance, in *British Airways, PLC v. Port Authority of New York and New Jersey*,¹⁹ the United States District Court for the Eastern District of New York held that although there was a delay in bringing the motion to disqualify, the delay was not prejudicial.²⁰ Indeed, other courts would not consider the waiver/delay argument unless

¹¹ *Id.* at 289.

¹² *Id.* at 288-90.

¹³ 822 F. Supp. 1099, 1115-16 (D.N.J. 1993).

¹⁴ *Id.*

¹⁵ 808 F. Supp. 1200 (E.D. Pa. 1992).

¹⁶ *Id.* at 1208-09.

¹⁷ *Piper Aircraft*, 701 F. 2d at 87.

¹⁸ *Id.* at 87-88. For a similar outcome, see *Unified Sewerage Agency v. Jelco, Inc.*, 646 F. 2d 1339 (9th Cir. 1981).

¹⁹ 862 F. Supp. 889 (E.D.N.Y. 1994).

²⁰ *See id.* at 901; *see also Montgomery Academy v. Kohn*, 82 F. Supp. 2d 312 (D.N.J. 1999).

the lawyer provided full disclosure to the client.²¹ Thus, the lawyer who argues that the client impliedly consented to the conflict through waiver must show (i) that the delay was inadequately explained, (ii) disqualification would be prejudicial to the other client, and (iii) the lawyer provided a full disclosure of the conflict.

3. *Advance consents*

An advance consent – or prospective waiver – is one that seeks a client’s consent to a conflict situation that may or may not arise in the future. Courts and the Standing Committee on Ethics and Professional Responsibility have recognized that advance consents are permissible and enforceable, though they are typically carefully scrutinized with mixed results on enforceability depending on the circumstances.

Formal Opinion 93-372 concluded that:

[A prospective waiver] must meet all the requirements of a waiver of a contemporaneous conflict of interest, and if the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client’s consent can reasonably be viewed as having been fully informed when it was given.²²

Even though the Committee recognized the utility of such prospective waivers, especially with larger law firms catering to corporate clients that sometimes employ more than one law firm to handle their legal matters, the Committee nonetheless emphasized the need to meet the “informed consent” standard.²³ The existence of the prospective waiver (i) will not determine conclusively if the waiver is effective, (ii) does not excuse the lawyer from deciding if the representation will be adversely affected, and (iii) will not be effective unless the future conflict was contemplated at the time the client signed the agreement.²⁴

In *Worldspan L.P. v. Sabre Group Holdings, Inc.*,²⁵ the United States District Court for the Northern District of Georgia held that a prospective consent must be ““exceedingly explicit.””²⁶ In *Worldspan*, the law firm representing Sabre Group Holdings (“Sabre”), also represented Worldspan in tax matters in the States of Georgia and Tennessee. The current litigation, as well as the tax matters, involved the different ways in which plaintiffs’ airline reservations system operated. Sabre consented to the law firm’s representation of Sabre in the lawsuit filed by

²¹ See *Griva v. Davison*, 637 A. 2d 830, 845 (D.C. 1994).

²² Formal Opinion 93-372, *Waivers of Future Conflicts of Interest*, American Bar Association, Standing Committee on Ethics and Professional Responsibility (April 16, 1993).

²³ *Id.* at 1-2.

²⁴ *Id.* at 1-2.

²⁵ 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

²⁶ *Id.* at 1357 (quoting *Florida Ins. Guaranty Assn. v. Carey Canada*, 749 F. Supp. 255, 260 (S.D. Fla. 1990)).

Worldspan; Worldspan, however, did not.²⁷ The law firm relied on its engagement letter with Worldspan to argue that Worldspan prospectively waived any future conflict.

The court rejected the law firm's argument that the engagement letter provided a form of "standing consent." The court held that:

[F]uture directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.²⁸

Thus, for counsel seeking to utilize "standing consent" agreements, counsel should (i) inform the client of potential conflicts, (ii) outline those potential conflicts in the agreement in plain language, (iii) advise the client that it should seek independent legal advice before entering into the standing consent agreement, and (iv) reduce the agreement to writing.

