

BASIC CONFLICTS OF INTEREST RULES: PART I

Hypotheticals

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Hypothetical 1

You serve on a bar committee considering fundamental changes to your state's ethics rules. You have been asked to pick one of two basic conflicts rules that will govern a lawyer's adversity to a current law firm client.

What basic conflicts rule should apply to a lawyer's adversity to a current law firm client?

A conflict exists only if lawyers at the firm are representing opposite sides in a transaction or in litigation.

A conflict exists whenever a lawyer becomes adverse to a current law firm client, even on a matter totally unrelated to the law firm's representation of that client

Hypothetical 2

You have represented the developer of a proposed office building for several years. The key zoning hearing will take place two weeks from now. One of your partners received a call this morning from a nearby landowner (whom your law firm represents on one unrelated matter). The landowner wanted to hire your firm to appear at the zoning hearing and oppose the development. Your partner knew enough to turn down the representation, but now you wonder what effect the landowner's actions will have on your long-standing representation of the developer.

Without the other landowner's consent, may you represent the developer at the upcoming zoning hearing?

YES

NO

Hypothetical 3

As the General Counsel of your publicly traded client, you naturally find yourself dealing with complicated situations. You just received a call from one of your client's directors, who serves on the Audit Committee. She has asked you to hire an outside law firm to assist the Audit Committee in conducting an internal corporate investigation into possible accounting irregularities. A prominent local lawyer comes immediately to mind, and within five minutes you have him on the phone. Before you can explain the situation in any detail, he asks you a simple question.

Who will be the outside law firm's client in this representation --

The board member who called you?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?

Hypothetical 4

One of your law school classmates is interviewing for in-house law jobs. She is a careful planner, and she wants your reaction to two issues, "just in case they come up."

- (a) If state law and the governing corporate documents require a majority board of directors vote to fire the company's lawyer, may she continue to represent the corporation if the board deadlocks on a motion to fire her?

YES

NO

- (b) What should your roommate do if the president of one wholly owned subsidiary gives her direction that is directly contrary to that given by the president of another wholly owned subsidiary?

Hypothetical 5

You have represented a closely held corporation for several years, dealing with each of the two owners and many of the corporation's employees. The two owners have been quarreling more vigorously than usual lately, and you wonder what that means for your representation.

If the two owners become acutely adverse, can you represent the corporation and one of the owners in litigation against the other owner?

YES

NO

Hypothetical 6

You have been asked to bring a lawsuit against a Dallas-based corporation. Although your law firm's computerized conflicts search does not reveal any problems, one of your partners just called to tell you that she is handling a small amount of labor work for one of the proposed defendant's sister corporations. Your law firm does not represent the parent. The sister corporations are in different businesses, but both rely on the parent's law department for legal advice.

May you represent your client in the lawsuit against the Dallas-based corporation (without its consent)?

YES

NO

Hypothetical 7

After about three years of practice, you decided to move in-house with your largest client. From your work with that client, you know that it has several wholly owned subsidiaries and several partially owned subsidiaries.

As an in-house lawyer, will you be jointly representing the parent corporation (which employs you) and all of its subsidiaries?

YES

NO

Hypothetical 8

You joined your state's attorney general's office immediately after law school, and have developed an interesting practice representing state-operated colleges. One of your college clients just asked for your help in pursuing a matter adverse to another state entity (which funds and processes state employee health care claims). You have never worked for the state health care agency.

May you represent the state-operated college in a matter adverse to the state-operated health plan?

YES

NO

Hypothetical 9

You occasionally represent a law firm in your city on labor and employment matters (your work has not given you any information about the law firm's finances). The firm has five partners and ten associates. You have met all of the firm's lawyers at social functions, but deal primarily with one of the partners. One of your partners just told you that the wife of another partner at that firm wants to hire your firm to file a divorce action against her husband.

May your firm represent the wife in suing one of your law firm client's partners for divorce (without that partner's consent)?

YES

NO

Hypothetical 10

You have been asked to represent an association of companies based in your state's capital. This is a plum assignment, and you think it might give you a real marketing opportunity -- because you will have the chance to "schmooze" many potential clients at regular meetings of the association. However, one of your partners worries that there might be a downside risk to representing the association, because it might prevent your firm from being adverse to association members.

If your law firm represents the association, may you take matters adverse to individual members of the association (without their consent)?

YES

NO

Insured/Insurance Company

Hypothetical 11

You had trouble finding a job after graduating from law school, but you finally landed an associate position at a law firm that primarily handles insurance defense work. During your first interview with an insured whom you have been asked to represent by the insurance company, the insured asks you a question that you cannot immediately answer: "Are you just representing me, or are you also representing the insurance company?"

When an insurance company hires a lawyer to represent one of its insureds, does that lawyer also represent the insurance company?

