

2023 Hot Topics: Conflicts

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Choice of Law

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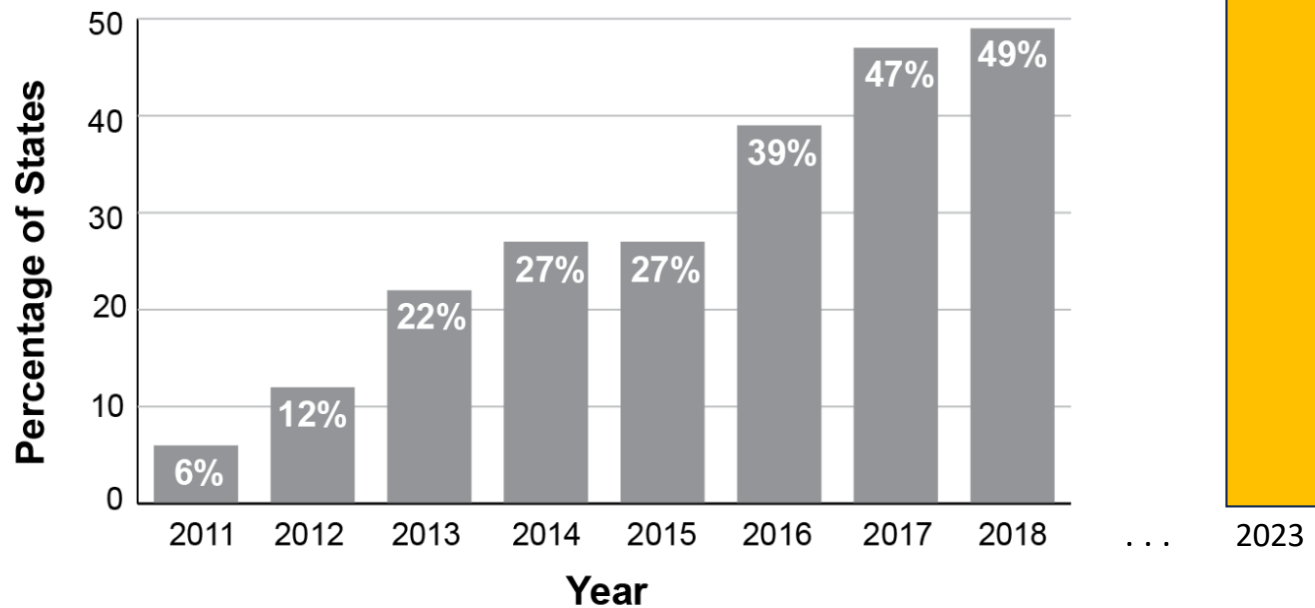
Why Choice of Law?

- Multijurisdictional practice rule → When an attorney practices in multiple jurisdictions, which jurisdiction's ethics rules apply?
- Some attorneys are members of multiple bars, each of which can separately discipline the attorney and has their own rules of professional conduct.
- Many states exercise disciplinary authority over lawyers who practice temporarily (e.g., fly-in/fly-out) but are not admitted to practice.

Why Is It a “Hot Topic”?

- Choice-of-law principles inform the lawyer who wants to avoid disciplinary issues by providing guidance about which rules apply.
- The issue is gaining increased attention from respondents, disciplinary authorities, and courts.
- ABA Formal Opinion 504 (March 1, 2023)
- Potential changes to DC’s rule
- More attorneys are barred in multiple jurisdictions?

Percentage of States (including the District of Columbia)
Administering the UBE by Year



* graph from The Bar Examiner, <https://thebarexaminer.ncbex.org/statistics/administration-of-the-ube-by-year/>

Why Is It a “Hot Topic”?

- Lots of lawyers in the DMV practice in multiple of these jurisdictions.
- Some rules of professional responsibility are different across these jurisdictions.
- And each of these jurisdictions has a different choice-of-law rule.
- You need to know which ethics rules to follow.



Virginia Rule 8.5(b)

In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a proceeding in a court, agency, or other tribunal before which a lawyer appears, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise; **["Litigation Provision"]**
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred; and **["Other Conduct Provision"]**
- (3) notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply. **["Virginia Rules Rule Provision"]**

ABA Model Rule 8.5(b)/MD Rule 18-308.5(b)

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.

