

# Recent Conflict of Interest Decisions

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# Agenda

- **Conflict of Interest Rules**
- **Recent Conflict of Interest Decisions**

# Conflicts of Interest: The Rules

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## Rule 1.7 (Current Clients)

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a 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 a personal interest of the lawyer.

## Rule 1.7 (Current Clients)

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) 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

(4) each affected client gives informed consent, confirmed in writing.

## Rule 1.9 (Former Clients)

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

## Rule 1.9 (Former Clients)

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

## Rule 1.9 (Former Clients)

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.



# Other Conflict of Interest Rules

- Rule 1.8 – Current Clients: Specific Rules
  - Business transactions with clients
  - Financial assistance to client
- Rule 1.10 – Imputation of Conflicts of Interest
  - Same firm
  - Former firm
- Rule 1.11 – Special Conflicts of Interest for Former & Current Government Officers & Employees

# Conflicts of Interest: Recent Decisions

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# North Carolina: Investment in Litigation Financing

- Facts
  - Lawyer: associate at law firm with no control over Law Firm's selection of clients or matters
  - Litigation Financing Fund: investment vehicle that advances money for litigation expenses and attorney fees to plaintiffs or law firms in litigation in exchange for share of recovery
  - Lawyer would not refer clients to Fund and would not have control over Fund's investment decisions
  - Fund does not disclose identity of clients to investors until litigation matter is concluded

# North Carolina: Investment in Litigation Financing

## Rules Implicated

- Rule 1.7(a)(2): risk that representation will be limited by personal interest of the lawyer
- Rule 1.8(e): providing clients with financial assistance in connection with pending or contemplated litigation
- Rule 1.8(i): acquiring a proprietary interest in the cause of action or subject matter of client's litigation

# North Carolina: Investment in Litigation Financing

**Holding:** a lawyer may not invest in a fund that provides litigation financing if the lawyer's practice accepts clients who obtain litigation financing.

# New York: Recreational Marijuana

- **Topics**
  - Accepting partial ownership of recreational marijuana business in lieu of fee
  - Personal use of recreational marijuana
  - Counseling clients in recreational marijuana business
- **Facts**
  - Recreational marijuana legalized March 31, 2021
  - Federal narcotics law prohibits recreational marijuana sale and use

# New York: Recreational Marijuana

- Rules Implicated
  - Rule 1.7(a)(2): risk that representation will be limited by personal interest of the lawyer
  - Rule 1.7(b): representing client notwithstanding conflict
  - Rule 1.8(a): business transactions with clients

# New York: Recreational Marijuana

- Holdings

- Lawyers may accept equity ownership interest in cannabis businesses in exchange for legal services
- Lawyers may use marijuana recreationally and cultivate marijuana plants for personal use
- Lawyers may counsel clients engaged in recreational marijuana business



# North Carolina: Contemporaneous Real Estate Closing

- Facts
  - A sells real property to B, and from B to end buyer C on the same day.
  - Sales price for A-B transaction is \$80,000
  - Sales price for B-C transaction is \$100,000
  - Lawyer would close both the A-B and B-C transactions, and represent both B and C

# North Carolina: Contemporaneous Real Estate Closing

- Rules Implicated

- Rule 1.7(a): concurrent conflict
- Rule 1.7(b): representing client notwithstanding conflict
- Rules 1.2(d), 8.4(a) and 8.4(b): criminal conduct

# North Carolina: Contemporaneous Real Estate Closing

**Holding:** Lawyer may only represent B and C if they each provide informed consent to the representations.

# New York: Joint Purchasers with Differing Interests

- Facts
  - Lawyer represents husband and wife in purchase of real property
  - Husband is involuntarily committed to psychiatric facility, and wants to proceed with purchase
  - Wife no longer wants to proceed with purchase

# New York: Joint Purchasers with Differing Interests

- Rules Implicated
  - Rule 1.7(a): concurrent conflicts
  - Rule 1.7(b): representing client notwithstanding conflict
  - Rule 1.14(a): diminished capacity

# New York: Joint Purchasers with Differing Interests

**Holding:** lawyer cannot continue to represent husband and wife jointly; that one of the clients has diminished capacity does not alter this conclusion

## Maryland: Propriety of Attorney Signing Confidentiality/Non-Disparagement Agreement

**Facts:** A defendant requests that plaintiff's counsel sign a confidentiality and non-disparagement agreement in settling a dispute pre-suit.