YES

NO

Hypothetical 12

As part of your local bar's mentoring initiative, you answer ethics questions from recent law school graduates. You just received a call from a young lawyer who wants to start taking trust and estate matters. Although she poses her question in the abstract, the answer could affect her day-to-day actions.

If an executor hires the young lawyer to perform work, who is the lawyer's client?

The estate?

The executor (but only in his or her fiduciary capacity)?

The executor in all his or her capacities?

Hypothetical 13

After about ten years in the business world, you decided to become a lawyer. Although you were involved in many bond deals in your previous career, you never had to answer a question that one of your law professors just posed to you.

When you act as bond counsel, is the bond issuer your client?

YES

NO

Hypothetical 14

You have developed a statewide reputation for representing retailers. Your largest client is a retailer which sells clothing. You just received a call from your client's largest competitor. You are flattered that the competitor has called you, but you also worry that representing both retailers might create an inappropriate conflict of interest.

May you represent both retailers?

YES

NO

Hypothetical 15

You represent an insurance company in labor and employment matters. On behalf of another client, you recently filed a lawsuit against an out-of-state company, seeking \$10 million in damages. You just received a call from the insurance company's vice president. She tells you that her company insures the out-of-state company, and that she considers your lawsuit against the company to be a direct conflict -- because the insurance company must pay the cost of defense and ultimately pay any judgment against the defendant company.

Is the lawsuit against the defendant company "adverse" to your insurance company client for conflicts purposes (thus requiring you to obtain the insurance company's consent before going forward)?

YES

NO

Hypothetical 16

A new associate is preparing a number of third party subpoenas that you will have to issue in a commercial case. He just called to ask a few questions.

- (a)** Absent consent, may you issue a subpoena to another firm client (which your firm represents on unrelated matters) when you expect a dispute over the discovery you seek?

YES

NO

- (b)** Absent consent, may you issue a subpoena to a bank (which your firm represents on unrelated matters), when there is no reason to think that the bank would resist or dispute the subpoena?

YES

NO

Hypothetical 17

You have represented a bank for several years. It is not your largest client, but has been a steady source of business. On behalf of that client, you normally argue that a particular state statute does not allow a certain type of claim against banks. One of your partners just received a call from a potentially lucrative new corporate client, which is in the midst of litigation with another bank that you have never represented. In that litigation, the company wants to take the position that the state statute does allow such a claim against banks.

May you represent the corporate client in asserting its position on the meaning of the statute (without your bank client's consent)?

YES

NO

Hypothetical 18

Although you generally handle transactional work for several family-owned companies and their owners, you also help some of your clients with their estate planning. The president of one of your corporate clients just called to say that he would like you to prepare a new will for him and his fourth wife. You worry that the president's interests are or will become adverse to her interests.

May you jointly represent the president and his fourth wife in preparing their estate plan?

YES

NO

Hypothetical 19

For the past six months, you have been representing a husband and wife in preparing their estate plan. You did not explain to either client whether you could (or must) disclose to one spouse what the other spouse told you in connection with their estate planning. Over lunch early this afternoon, the wife told you in confidence that several years before meeting her current husband she had an affair with a coworker and had an illegitimate child. Her husband does not know anything about this, but the wife is considering if she should make arrangements for her illegitimate child to receive some of her estate.

Shell-shocked, you return to the office and discuss this issue with one of your senior partners.

(a) Must you tell the husband about his wife's illegitimate child?

YES

NO

(b) May you tell the husband about his wife's illegitimate child?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 20

About six months ago, a well-known basketball coach asked you to represent him and his wife in preparing their estate plan. The coach had been the subject of tabloid rumors, and you did not want to be surprised by some disclosures that you might have to share with his wife. At the beginning of the representation, you therefore had your clients sign a retainer agreement indicating that you would not share with both clients information that you learn from one of the clients. Just as you feared, your basketball coach client told you this morning that he had been romantically involved (for about 15 minutes) with another woman at a bar, and worries that she will claim paternity if she has a baby.

(a) Must you tell the wife about this incident?

YES

NO

(b) May you tell the wife about this incident?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 21

You have been representing a husband and wife in their estate planning for about two years. At the beginning of the representation, you had both of your clients sign an explicit "no secrets" retainer agreement. Your goal was to avoid the awkward situation in which one of the clients asks you to keep secret material information from the other client, and the clients have not agreed in advance on how to handle such a conflict.

During your most recent meeting with just the husband, he tells you that he has fallen in love with his neighbor, and plans to divorce his wife. When he asks you to keep this information secret until he is ready to break the news to his wife, you remind him of the agreement that he and his wife signed two years ago that there would be "no secrets" in the estate planning process. You can tell from the horrified look on the husband's face that he has forgotten about that agreement.

(a) Must you tell the wife about the husband's divorce plans?