D.C. Ethics Opinion 309 also addressed "advance waivers of conflicts of interest," echoing the requirements that they nevertheless conform with the "overarching requirement of informed consent." Ethics Opinion 309 noted that "the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character." See D.C. Ethics Opinion at <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion309.cfm>. Consent to a type of conflict with which the client is familiar is more likely to be effective than a general or open-ended consent. Commission on Evaluation of the Rules of Professional Conduct, Report to House of Delegates (May 2001 rev.) ("Ethics 2000 Report"), prop. Model Rule 1.7, comment 22.

In Opinion 309, the D.C. Ethics Committee recognized two trends in the practice of law that make advance waivers an important tool to manage conflict issues. The first is the trend toward larger law firms: "Increasingly, though, law firms have hundreds or even thousands of lawyers, with multiple offices across the country and around the globe. In such firms, individual partners or associates may not even know one another, let alone the identities of the clients their colleagues represent or the details of the matters their colleagues are pursuing for such clients." The second trend, also highlighted by the ABA Formal Op. 93-372, related to the manner in which commercial clients hire lawyers: "The days when a large corporation would send most or all its legal business to a single firm are gone. Today, when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease

²⁷ *See id.* at 1358.

²⁸ *Id.* at 1359 (citations omitted).

should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers." D.C. Ethics Opinion 309, citing ABA Formal Op. 93-372 (1993) ("ABA Opinion"), in American Bar Association, Formal and Informal Ethics Opinions, 1983-1998, at 167-68. The DC Ethics opinion went on to explain: "This means, for example, that if the law firm hypothesized in the ABA Opinion is looking out for its own interests, it might decline the Miami representation. This in turn would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally."

D.C. Ethics Opinion 309 recounted cases in which advance consents were sustained as well as when they have been found ineffective:

Most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission. Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client's in-house counsel. E.g., *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Fisons Corp. v. Atochem North Amer., Inc.*, 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990); *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). The Fisons court stated that where the waiving client is sophisticated, notification of the potential conflict itself is sufficient to satisfy the requirement. *Fisons Corp.*, 1990 WL 180551, at *5. Moreover, at least one court has held that an advance waiver may be implied where the objecting client, including its in-house counsel, had extensive knowledge of the law firm's longtime representation of the other client. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977).

On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved. Correspondence with the objecting client's nonlawyer employees (claims adjusters), for example, was held insufficient to constitute "consultation" or "full disclosure." *Florida Ins. Guaranty Ass'n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990); see *Marketti v. Fitzsimmons*, 373 F. Supp. 637 (W.D. Wisc. 1974) (where client a labor union local, mere knowledge of second representation insufficient to constitute waiver). Similarly, an open-ended release of the lawyer from "all rights, burdens, obligations, and privileges which appertain to his [former] employment," coupled with consent for the lawyer to "engage his services pro and con, as he may see fit," was held (notwithstanding the relative sophistication of the client) grossly insufficient to justify the lawyer's subsequent activity—including disclosure of confidential information—adverse to the former client. *In re Boone*, 83 F. 944 (N.D. Calif. 1897). Instead, said the court, the release would be effective only if it were "positive, unequivocal, and inconsistent with any other interpretation." *Id.* at 956. A more recent decision held that a general advance consent covering all

unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to “litigation.” *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

The bottom line is that advance consents are an available tool, but a lawyer should be mindful of the “it depends” nature of their enforceability. Not only should the lawyer ensure “informed consent” of the client giving the advance consent but likewise the client on whose behalf the lawyer obtained and plans to rely on the informed consent.