## Maryland: Propriety of Attorney Signing Confidentiality/Non-Disparagement Agreement

### Rules Implicated:

- Rule 5.6 (restraint on practicing law)
- Rule 1.7 (conflicts of interest)
- Rule 1.9 (duties to former clients)



## Maryland: Propriety of Attorney Signing Confidentiality/Non-Disparagement Agreement

**Holding:** Lawyer cannot agree to confidentiality provision (except for details like existence and terms of settlement agreement) as part of settlement, whether or not pre-suit, because doing so would limit the lawyer's ability to represent subsequent clients against the settling defendant. In addition, a lawyer cannot represent a subsequent client if prior client's representation would materially limit the representation. Finally, under some circumstances, attorney may not be able to obtain consent to represent new client without providing information learned in prior representation, resulting in prior client breaching confidentiality obligations.

Non-disparagement clauses do not raise these concerns, and depend on how broadly drafted the clause is. If it would prohibit statements made in the course of litigation, it would restrict the practice of law in violation of Rule 5.6.

## Maryland: Joint Representation of Law Firm and Client

**Facts:** A law firm practices in the mortgage and banking industry, and its attorneys often serve as trustees on deeds of trust for mortgage lender clients. As a result, sometimes a borrower may bring an action involving a property against both the lender client and the attorney trustee. Can the firm represent itself and its client in such action?

## Maryland: Joint Representation of Law Firm and Client

### Rules Implicated:

- Rule 1.7 (conflicts of interest)

## Maryland: Joint Representation of Law Firm and Client

**Holding:** Joint representation is allowed if representing one client is not adverse to the other and the attorney is not materially limited. Here, the firm and client likely have a unity of interests, and no conflict exists. However, this unity could change as specific allegations unfold. Even with potential conflict, attorney can undertake joint representation with informed consent pursuant to terms of Rule 1.7(b).

## California: Duties to Prospective Clients

### Rules Implicated:

- Rule 1.01 (terminology)
- Rule 1.4 (communication with clients)
- Rule 1.6 (confidential information of client)
- Rule 1.7 (conflicts of interest: current client)
- Rule 1.8.2 (use of current client's information)
- Rule 1.9 (duties to former clients)
- Rule 1.10 (imputation of conflicts)
- Rule 1.16 (declining or terminating representation)
- Rule 1.18 (duties to prospective clients)

## California: Duties to Prospective Clients

### *Scenario 1*

**Facts:** Lawyer interviews potential client and does not put any limits on what to disclose. potential client provides confidential information that is materially beneficial to a competitor. The firm does not take the potential client's case, and the competitor seeks to retain the firm in the same matter against the prospective client.

## California: Duties to Prospective Clients

### *Scenario 1*

**Holding:** Potential client provided no informed consent to represent competitor and lawyer did not take any measures to ensure lawyer would not receive more information than necessary from potential client. Because lawyer did not take steps to avoid learning unnecessary information, neither lawyer nor law firm can represent competitor even with a screen.

## California: Duties to Prospective Clients

### *Scenario 2a*

**Facts:** Lawyer advises potential client to limit disclosures to basic facts and not to disclose confidential information unrelated to the representation. Prospective client provides the name of the defendant and subject of the lawsuit. Conflict check reveals potential defendant is an existing client on an unrelated matter. Lawyer declines to represent prospective client. Lawyer believes prospective client's suit is material information to existing client, but knows that disclosing it would harm potential client.



## California: Duties to Prospective Clients

### *Scenario 2a*

**Holding:** Lawyer owes a duty not to disclose information from prospective client. Despite duty to existing client, ethics opinions suggest (but do not clearly hold) that lawyer *cannot* disclose material information learned from prospective client to existing client.

If prospective client later sues existing client, lawyer may represent existing client, because the lawyer took reasonable steps to limit what information she learned, and the fact of the prospective client's anticipated lawsuit is public once the suit is filed. Unless some other information learned in the initial conversation remains material, lawyer can personally represent existing client. Even if she cannot, firm can put in place a screen because lawyer took reasonable steps to avoid learning confidential information.