YES

NO

(b) May you tell the wife about the husband's divorce plans?

YES

NO

(c) May you continue to jointly represent the client?

YES

NO

Hypothetical 22

A large rehabilitation hospital chain has been in the news lately, because it may have inflated its earnings over the past several years by engaging in improper accounting. Some of your clients have sold goods and services to the hospital chain, and several have asked you for advice about how they should proceed (for instance, whether they should file lawsuits and seek pre-judgment attachment of hospital assets).

- (a)** May you advise more than one creditor of the hospital chain about how to proceed?

YES

NO

- (b)** May you represent more than one creditor in filing lawsuits against the hospital chain?

YES

NO

- (c)** Would it make a difference if some of your creditor clients are secured creditors, and some are unsecured creditors?

YES

NO

Hypothetical 23

In a classic "good news bad news" telephone call, you just learned that your best client has found a buyer for a prime piece of real estate it has been trying to sell. The "bad news" is that one of your partners represents the buyer in nearly all of its real estate matters. Your client has asked whether it is possible for your law firm to represent both the buyer and the seller in this real estate transaction.

May your law firm represent both the buyer and the seller in a real estate transaction?

YES

NO

Hypothetical 24

Your law firm represents a number of small companies in your city. One of your clients has asked you to prepare and file a collection case against another local company which has failed to pay for a large printing job that your client performed for the other company. You know that one of your partners handles most of the corporate matters for the potential defendant company. Your client has told you that it would consent to your law firm representing the defendant in the case, because your client trusts you to vigorously pursue the collection case.

With the defendant company's consent, can your law firm represent both the plaintiff and the defendant in the collection case?

YES

NO

Hypothetical 25

In connection with your service on a committee reviewing your state's ethics rules, you have been asked to vote on proposals governing adversity to former clients.

What basic conflict rule should apply to a lawyer's adversity to a former law firm client?

1. As long as the lawyers with material confidential information do not work on the matter (and comply with their ethical duty of confidentiality), other lawyers in the firm may be adverse to the former client.
2. As long as the firm sets up a formal "ethics screen" prohibiting the lawyers with material confidential information from revealing it to anyone else in the firm, other lawyers in the firm may be adverse to the former client.
3. If any lawyer at the firm has material confidential information from an earlier representation, no lawyer in the firm may be adverse to the former client.

Hypothetical 26

About six months ago, a doctor asked you to prepare an offer for an office building she was interested in purchasing. She gave you the figure to include in the offer, and you prepared and sent her a standard offer for her review. You have not heard from her since you sent her the draft offer, and you have no idea whether she ever presented it to the seller. This morning, you received a call from a company who wants you to pursue a trademark infringement action against the doctor (based on some phrases that the doctor uses in her marketing).

Without the doctor's consent, can you represent the company in the trademark action against the doctor?

YES

NO

Hypothetical 27

You represented an antique dealer for about ten years, ending in 1990. Another client just asked you to handle a lawsuit against the antique dealer.

Without your former client's consent, may you represent a client adverse to the antique dealer now that twenty years has passed since you represented the dealer?

YES

NO

Hypothetical 28

A former client just filed a motion to disqualify your firm from handling a matter adverse to it. You check your time records, and discover that one of your lawyers spent less than two hours working for that client during the very brief time that you handled a matter for it.

Without the former client's consent, can you take a matter adverse to the former client whom you represented for less than two hours?

YES

NO

Hypothetical 29

Several months ago you began to represent a bank in foreclosing on a hotel in another state. Your bank client had loaned the hotel owner several million dollars five years ago, but he defaulted. Your conflicts check had showed that your firm had previously represented the hotel owner (the matter was called "General Business"), but the matter was closed over 15 years ago. Your firm had not done any work for the owner since then, and the partners who formerly represented the owner could not recall any of the details of their work for him.

You just received a letter from your state bar, reporting that the hotel owner has filed an ethics charge against you. As you hurriedly read the charge, you learn for the first time that 15 years ago your law firm represented the owner in buying the exact hotel upon which you are now helping the bank foreclose. As you do some more checking, you discover that some of the purchase closing documents actually contain your partners' signatures as witnesses. The hotel owner alleges that it is a blatant conflict of interest for you to foreclose on the very same hotel that your partners assisted him in buying.

Does your representation of the bank in the foreclosure matter violate the ethics rules?

YES

NO

Hypothetical 30

You formerly represented a corporation on several (but not all) of its legal matters. Over the course of that representation, you learned quite a bit about the corporation's preferred approach to settlement discussions and negotiation strategies, corporate executives' willingness or unwillingness to be deposed by an adversary, etc. About six months after your representation of the company ended, you received a call from another company that wants you to handle a breach of contract action against your former client. When your former client learns of this possibility, its president calls you to complain, arguing that you are prohibited from taking the matter because of the "intimate" knowledge you acquired while representing the company.