D.C. Rule 8.5(b)(1)

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 to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;

D.C. Rule 8.5(b)(2)

- (2) For any other conduct,
 - (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
 - (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Virginia Rule 8.5(b)

In any exercise of the disciplinary authority of Virginia, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct **in connection with a proceeding** in a court, agency, or other tribunal **before which a lawyer appears**, the rules to be applied shall be the rules of the jurisdiction in which the court, agency, or other tribunal sits, unless the rules of the court, agency, or other tribunal provide otherwise;
- (2) for any other conduct, the rules of the jurisdiction **in which the lawyer's conduct occurred**; and
- (3) **notwithstanding subparagraphs (b)(1) and (b)(2), for conduct in the course of providing, holding out as providing, or offering to provide legal services in Virginia, the Virginia Rules of Professional Conduct shall apply.**

Virginia Analysis

1. Did the conduct occur in the course of providing, holding out, or offering to provide services in Virginia?
 - If “yes,” apply the Virginia Rules of Professional Conduct.
 - If “no” . . .
2. Does the conduct involve a proceeding before a tribunal in which the lawyer appears?
 - If “yes,” apply the Rules of Professional Conduct of the jurisdiction in which the tribunal sits.
 - If “no” . . .
3. In what jurisdiction did the conduct occur?
 - Apply the Rules of Professional Conduct of that jurisdiction.

Virginia Analysis - Questions

- What does “in connection with” in the litigation provision mean?
- Does the litigation provision only apply once an attorney has entered an appearance?
- What if the questioned conduct involves multiple proceedings in different jurisdictions? (e.g., trust account violations/unreasonable fees)
- How do you determine where the conduct occurred?
 - Is it where the offending lawyer was physically located at the time?
 - What about neglect?
- What does “in the course of . . . provid[ing] legal services in Virginia” mean?
 - Similar to UPL rule?
 - Physical location of attorney vs. residence of client vs. Virginia law

Virginia Analysis - Comments

- “The physical presence of the lawyer is not dispositive in determining where the questioned conduct occurred.” [cmt. 10]
- “Determining where the lawyer’s conduct occurred in the context of transactional work may require the appropriate disciplinary tribunal to consider other factors, including the residence and place of business of any client, third person, or public institution such as a court, tribunal, public body, or administrative agency, the interests of which are materially affected by the lawyer’s actions.” [cmt. 10]
- What about regulatory work? Compliance work? Pre-work work?

Virginia Analysis - Comments

- The commentary appears to adopt an actual “conflict” analysis.
 - As to the “everything else” provision, “if jurisdictions have conflicting rules regarding the questioned conduct,” that provision “resolves the conflict by choosing the rules of the jurisdiction in which the conduct occurred.” [cmt. 10]
 - If the tribunal has rules of its own (e.g., USPTO), the lawyer is subject to the PTO rules, “and in the event of a conflict between the rules of Virginia and the PTO rules with respect to the questioned conduct, the latter would control.” [cmt. 9]
- Maryland and ABA Model rules **do not permit** a conflict analysis. Strongly suggested in the comments. Supreme Court of Maryland recently concluded this. See *Att’y Grievance Comm’n of Md. v. Tatung*, 476 Md. 45 (2021).

Robol v. Virginia State Bar, 300 Va. 406 (2022)

- Only Supreme Court of Virginia case addressing choice of law.
- No analysis. Accepted Disciplinary Board's conclusion that the Ohio Rules of Professional Conduct applied, citing to the "litigation provision."
- Seems correct because the misconduct occurred in connection with a proceeding in (and was sanctioned by) a district court in Ohio.
- BUT the Board did not conduct a conflict analysis . . .

What If You Also Practice in DC and/or MD?

Except for the Litigation Provision, the DC and MD rules are very different from one another and from Virginia's rule.

Litigation provision:

- VA: in connection with a proceeding in a tribunal before which the lawyer appears
- MD/DC: in connection with a matter pending before a tribunal

Key differences:

(1) No "Our State Rules Rule!" Provision

What If You Also Practice in DC and/or MD?

(2) Other Conduct Provision:

- VA: “rules of jurisdiction in which the lawyer’s conduct occurred”
- MD: “. . . or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction”
- DC: Totally different—turns primarily on licensure/primary practice
 - If a person is only barred in DC, the DC Rules will always apply.
 - If you’re barred in DC and, say, VA, the rules of the jurisdiction in which you primarily practice apply, unless the conduct “clearly has its predominant effect in another jurisdiction in which [you’re] licensed to practice.”