## California: Duties to Prospective Clients

### *Scenario 2b*

**Facts:** Same facts as Scenario 2b, but client gratuitously discloses material confidential information despite lawyer's instruction not to.

## California: Duties to Prospective Clients

### *Scenario 2b*

**Holding:** Lawyer may not disclose confidential information from prospective client. And because lawyer learned material confidential information despite reasonable measures, lawyer cannot personally represent existing client in subsequent lawsuit. However, because lawyer took reasonable measures to avoid learning material confidential information, law firm can represent existing client with ethical screen.

## California: Duties to Prospective Clients

### *Scenario 3*

**Facts:** Lawyer and potential client continue discussing whether firm can represent potential client. Lawyer receives financial information demonstrating potential client's ability to pay fees. Potential client asks for contingency fee, and lawyer asks for additional information to assess potential value of the case. Lawyer cautions potential client to limit disclosure to only information being requested. Lawyer declines to represent potential client. After potential client files suit against its competitor, competitor seeks to hire lawyer to represent it in the same case.

## California: Duties to Prospective Clients

### *Scenario 3*

**Holding:** Lawyer is prohibited from representing competitor and may not use or disclose information received from potential client. However, firm can represent client with an ethical screen, because lawyer made reasonable efforts to avoid disclosing more information than necessary.

## California: Duties to Prospective Clients

### *Scenario 4*

**Facts:** Potential Client, wanting to evaluate law firm, gives material confidential information about the case so law firm can prepare an analysis. Lawyer and firm agree to perform the analysis for free, if potential client agrees that, if firm is not retained, firm can act adversely to potential client in the same matter as long as: (1) lawyers who received confidential information are screened; (2) potential client agrees that if competitor hires firm, competitor can be informed of and required to consent to screening arrangement. Potential client agrees. Potential client does not hire law firm. Competitor hires firm and consents to the representation and screening.

## California: Duties to Prospective Clients

### *Scenario 4*

**Holding:** Lawyer and team that received material confidential information cannot represent competitor and cannot disclose that information.

Independent of informed consent, ethical screen would be problematic because the firm received information material to the dispute itself, not just information related to determining whether to represent potential client. Absent informed consent, ethical screen probably would be inadequate.

Here, potential client provided consent to ethical screen. To be informed consent, lawyer must communicate and explain relevant circumstances and material risks. Assuming potential client's consent was informed, it would be ethically proper.

## California: Duties to Joint Clients in Mass Tort Case

**Facts:** Law firm represents a number of individuals in a mass tort claim that cannot be certified as a class action, but where the individual injuries are too small to support individual actions. What ethical considerations might the firm encounter and how should it handle them?



## California: Duties to Joint Clients in Mass Tort Case

### Rules Implicated:

- Rule 1.1 (competence)
- Rule 1.2 (scope of representation)
- Rule 1.3 (diligence)
- Rule 1.4 (communication with client)
- Rule 1.4.1 (communication of settlement offers)
- Rule 1.6 (confidential client information)
- Rule 1.7 (conflict of interest)
- Rule 1.8.7 (aggregate settlements)
- Rule 1.16 (declining or terminating representation)

## California: Duties to Joint Clients in Mass Tort Case

### Client Communications and Confidentiality:

- Firm owes each client a duty to communicate. Must consider how to share confidential information with rest of clients, how best to communicate updates, etc.
- No duty of confidentiality between or among joint clients
- Should determine at the outset what constitutes a matter of joint interest.
- If firm wants to disclose client information that is *not* common interest, must explain to the client what it wants to disclose and allow client to make informed decision
- If disagreements arise between client and firm as to disclosure of information, conflict may arise and firm may need to withdraw
- Firm must determine best method for communication to joint clients while following ethical obligations
- Firm must guard against disclosure to third parties.

## California: Duties to Joint Clients in Mass Tort Case

### Conflicts of Interest:

- A directly adverse conflict arises when lawyer represents more than one client in a matter in which clients' interests actually conflict. Lawyer cannot proceed without informed consent
- While no direct conflict is likely, there is a risk firm's representation of each client may be limited by responsibility to other clients. Informed consent is therefore necessary from each client.