Is the type of knowledge you acquired while representing the company sufficient to prevent you from taking the breach of contract matter without its consent?

YES

NO

Hypothetical 31

One of your partners has been handling small employment discrimination cases for an out-of-state company with a factory in your town. Cases are slowly moving forward, but there are no depositions or trial dates on the immediate schedule. You just read a press release from that company indicating that it would begin manufacturing and selling outboard motors -- starting about three years from now. One of your firm's largest clients manufactures outboard motors, and you want to "clear the decks" now to avoid any possible conflict once the two companies begin to compete with one another.

Would it be ethical for you to withdraw now from the small employment discrimination cases your firm is handling?

YES

NO

Hypothetical 32

You are about three weeks away from a large trial, but your client just told you that it cannot afford to pay your last bill and will not be able to pay any future bills. Your law firm's management wants you to withdraw from the representation.

May you withdraw from representing a client who has not paid its bills?

YES

NO

Hypothetical 33

You just received a call from the president of your firm's largest client. She asks that you file a lawsuit on your client's behalf against a small company from which your client buys equipment. Your conflicts check reveals that one of your lawyers is currently representing the equipment supplier in a very small unrelated real estate matter. You are familiar with the general ethics rules, and you ask your firm's "ethics guru" whether the rules allow you to withdraw from representing the equipment supplier so it will be considered a "former" client under the conflicts analysis -- thus permitting you to represent your largest client against it in this new unrelated matter.

Would it be ethical for you to withdraw from representing the equipment supplier so you could take the case against it for your largest client?

YES

NO

Hypothetical 34

In the last day or two, several potential new clients have called to see whether your firm could represent them. The conflicts checks have revealed the need for consents, and you want to know what steps to undertake.

- (a) May you call an existing client and ask for its consent to your representation of a new client in business negotiations adverse to your existing client?

YES

NO

- (b) May you call an existing client and ask for its consent to your representation of a new client in analyzing the existing client's patents which might be infringed by an important new product that the new client plans to market next year?

YES

NO

Hypothetical 35

Before beginning to defend one of your clients in a lawsuit brought by another company that your firm represents on unrelated matters, you obtained both clients' consent. The litigation has now turned uglier than expected, and the client who is the plaintiff in the litigation just sent you a letter revoking its consent -- and insisting that you withdraw as counsel of record for the defendant.

Must you withdraw from the representation?

YES

NO

Hypothetical 36

Your firm generally represents developers. A general contractor recently called one of your partners to see if she was available to handle some labor problems that the general contractor was facing. Your conflicts check reveals that you are not actively adverse to that general contractor, but you know that some of your developer clients deal with the general contractor, and you do not want to jeopardize your firm's opportunity to represent your large developer clients if they ever become adverse to that general contractor.

May you obtain a prospective consent from the general contractor that will allow you to represent your developer clients adverse to it in the future?

YES

NO

Hypothetical 37

Your law firm has either filed or defended a number of disqualification motions lately, and you would like to understand how the disqualification standard differs (if at all) from the conflicts analysis with which you are fairly familiar.

- (a)** Is a court likely to disqualify a law firm upon finding it guilty of a conflicts violation?

YES

NO

- (b)** Is the court likely to rely on an "appearance of impropriety" standard when assessing a disqualification motion?

YES

NO

Hypothetical 38

For the past year, you and local counsel in another city have been defending a corporate client and one of its executives in a covenant-not-to-compete case. You were surprised to receive a call this morning from local counsel, advising you that the adversary had just filed a motion to disqualify that firm based on its alleged conflict caused by its representation of both the company and the executive. The motion claims that representing both defendants creates an inherent and insoluble conflict. A few questions come quickly to your mind.

- (a) May you argue that your adversary does not have standing to pursue a disqualification motion?

YES

NO

- (b) May you argue that the disqualification motion is barred by the doctrine of laches?

YES

NO

- (c) If your adversary succeeds in disqualifying your co-counsel, will you also automatically be disqualified?

YES

NO

Degree of a "Material Limitation" That Creates a Conflict

Hypothetical 39

You were just appointed to your firm's Conflicts Committee, and you are trying to understand basic conflicts concepts. You realize that your firm cannot represent one client in a matter directly adverse to another client. You also understand that you cannot undertake a representation if one of your lawyer's judgment would be "materially limited" by that lawyer's duty to some other client or a third party, or by the lawyer's own interests. You are having some trouble understanding what level of possible "material limitation" triggers a problem under that second type of conflict.

For the material limitation type of conflict, what level of "limitation" requires you to treat a representation as a conflict requiring client consent, etc.

When a material limitation is "possible"?

When there is there a "significant risk" of a material limitation?

When a material limitation is "inevitable"?