- **Thrust Upon Conflict Issues**

If a lawyer representing an industry or group can identify current or even specifically anticipate future conflict issues, the lawyer can and should address those issues with informed consent of affected clients. However, conflict issues that may arise with respect to third parties whose interests may be adverse to the group or members of the group or otherwise materially limit the lawyer’s representation of the group can be harder to predict and thus harder to proactively manage. This is particularly true in representations that involve issue advocacy, because “involved parties” may not be apparent from the outset. Even if participation of particular parties or types of parties is foreseeable, it is also not always apparent from the outset what those participants’ respective positions or goals may be and whether they materially diverge from the positions or goals of the group or its members.

The conflict of interest rules are designed to avoid the situation in which a lawyer may not be able to diligently represent a client due to a conflict of interest. *See* Rules 1.7 & 1.9. Rule 1.7 addresses a lawyer’s obligation with respect to **current** clients, while Rule 1.9 addresses a lawyer’s obligation with respect to **past** clients. Under Rule 1.7, a lawyer generally may not undertake representation of a new client that will be adverse to an existing client, whether the matter is related or unrelated to the representation of the existing client. Under Rule 1.9, a lawyer generally may undertake representation adverse to a past client if the matter is unrelated to any work the lawyer did for the past client (and subject to duties to protect confidential information).

Even if a lawyer accepts a representation in accordance with these rules at the outset, circumstances may change that “thrust upon” the lawyer a conflict which would violate the client protections against conflicts articulated in Rules 1.7 and 1.9. For example, this may occur because of the addition or realignment of parties in litigation, or when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. *See* Model Rules of Prof’l Conduct R. 1.7 cmt. 5 and Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000). This may also occur in “issue” or “industry” lawyering, for example, when a rule is published for comments and only then do interested parties and their positions appear.

In thrust upon conflict situations like the foregoing, a lawyer may be able to continue in the representation of one or both clients provided that certain factors exist. A thrust upon conflict is a conflict between two or more clients that: “(1) did not exist at the time the representation commenced, but arose only during the ongoing representation of both clients, where (2) the conflict was not reasonably foreseeable at the outset of the representation, (3) the conflict arose through no fault of the lawyer, and (4) the conflict is of a type that is capable of being waived,

but one of the clients will not consent to the representation.” See Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 2005-05. The District of Columbia is the only jurisdiction to expressly address thrust upon conflicts in its ethics rules, but the issue has also been addressed in cases and legal ethics opinions in various jurisdictions.²⁹ Under the D.C. Rule, a thrust upon conflict is a conflict not reasonably foreseeable at the outset of representation. See D.C. Rule 1.7.

The thrust upon rule and its potential application will vary by jurisdiction. The lawyer assessing the applicability of the thrust upon rule should consult the rules, case law, and legal ethics opinions applicable in the jurisdiction or jurisdictions that may govern the lawyer’s conduct (e.g., where the lawyer is licensed, in the forum where the lawyer is appearing on behalf of the client). The lawyer should always be mindful of whether withdrawal from a client’s representation will violate applicable professional rules, and/or whether such withdrawal will result in liability or material harm to the client.

When a conflict arises in the course of a representation, whether a lawyer can take advantage of a thrust upon argument depends on several factors, including whether the conflict was reasonably foreseeable at the outset of the representation and if the conflict arose through no fault of the lawyer.

✓ Reasonably Foreseeable

The analysis for determining whether a conflict is thrust upon begins with a question of reasonable foreseeability. In determining whether a conflict is reasonably foreseeable, the test is an objective one. See D.C. Rule 1.7, Comment [33]. In determining the reasonableness of a lawyer’s conduct, such factors as whether the lawyer (or lawyer’s firm) has an adequate conflict-checking system in place, must be considered. *Id.*