What If You Also Practice in DC and/or MD?

(3) Safe Harbor Provision:

- VA: no
- MD: yes – but only as to predominant effect
- DC: maybe – would apply to entire rule

D.C. Rules of Professional Conduct Review Committee proposed changes to Rule 8.5
– main change is adding a safe harbor provision:

(b)(3) So long as the lawyer's conduct conforms to the rules of a jurisdiction that the lawyer reasonably believes will be applicable to his or her conduct under paragraph (b)(1) or (b)(2), the lawyer shall not be subject to discipline.

What does “predominant effect” mean?

Supreme Court of Maryland

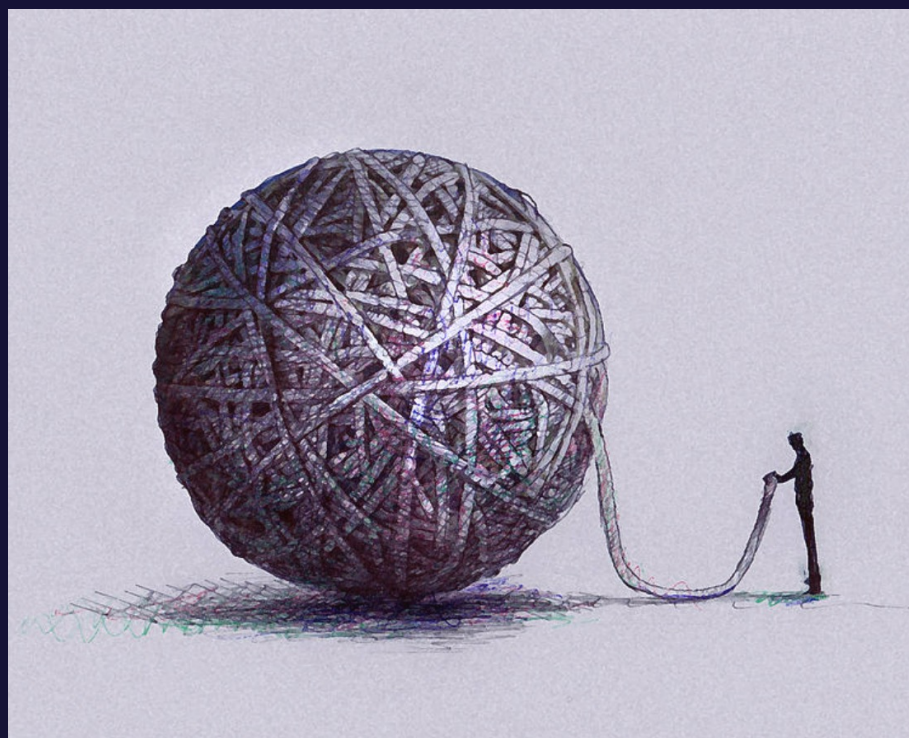
- *Att’y Grievance Comm’n of Md. v. Tatung*, 476 Md. 45 (2021) → Briefly discusses but doesn’t apply. Depends on the “facts and circumstances of the particular representation.” Location of physical office isn’t enough.
- *Att’y Grievance Comm’n of Md. v. Bonner*, 477 Md. 576 (2022) → Affirms district court’s interpretation and application to apply DC law—but without analysis or explanation.
 - Respondent stole money from his law firm. District court analysis: “The only party directly affected by his conduct was his law firm.” Firm has offices in several states, but the office predominantly affected was the D.C. office: financial and administrative headquarters, location of Accounting Department, largest office.

What does “predominant effect” mean?

ABA Formal Opinion 504 (March 1, 2023) – factor-based analysis

- the client’s location, residence, and/or principal place of business;
- where the transaction may occur;
- which jurisdiction’s substantive law applies to the transaction;
- the location of the lawyer’s principal office;
- where the lawyer is admitted;
- the location of the opposing party and other relevant third parties (residence and/or principal place of business); and
- the jurisdiction with the greatest interest in the lawyer’s conduct

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Best Practices for VA-Licensed Practitioners

Have a basic knowledge of the ethics rules in any jurisdiction in which you are licensed.

Understand which rules are different in the jurisdictions in which you practice, and make a habit of following, where possible, the most conservative rule.

Whenever you represent a client that is located outside of VA or the matter is before a non-VA court, refamiliarize yourself with that jurisdiction's ethics rules, including its choice-of-law rule.