## California: Duties to Joint Clients in Mass Tort Case

### Potential Sources of Conflicts:

- Allocation of fees and costs
- Vigorous advocacy favoring particular client subset
- Arbitration provisions in some, but not all, clients' underlying agreements
- Client revocation of prior consent
- Conflicting interest at trial
- Settlement

## California: Duties to Joint Clients in Mass Tort Case

### Settlement:

- Lawyer cannot enter into aggregate settlement unless *each* client gives informed written consent
- Firm must evaluate whether a global settlement is in best interest of clients as a whole
- If some clients favor settlement and some object, a conflict might arise and the firm might need to withdraw
- Firm must promptly communicate settlement offers and give clients information to evaluate proposed settlement
- Must determine how to divide settlement among clients
- Firm must get consent of all clients to enter settlement made to some but not all clients
- Some opposing parties want all-or-nothing settlements. Conflict may develop if some clients don't want to accept such settlement
- In persuading clients to settle, firm should avoid improper advocacy on behalf of some clients against others
- If one or more clients oppose aggregate settlement or all-or-nothing settlement, conflict may arise and the firm must determine if it is waivable

## California: Duties to Joint Clients in Mass Tort Case

### Termination:

- Certain conflicts among joint clients may require firm to withdraw
- Firm may need to withdraw if it discovers some clients' cases are not meritorious and the client insists on pursuing it to harass
- Withdrawal may be necessary if client renders it unreasonably difficult to carry out representation
- But withdrawal *cannot* be compelled as a term of settlement
- Departure of some clients may lead firm to question whether representation of remaining clients should proceed.

## ABA: “Materially Adverse Interests”

**General area of discussion:** If a lawyer’s new client isn’t suing the lawyer’s old client (or on the other side of the old client in a negotiation), how do you know if the lawyer’s new client is materially adverse to the old client?

## ABA: “Materially Adverse Interests”

**Principle:** Mere economic adversity is not sufficient, but material adversity can exist without being directly opposite a former client.



## ABA: “Materially Adverse Interests”

Examples of material adversity: (1) suing or negotiating against a former client, (2) attacking lawyer’s own prior work, and (3) examining a former client.

# Virginia: Successor counsel in contingency fee cases

**General area of discussion:** When prior counsel in a contingency fee case has a *quantum meruit* claim against client for fees, can successor counsel represent client in negotiating with prior counsel?

# Virginia: Successor counsel in contingency fee cases

**Rule implicated:** Rule 1.7(a)(2) – conflicts involving personal interest of lawyer

## Virginia: Successor counsel in contingency fee cases

**Holding:** Determination is on a case-by-case basis and usually requires informed consent.

When *quantum meruit* payment comes entirely out of successor counsel's fee, successor counsel *may* represent client in negotiating, but *may not* charge the client for that work.

## DC: Conflicts related to witnesses

General area of discussion: How to manage conflicts of interests related to (usually former) clients in witness roles

## DC: Conflicts related to witnesses

**Rules implicated:** Rules 1.7 (current client conflicts), 1.9 (former client conflicts), and 1.10 (imputed disqualification), among others

## DC: Conflicts related to witnesses

Some of the holdings: (there's a lot there in this one)

- Issuing subpoenas to (a) current clients or (b) former clients in substantially related matters will usually, but not always, create a conflict.
- Cross-examination of a client witness who testified adversely to a client-party usually creates a conflict under rule 1.7. But there are some exceptions if the lawyer obtains informed consent.
- Lawyers *may* usually examine clients if the conflict is thrust-upon—i.e., unexpectedly arises.

## Texas: Conflicts related to prospective clients

**Facts:** A wife sought to hire a law firm partner for a divorce, but after meeting with him for 45 minutes, decided not to. The husband then hired a different partner in the same firm for the same divorce. Is that okay?



# Texas: Conflicts related to prospective clients

## Holdings:

- Even though TX doesn't have a rule on this (unlike DC, VA, and the model rules), lawyers do owe confidentiality duties for prospective clients.
- Texas also imputes information learned by one lawyer to all members of the firm in this context (unlike the model rules, which permit screens to avoid this effect).
- Although each case is fact specific, the lawyer in this example would probably be barred from representing the husband.

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# Questions?

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