D.C. Ethics Opinion 292 offers an example of an unforeseeable conflict where a law firm had been representing Client A in ERISA litigation and Clients B and C in ongoing Competitive Access and Direct Access proceedings when Client A announced its intent to acquire a company that had been and continued to be adverse to Clients B and C. The adversity arose from Client A’s merger, which gave it for the first time an interest in ongoing proceedings in which the law firm had been representing B and C, and the conflict was thus not reasonably foreseeable. See D.C. Bar Legal Ethics Comm., Op. 292. Another example of an unforeseeable conflict is in *Board of Regents of the University of Nebraska v. BASF Corp.*, where a firm client sought to disqualify a firm for representing a defendant in a lawsuit in which it intervened. *Bd. Of Regents of the Univ. of Neb. v. BASF Corp.*, 2006 U.S. Dist. LEXIS 58255,2 (D. Neb. Aug. 17, 2006). In this case, a lawsuit regarding rights to a non-exclusive license was filed in November of 2004 and the firm began representing the defendant in the matter at that time. *Id.* At 31-32. In January of 2005, another firm client entered into a license agreement with the plaintiff in the same lawsuit, thereby thrusting a conflict upon the firm. *Id.* At 32. The court considered the conflict an “unforeseeable development” because when the case was filed, there was no notion

²⁹ See generally cases and legal ethics opinions listed on Attachment A.

that any other party was involved, much less that a current client would take a position adverse to the plaintiff. *Id.* at 31-32.

In *Commonwealth Scientific & Industrial Research Organisation v. Toshiba America Information Systems, Inc.*, a conflict was thrust upon a law firm when its client disclosed the existence of certain indemnity agreements relating to another firm client that it had previously concealed from the firm. *Commonwealth Scientific & Indus. Research Org. v. Toshiba Am. Info. Sys., Inc.*, 297 Fed.App'x 970, 974 (Fed. Cir. 2008). Upon learning of the conflict and after being denied a waiver, the firm terminated its representation of the client who caused the conflict. *Id.* The terminated client accused the firm of violating its ethical obligations, contending that the firm should have known of the existence of the indemnity agreements because they were an industry standard and argued that it was therefore incumbent on the law firm to discover the conflict without its client's assistance. *Id.* The appellate court found this argument unpersuasive and agreed with the lower court that the thrust upon exception applied where unforeseeable developments caused two concurrent clients to become directly adverse. *Id.* While a client is free to choose which facts it does and does not disclose to counsel, the client cannot subsequently assert those purposefully withheld facts as a means to disqualify. *Id.*

Alternatively, certain factors will lead a court to determine that a conflict was foreseeable and therefore not considered "thrust upon." In *El Camino Resources, Ltd. v. Huntington Nat. Bank*, two firm clients moved to have the firm disqualified from representing another client as defense counsel in criminal, civil, and bankruptcy actions on the ground that the firm had a conflict of interest arising from its status as counsel for each of the two moving plaintiffs in other litigation. *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 623 F.Supp.2d 863, 866 (2007). In this case, the moving plaintiffs alleged massive fraud by Cyberco and alleged that the firm's other client, Huntington National Bank, aided and abetted Cyberco's fraud as its principal financial institution and depository. *Id.* at 866. At the time the firm agreed to represent Huntington National Bank in the aiding and abetting matter, it had an active attorney-client relationship with the two moving plaintiffs. *Id.* at 867. The court found that the conflict was eminently foreseeable because Huntington National Bank's deep involvement in bankruptcy proceedings leading up to the aiding and abetting case made it foreseeable that large creditors would assert claims against it, and the record showed that both the client and the law firm *actually foresaw* the conflict and the firm pursued a waiver that would allow it to proceed despite the potential conflict. *Id.* at 886-87 (emphasis in original).

Philadelphia Bar Association Opinion 2009-7 deemed it foreseeable that when a law firm undertook representation of a builder of a proposed office building, that persons could emerge to oppose the project at some point in the future, as is inherent in real estate development projects.³⁰ This reasoning diverges from the analysis typically used to assess reasonable foreseeability because the Committee did not believe that the conflict was ascertainable at the outset of representation, but it did believe that where the law firm in question is large and has many clients, some of whom can reasonably be expected to live in proximity to the development project, the conflict was not unforeseeable and is a risk that law firms take on in the course of doing business. *Id.*

³⁰ Although based on Pennsylvania Rule 1.7, which is identical to the Model Rule, this Opinion is advisory only and not cited in any case law.