If you practice in D.C., watch for the D.C. Court of Appeals' decision regarding proposed changes to Rule 8.5(b).

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2023 HOT TOPICS

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Summary

- Part I: Summary of Recent Conflict-of-Interest Decisions
- Part II: Review of the Rules
- Part III: Basic Framework for Analyzing Conflicts

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Part I: Summary of Recent
Conflict-of-Interest Decisions

Part I

- Roadmap
- Virginia LEO 1898 (Sep. 19, 2022): Conflicts from accepting advance fee in cryptocurrency.
- Virginia LEO 1893 (Apr. 12, 2023): Conflicts when representing a child.
- *In re Peiffer* (4th Cir. 2023): Personal-interest conflicts in litigation.
- *Doe v. Rockingham County School Board* (W.D. Va.): Expert witness conflicts in litigation (W.D. Va. 2023).
- D.C. LEO 383 (Apr. 2022)

Recent Decision: VA LEO 1898

- Adopted by VA Sup. Ct. on September 19, 2022
- Addresses ethics of receiving advance payment of fee in cryptocurrency.
- Holds that these transactions may involve conflicts of interest:
 - Treats this as a business transaction with a client subject to Rule 1.8 (Conflict of Interest: Prohibited Transactions).
 - Thus, need to give client opportunity to seek advice of independent counsel.
 - Need to get client's written, informed consent after full disclosure.
 - Terms must be fair and reasonable.

Recent Decision: VA LEO 1898

- Key disclosure questions:
 - What happens if value rises or falls?
 - Given “extreme fluctuation” in value, when will value be determined? Any true-ups?
 - Will client be billed in dollars or cryptocurrency?
 - Who pays transaction/transfer fees?
 - Which platform will be used to determine value?
 - When is fee earned?
- Other key (non-conflict) concerns:
 - Fairness and reasonableness of transaction will be evaluated based upon the facts available at the time the arrangement is agreed to.
 - Safekeeping client property / data security.
 - Client must be able to tell lawyer

Recent Decision: VA LEO 1893

- Question: What happens if you represent a child in a lawsuit, and you believe the parent is giving you directions that are not in child's best interest?
- Answer:
 - The child is the real party-in-interest, but you have to look to the parent to speak for and act on behalf of the child.
 - If there is no conflict between the interests of the child and the parent, there is usually a presumption that the parent is acting in the child's best interests.
 - If a conflict of interest arises between the interests of the child and the parent, then you should petition the court to appoint a guardian ad litem or different "next friend" to replace the parent, and you must advise the parent to consult independent counsel.

Recent Decision: *In re Peiffer*

In re Peiffer, No. 23-5, 2023 WL 6308691 (4th Cir. Sep. 5, 2023).

- Lawyer sought to withdraw from a complicated, time-consuming habeas proceeding when her mother was diagnosed with cancer.
- Claimed that her personal obligations to care for her mother created a conflict that prevented her from adequately representing her client.
- Court refused to let her out because she was the only representative of her client with “institutional memory,” but told her she could allow a co-counsel to take the “lead role.”
- Fourth Circuit affirmed, reiterating that withdrawal is not all-or-nothing, and that Peiffer “was free to divide up responsibilities” with co-counsel “in the way she sees fit.”

Recent Decision: *Doe v. Rockingham Cty.*

Doe v. Rockingham County School Board, No. 5:21-cv-00051, 2023 WL 6617333 (W.D. Va. Oct. 10, 2023).

- Plaintiff sought to disqualify Defendants' expert witness because expert had previously engaged her and disclosed privileged communications and work product.
- The expert claimed she had only had a perfunctory discussion with Plaintiff and received "little-to-no substantive information about the Virginia case, let alone privileged or protected material."
- Court disqualified the expert.

Recent Decision: Doe v. Rockingham Cty.

- Applicable standard for expert disqualification: *Wang Laboratories* test:
 - Was it objectively reasonable for the party seeking disqualification to believe that it had a confidential relationship with the expert?
 - Did “the party seeking disqualification share[] any confidential or privileged information with the expert”?
 - Same case / substantially related?
- Lessons
 - Memorialize any disclosures and confidentiality agreements and obligations in initial communications with expert.
 - Even if your documentation isn’t perfect, you may still be able to seek DQ.