✓ Outset of Representation

In order to be considered thrust upon, the conflict must not have been reasonably foreseeable at the *outset of representation*. “Representation” is not a defined term in D.C. Rule 1.7(d), but the outset of representation will be deemed to occur when the law firm first begins to provide legal services that involve the same facts, legal theories, claims, defenses and parties. *See* D.C. Bar Legal Ethics Comm., Op. 292. The Committee in this opinion agreed with a law firm asserting that its ongoing representation of clients in various proceedings relating to Competitive Access and Direct Access constituted, for each client, a single and continuing representation in pursuit of a sole objective. *Id.* Where a law firm is providing ongoing representation of a client with respect to an identifiable set of legal issues involving common parties, facts, theories and claims, that representation should be viewed as a single representation for purpose of applying the “thrust upon” conflict provision of 1.7(d), even though multiple legal proceedings may be involved. *Id.* The underlying commonality of facts, issues and parties required to find a single “representation” must be objectively verifiable. *Id.* The thrust upon conflicts analysis does not extend, however, to situations where there is an ongoing general representation of a client but the matter in which adversity develops has not yet begun, such as where a law firm represents two clients on unrelated matters and thereafter one client decides to sue the second client in a new matter. *See* D.C. Bar Legal Ethics Comm., Op. 272.

✓ No Fault of the Lawyer

The third component in determining whether a conflict is thrust upon is that the conflict arose through no fault of the lawyer.³¹ Courts have generally held that, when a conflict arises which the challenged law firm played no role in creating, counsel may avoid being disqualified by moving swiftly to sever its ties with one client, in such a way as to minimize prejudice to the other. *Flying J Inc. v. TA Operating Corp.*, 2008 U.S. Dist. LEXIS 18459,4 (D. Utah Mar. 10, 2008). In *Flying J*, the court found that the law firm did not meet the thrust upon requirement that “the conflict must truly be no fault of the lawyer,” since it did not act immediately to resolve the conflict and instead pursued litigation in the face of a clear conflict of interest without disclosing the conflict, seeking consent, or withdrawing its representation. *Id.* at 5. Similarly, in *El Camino*, the firm claimed that the conflict was thrust upon it due to the plaintiffs’ decision to bring an action against the defendant. *El Camino* at 887. The court disagreed and found that the plaintiffs no more created the conflict by bringing the suit than the defendant did by deciding to defend itself and so the firm could not avail itself of the thrust upon argument. *Id.*

1. Withdrawal from Representing One Client (Exception to Hot Potato Rule)

Rule 1.16(a)(1) requires a lawyer to withdraw from representing a client if the continued representation of that client would result in a violation of the Rules of Professional Conduct. *Ex parte AmSouth Bank*, N.A., 589 So.2d 715, 719 (1991). Although Rule 1.16 allows a lawyer to

³¹ Where a conflict exists at the outset of representation and is simply not discovered by the lawyer at that time, it is mere negligence and not a thrust upon conflict. *See Parkinson v. Phonex Corp.*, 857 F.Supp. 1474, 1482 (D. Utah 1994).

withdraw from representing a client as long as there will be no material adverse effect, a lawyer cannot withdraw under this permissive withdrawal provision in order to turn a current client into a “past client” for conflicts analysis purposes. This is informally known as the “hot potato” rule.³² Courts generally apply a flexible approach³³ to the hot potato rule in thrust upon situations and will allow withdrawal if appropriate under Rule 1.16(b). An exception to the hot potato rule may be allowed where the undertaking of both client representations was permissible at the time each representation began, and it was only the unexpected objection by one client to the project of another that created the conflict. *See* Massachusetts Bar Association Opinion 02-2 (June 2002).

This flexible approach is reflected in the Comments to ABA Model Rule 1.7: “Unforeseeable developments ... might create conflicts in the midst of a representation. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.” Model Rules of Prof'l Conduct R. 1.7 cmt. 5. The Restatement of the Law Governing Lawyers also notes that a lawyer may withdraw in circumstances attributable to the client’s actions: “A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients.” Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000). If the conflict of interest was not reasonably foreseeable at the outset of the representation, the law firm may be able to continue its representation without client consent even if a conflict with another firm client is triggered by a subsequent legal proceeding. *See* D.C. Bar Legal Ethics Comm., Op. 272.

D.C. Rule 1.7 was revised in 1996 and paragraph (d) was added to eliminate an unfair “veto power” which Rule 1.7(b)(1)³⁴ could have been understood to give one client where, as a result of events that were not reasonably foreseeable when the representation of another client on a different matter commenced, that representation became adverse to the first client. *See* Legal Information Institute, District of Columbia Legal Ethics, Rule 1.7, https://www.law.cornell.edu/ethics/dc/narr/DC_NARR_1_07.HTM. D.C. Rule 1.7(d) provides an exception to the general prohibition against simultaneously representing two clients whose interests are directly adverse, allowing that, “If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).”

³² *See generally, Superhuman Ethics: The Ethics of Industry and Issue Lawyering: Terminating Client Relationships to Solve Conflicts Problem – a/k/a the “Hot Potato” Doctrine.*

³³ The flexible approach does not eliminate an ethical violation, but merely examines options available to courts in fashioning appropriate remedies where ethical standards have been violated. *El Camino* at 884.

³⁴ Under D.C. Rule 1.7(b)(1), a lawyer shall not represent a client with respect to a matter if that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.

In D.C. Ethics Opinion 292, a conflict was determined not to be reasonably foreseeable at the outset of representation and so, after seeking but failing to obtain Client A's consent, the law firm was permitted under Rule 1.7(d) to continue representing Client A in the ERISA litigation and Clients Band C in the ongoing Competitive Access and Direct Access proceedings. *Id.* If, however, the representation would have been adversely affected by representation of another client, representation of another client would have been adversely affected by such representation, or the lawyer's professional judgment may have been adversely affected, the firm would have been required to withdrawal under the D.C. rule. *See Id.* and D.C. Rules 1.7(b)(2-4).

2. *From Which Client May the Lawyer Withdraw?*

Ethics rules do not specify from which representation(s) a lawyer should withdraw in order to cure a conflict. However, relevant case law indicates that the flexible approach requires a balancing of factors including (1) prejudice to the parties, including whether confidential information has been conveyed, (2) costs and inconvenience to the party being required to obtain new counsel, (3) the complexity of the various litigations, and (4) the origin of the conflict. *Gould, Inc. v. Mitsui Mining and Smelting Co.*, 738 F.Supp. 1121, 1126 (N.D. Ohio 1990).³⁵ The most important factor in this balancing test is the prejudice the withdrawal or continued representation would cause the parties, including whether continuing representation of one party would give it an unfair advantage to the detriment of the other party. C. Evan Stewart, *The Legal Profession and Conflicts: Ain't No Mountain High Enough?*, 11 N.Y. Bus. LAW J. 7, 9 (Fall 2007).

In *Ex parte AmSouth Bank, NA.*, the Alabama Supreme Court found that although a law firm was prohibited under Rule 1.7 from representing both clients in a thrust upon conflict situation, neither Rule 1.7 nor Rule 1.16(a)(1) required the firm to withdraw from both clients. *Ex parte AmSouth Bank, N.A.* at 719. The law firm in this case learned that it faced a conflict of interest, unsuccessfully sought a waiver, and withdrew from the client that it thought would be the least prejudiced by losing its services. *Id.* The court found that the firm did not act improperly by withdrawing from the representation of one client and continuing to represent the other client because the firm did not by its own actions create the conflict of interest and the firm made its decision to withdraw after carefully considering the duties of loyalty that it owed to both clients. *Id.*