Recent Decision: D.C. Bar Ethics Op. 383

- D.C opinion addresses ethical issues with Outside Counsel Guidelines, often imposed by large institutional clients.
- OGCs frequently require lawyer to withdraw from representing another current client in the event of a “midstream conflict.”
 - Held: Agreeing to this (or asking another lawyer to do so) may violate the ethics rules.
 - Rules provide that lawyer need not withdraw if a midstream conflict arises unless the conflict would adversely affect one of the representations in question.
 - Absent adverse effect, lawyer **must not** withdraw if withdrawal would have material adverse effect on interests of the client (with certain exceptions).
 - Therefore, an advance agreement to withdraw “may contravene Rule 1.7(d).”

Recent Decision: D.C. Bar Ethics Op. 383

- Opinion also addresses a number of non-conflicts issues in OCGs:
 - OGC often purports to require lawyer to advise client or obtain client’s consent “before the lawyer or law firm agrees to represent a competitor of the client in an unrelated matter not involving the client.”
 - OGC may require lawyer to notify client or seek consent “where the issue involved might be of interest to the client.”
 - OGC often purports to give client the right to “audit a lawyer’s records,” but this may contravene duty of confidentiality to other clients.
- **Key holding:** Merely agreeing to these provisions—or asking another lawyer to agree to them—may violate the Rules of Professional Conduct even if you never disclose any confidential information.

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Part II: The Conflict Rules

General Rule: Rule 1.7

“A lawyer shall not represent a client if the representation involves a **concurrent conflict of interest**.”



A **concurrent conflict of interest** exists if:

- Representation of one client is **directly adverse** to another client.

OR

- There is significant risk that the representation 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(a)(1)

Direct Adversity: Clearly Yes

- Litigation: (Client A v. Client B)
- Litigation: Cross Examining or Seeking Discovery from a Client
- Administrative Law: Representing claimant in workers compensation proceeding. Also representing a medical provider who files a claim in the proceeding, seeking to be paid fees out of claimant's award. (In re Geib, VSBA Docket No. 21-022-120729.)
- Transactions: Negotiating for Client A against Client B
- Counseling: Advising Client A about rights vis-à-vis another Client B. (ABA Formal Op. 05-434.)
Example: Has the statute of limitations run for Client A to sue Client B?

Rule 1.7(a)(1)

Clearly Not Directly Adverse

- Litigation: Client A v. Non-Client. Case may put Non-Client out of business. Non-Client is a customer of Client B.
 - Client B has an economic interest, but mere economic interest is not direct adversity. (Rule 1.7, cmt. 6.) But still need to consider whether you have a punch-pulling conflict.
- Transaction: Representing Client A in acquisition of a Non-client. Client B is a business competitor of Client A but is not bidding or otherwise involved. The acquisition will harm Client B by making Client A a stronger rival.

But other cases are less clear.

Rule 1.7(a)(2)

Material-Limitation Conflicts

- Includes “punch pulling” conflicts.
- Effectiveness conflicts.
- Often, but not always, involves different matters.

Relevant Comments

- Identifying Direct Adversity
 - Rule 1.7, Comments [6]-[7]
- Identifying Material Limitation
 - Rule 1.7, Comment [8]
- Personal Interest Conflicts
 - Rule 1.7, Comments [10]-[12]

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Former Client Conflicts: Rule 1.9

- Substantial relationship test
 - Test focuses on facts in the current and former matters – not the type of law.
 - Comment [3]
 - VA LEO 1399 - An in-house lawyer performed some work for the corporation's subsidiary. After leaving that position, the lawyer was hired by a company adverse to the subsidiary. The lawyer may represent the company, because the matter was unrelated to the work the lawyer had performed for the subsidiary and the lawyer had learned no confidences or secrets.
- Encourages lawyer mobility and client choice
- DC Ethics Opinion 343 – limiting scope of representation to avoid conflict

Conflicts Involving Former Government Officials and Former Arbitrators/Mediators

- Rule 1.11 – Former Government Officials
 - Comparison to Rule 1.9
 - Screens
- Rule 1.12 – Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

Imputation of Conflicts

- Basic Rule – Rule 1.10
 - Impact of screens
 - What constitutes “associated in a firm”
- Exception for personal interest conflict, Rule 1.9(a) or (b), or association with prior firm
 - Rule 1.18 – Perspective Clients
 - Rule 6.5 – Walk-in Clinics

Imputation of Conflicts - Laterals

- A lawyer joins a new firm. A screen can cure a former client conflict (Rule 1.9(a) or (b)) based on her association with prior firm.
- Rule 1.9(a) provides a lawyer who has formerly represented a client in a matter cannot thereafter represent another in the same or substantially related matter.
- Rule 1.9(b) applies to clients represented by a firm in which the lawyer was formerly associated. Lawyer only barred from representing person if obtained confidential information that is material to the matter.