In *Eastman Kodak Co. v. Sony Corp.*, where a thrust upon conflict arose in the context of an acquisition, the court sought to find a delicate balance between two competing considerations: the prerogative of a party to proceed with counsel of its choice and the need to uphold ethical conduct in the courts of law. *Eastman Kodak Co. v. Sony Corp.*, 2004 U.S. Dist. LEXIS 29883, 9 (W.D.N.Y. Dec. 27, 2004). The court believed in this case that the flexible approach provided a more practical framework than the hot potato rule but ultimately found that the firm's continued representation of its client was ethically problematic and disqualified the firm,

³⁵ Although typically arising in the context of a disqualification motion, this same analysis is used to determine whether withdrawal from a particular client is appropriate. *See generally* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2005-05.

acknowledging that the result would be unfair to whichever client the firm did not represent. *Id.* at 9.

- **No Conflict Under the Rule**

The thrust upon analysis is based on the premise that there is adversity between firm clients, but there are also situations that never reach the thrust upon analysis because it is determined that there is no conflict of interest under the applicable rule, such as matters involving rule-making, the solicitation of bids, unnamed class members, and some conflicts arising out of changes in corporate structure.

1. *Rule-Making*

D.C. Rule 1.7(b)(1) is confined to “matter[s] involv[ing] a specific party or parties,” a phrase that excludes lobbying, rulemaking and other matters of general government policy. *See* D.C. Rule 1.7. As a result, D.C. Rule 1.7 rule does not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist’s law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist’s firm.” *See* D.C. Bar Legal Ethics Comm., Op. 344. Generally, all potentially affected members of the public are given an opportunity to participate in a rulemaking proceeding, enabling interested persons to participate in the process of formulating the rules that affect them and to which they must conform. *See* D.C. Bar Legal Ethics Comm., Op. 297. As such, a rulemaking of general application is not “particular to a specific party or parties.” *Id.*

A lawyer, however, must assess whether the D.C. Rule will govern the situation before relying on it. *See* R. 8.5(b) on choice of law (“In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”).

2. *Bids*

A lawyer may be asked to undertake the representation of a client in a specific matter when the lawyer has reason to believe that another client will take a position adverse to that client in that matter, but cannot identify the nature of the conflict or the specific clients who might be affected. *See* D.C. Bar Legal Ethics Comm., Op. 356. D.C. Ethics Opinion 356 responds to a lawyer’s inquiry concerning a client who has asked for advice in connection with a proposed acquisition which would be subject to regulatory approval and might generate scrutiny and opposition from the business and political communities. *Id.* Based solely on her industry expertise and experience (and not confidential information from any of her clients), the lawyer believed that

one or more of her other clients might offer competing bids, but this did not impact the D.C. Bar's reading of Rule 1.7(b)(1): "The prohibition under Rule 1.7(b)(1) cannot depend on whether a lawyer's speculation about certain industry events, which are often based on unpredictable business judgments, is proven correct. Such expertise and instinct may serve clients well in transactional negotiations and litigation strategy, but it does not inform the test of what constitutes a conflict of interest under Rule 1.7(b)(1)." *Id.* The rule prohibits only those representations in which the lawyer can identify (i) the nature of the conflict and (ii) the specific client or clients who might be affected. Simply put, if the lawyer cannot know which clients to talk to and what conflicts to disclose, then there is no conflict of interest under Rule 1.7(b)(1). *Id.*

3. *Unnamed Class Members*

The *In re Rail Freight Fuel* court found that no violation of Rule 1.7(b)(1) was found for two separate reasons: First, the law firm's representation of a client in multidistrict litigation was not adverse to another client in a related case because they were not the "same matter" under Rule 1.7(b)(1). Second, the representation of one client in the multidistrict litigation was not adverse to the second client in the same matter because the second client was only an unnamed class member in the litigation. *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 965 F.Supp.2d 104, 112 (D.D.C. 2013). In this case, both sides agreed that, typically, a firm seeking to represent a defendant in a class action is not required to clear potential conflicts with unnamed class member clients, and that a contrary rule would be "virtually impossible to satisfy" and "patently unworkable." *Id.* at 115. This case also found that D.C. Rule 1.7(b)(1) should be read to include the limitation made explicit in Comment 25 to Rule 1.7 of the Model Rules:

When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

See Model Rule 1.7, Comment [25]. *In re Rail Freight* at 116. The court in *In re Rail Freight* did recognize, however, that there may be situations in which a law firm's attorney-client relationship with an unnamed class member may create a conflict that would prevent that firm from representing a named defendant, such as where the law firm's relationship with the class member is so substantial that it raises questions about the firm's ability to zealously represent the defendant, or where there is a risk that the class member's confidential information could be used by the firm in preparing the defendant's legal strategy. *Id.* at 118.

- **Positional or Issue Conflicts**

Positional or issue conflicts are those in which the law firm represents two different clients in two unrelated matters but in which arguments may be advanced on opposite sides of the same issue in those separate cases. For example, a lawyer for one client may argue to invalidate an

agency's new rule on the theory that the agency failed to give deference to an administrative law judge's factual findings. On the other hand, another lawyer from the same firm may argue to invalidate an agency's new rule on the theory that agency should not have given deference to an administrative law judge's factual findings.

The conflicts rules do not expressly address positional or issue conflicts as such. Rather, the issue generally falls under Rule 1.7(a)(2) definition of a conflict as the circumstance in which there is "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." On the one hand, the law firm owes a duty to advance the argument for deference on behalf of one client. In doing so, however, the law firm's effectiveness in advancing the contrary argument for another client could be materially limited. The same could be true in reverse. Imagine having your firm's brief cited against your client to contradict or undermine the advocacy. Had the client known of this risk and potential limitation, the client may have selected other counsel.

As ABA Formal Ethics Op. 93-377 (1993) described this ethical issue as follows:

...[A]rguing a position on behalf of one client that is adverse to a position that the lawyer, or her firm, is arguing on behalf of another current client raises a number of concerns. For example, if both cases are being argued in the same court, will the impact of the lawyer's advocacy be diluted in the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer's effectiveness—and, if so, can the lawyer (or firm) avoid favoring one client over the other in the "race" to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?

....

The Committee is therefore of the opinion that if the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.

Even in cases that are not being litigated in the same jurisdiction, this opinion notes that a lawyer should consider the relative importance of the positional conflict issue and the likelihood that it may affect the outcome of one or both of the cases, the extent to which a decision in one case might influence the decision in the other and the extent to which the lawyer might "pull his punches" in one case so as to minimize any adverse effects on the client in the other case. See generally, Peter Geraghty, "Ethics of positional conflicts," *Eye on Ethics* (American Bar Association, May 2017) at <https://www.americanbar.org/publications/youraba/2017/may-2017/the-ethical-issues-surrounding-positional-conflicts.html>; Rotunda and Dzienkowski, *Positional Conflicts* § 1.7–6(o), *The Lawyers' Deskbook on Professional Responsibility* (2016-17).

Although the ABA guidance on positions or issue conflicts sets forth a fairly narrow circumstance for an ethical conflict, clients often warn lawyers against a broader notion of “issue conflicts.” Specifically, clients attempt to broaden this notion to any advocacy that might cut against their business interests or otherwise amount to contrary positions to those taken by the client through other firms. While this does not transform the standard for an ethical conflict, clients are putting lawyers on notice of what might draw consternation if not discharge from the client. If the client relationship would cause the lawyer to steer clear of advocacy that a client may not like, the lawyer may then indeed have a “material limitation” as a result of the client relationship on what the lawyer can do for other clients.

Just like more traditional ethical conflicts may be hard to foresee when representing a group on an industry or issue basis, these types of issue or positional conflict issues may not be apparent at the outset of a representation. Positional or issue conflicts are not likely to be identified as a result of traditional searching of involved parties nor is there likely sufficient information in a firm’s client/matter database to “search” for such conflicts. As a result, these types of issues are less amenable to management at the “business intake” stage.