Imputation of Conflicts - Laterals

- What happens to the firm's conflict profile when a lawyer leaves? Rule 1.10(b).
- A lawyer leaves a firm. That firm can be adverse to any client of the formerly associated lawyer and not currently represented by the firm unless: (1) the matter is the same or substantially related to a matter handled by the formerly associated lawyer and (c) any remaining lawyer at the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Conflict Waivers

- Waivers and advance waivers
 - Rule 1.7(b)
 - Informed consent and required disclosure
 - Comments [18]-[20]
- Waivers should be in writing.
- Waivers require “informed consent” explanation of material risks and reasonable alternatives.
- Don’t offer screens or walls if you can avoid them.
- Avoid, if possible, waivers based on consent from non-lawyers.

Advance Waivers

- Don't just rely on broad "kitchen sink" advance waivers.
- If there are specific conflict scenarios that you foresee, put them in the waiver.
- Avoid labeling a waiver as an "advance waiver" if you can.

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Part III: Framework for Analyzing
a Conflict of Interest

How to Analyze a Conflict of Interest

- Which law applies?
- Who is the client?
- How many clients do you have?
- Is there adversity among the clients involved?
- Is the client to which the lawyer is adverse a current or former client?

Choice of Law

- What state's rules apply? Choice of applicable ethics rules governed by Rule 8.5.
- For matters before tribunal, apply law of jurisdiction in which tribunal sits.
- For non-litigation matters, apply rules of the jurisdiction where the predominant effect of the lawyer's conduct occurs.

Who is the Client?

- Conflict rules (Rule 1.7 and 1.9) apply when the party involved is a current or former client.
 - Therefore, determining whether the person or entity is or was a client is critical.
- Corporation as client
 - Corporation, Corporate officers, Employees, or all of the above
- DC Ethics Opinion 356 – identifying the client's position

Accidental or De Facto Clients

- Other participants in the transaction: advisors, brokers, lenders, etc.
- Related party and corporate family issues: e.g., partners, dominant shareholders, corporate parents, affiliates, subsidiaries, etc. Rule 1.7, Comments 34 (VA did not adopt)-35
- Membership entities: e.g., trade associations, lending syndicates, partnerships

Avoid Accidental or De Facto Clients

- Specify client in engagement letter.
- Notify potential “accidental” clients that you don’t represent them.
- Don’t give non-clients legal advice or get confidential information from them.
- Be careful with “attorney-client” communications.

Is There Adversity?

- Conflict rules (Rule 1.7 and 1.9) also require that there is adversity in some form. Absent adversity, there is no conflict under these rules.
 - DC Ethics Opinion 243 – joint representation in divorce cases sometimes allowed.
 - N.C. Eth. Op. RPC 137 – lawyer who formerly represented an estate may not subsequently defend the former personal representative against a claim brought by the estate.

Adversity: Handling Multiple Clients

If you have multiple clients, are they adverse?

- “Adversity” not just hostility or antagonism, includes differing interests.
- “Adversity” is not static concept – it can be absent at the outset of an engagement but arises over the course of an engagement.

Adversity: Handling Multiple Clients

When are clients too adverse?

- “A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic . . . but [with disclosure and consent] common representation is permissible where clients are generally aligned in interest even though there is some difference in interest among them.” Rule 1.7, Comment 28.

Adversity: Handling Multiple Clients

- Clients should be advised that no privilege in any dispute among them and no secrets during the engagement. Rule 1.7, Comment 30.
- Lawyer should set forth in engagement letter reasons why lawyer believes common representation is permitted.

Former or Current Client?

- Lawyer's obligations depend on client's status as former vs. current.
- If a lawyer handles one matter for a client and completes that matter, then the client is typically a former client once the matter is done.
- If the lawyer handles multiple matters for a client, the client may be considered a current client even if the lawyer has no pending assignment.
 - Comment [4] to Rule 1.3. These are "sleeper clients."
 - The only way to avoid "sleeper clients" is for the lawyer to tell the client (preferably in writing) that the most recent engagement is concluded and that the attorney-client relationship has ended.

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Questions?

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Thank You!