

BASIC CONFLICTS OF INTEREST RULES: PART II

Hypotheticals

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Hypothetical 1

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 2

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 3

You prepared the estate plan for a wealthy developer about three years ago. His original will is still in your law firm's safe, and you send him period "legal updates" on estate tax changes -- none of which has prompted him to retain you for any work since you finished his estate documents. This morning your largest client asked you to file a lawsuit against the developer over an important zoning matter that arose six months ago.

Without the developer's consent, can you represent your client in the suit against the developer?

YES

NO

Hypothetical 4

You represented an out-of-state company in several matters over the past five years. Your last work for the company involved a dispute with its landlord. After several months of intense negotiations, you stopped hearing from the company, although you do not know if it resolved its dispute with the landlord. Your last communication with the company was approximately eight months ago.

Your largest client just asked you to represent it in a large patent case against the out-of-state company. The case has nothing to do with the landlord dispute, and would generate several million dollars of fees for your firm. You are wondering what steps (if any) you should take.

(a) Should you send a termination letter to the out-of-state company?

YES

NO

(b) Should you ask the out-of-state company for consent to take the antitrust matter against it?

YES

NO

Hypothetical 5

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 6

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 7

Last year you represented a dentist in divorcing his wife. You have now been asked to take a matter adverse to the dentist on a completely unrelated matter.

Is there any circumstance in which you would not be able to take the matter adverse to the dentist in the completely unrelated matter?

YES

NO

Hypothetical 8

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 9

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 10

An in-house lawyer recently left her company and joined your firm. She just called to ask you whether the same standard governing adversity to former clients applies to in-house lawyers and outside lawyers.

Does the same standard apply to in-house lawyers' and outside lawyers' adversity to former clients?

YES

NO

Hypothetical 11

A government lawyer just left her agency and joined your firm. She called to ask you whether the standard governing adversity to former clients applies any differently to government lawyers than to private lawyers.

Does the same standard apply to government lawyers' and private lawyers' adversity to former clients?

YES

NO

Hypothetical 12

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 13

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 14

You are considering adding a phrase to your standard retainer letters that would secure a client's advance consent to your law firm's withdrawal "if the client fails to pay agreed legal fees and expenses in a timely manner."

May you include such a provision in your standard retainer letter?

YES

NO

Hypothetical 15

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 16

You have been fairly active in international bar association activities, and enjoy learning about other countries' ethics rules. During one recent meeting, a lawyer from another country told you that her country's ethics rules allow a law firm to take a matter adverse to another firm client as long as the lawyers representing the client and the lawyers representing the client's adversary are separated from one another. She expresses some surprise that the United States might not follow the same rule.

Would an "ethics screen" allow your firm to take a matter adverse to a current client without its consent?

YES

NO

Hypothetical 17

A new client just called to hire you in a relatively small real estate matter. Your conflicts check reveals that one of your partners is representing a much larger firm client in a business negotiation with the new client. You want to begin working quickly, so you immediately obtain the new client's consent for your firm to continue representing your larger client in the business negotiation. You are not sure if you also need the larger client's consent, so you call your firm's "ethics guru" to ask.

Before representing the new client in the real estate matter, must you obtain your larger existing client's consent?

YES

NO

Hypothetical 18

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 19

You act as your firm's "ethics guru." You just received a call from one of your partners, who wonders whether she needs a consent letter. She is handling a negotiation on behalf of a developer against a general contractor that your firm represents in ERISA matters. Your partner tells you that the general contractor's in-house lawyer handling the negotiations obviously knows about the conflict, because the in-house lawyer had visited your firm's partner who handles the ERISA matters and attended negotiation sessions (with your firm representing the contractor's adversary) during the very same visit to your firm's offices. Your partner argues that obtaining a formal consent is a waste of time, given this situation.

- (a)** Must you obtain the general contractor's formal consent to your representation of the developer adverse to it in negotiations?

YES

NO

- (b)** Must the consent be in writing?

YES

NO

Hypothetical 20

You want to represent a hospital in fairly friendly negotiations with the inventor of a medical device that the hospital wants to license. An associate at your firm currently represents the inventor on an unrelated intellectual property matter. You have advised your contact at the hospital that you must obtain the inventor's consent to represent the hospital adverse to the inventor. The hospital has offered to speak with the inventor, and arrange for the inventor to sign whatever consent letter you suggest.

May you follow the hospital's suggestion?

YES

NO

Hypothetical 21

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 22

You have been representing both a trucking company and one of its drivers in a matter. Your retainer letter with the driver specifically identifies him as an "accommodation" client, and permits you to withdraw from representing him (and continuing representing the company) should adversity develop between them. Adversity has now developed, but the driver claims that the "hot potato" rule prevents you from withdrawing from representing him.

May you withdraw from representing the driver in order to represent the company adverse to him?

YES

NO

Hypothetical 23

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 24

As your law firm's new general counsel, you want to understand the imputed disqualification rules.

Does the same imputed disqualification rule apply to private law firms, corporate law departments and government agencies?

YES

NO

Hypothetical 25

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 26

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

Hypothetical 27

For the past twelve years, you have given an annual ethics program so your law firm colleagues and best client representatives may satisfy your state's two-hour ethics MCLE requirement. You have been trying to teach the basic ethics principles that govern conflicts of interest, but no one seems to listen to you -- although you are remarkably handsome (for a lawyer) and incredibly articulate. You want to scare your colleagues into complying with the conflicts rules -- by warning them about the sanctions that can be imposed on lawyers who ignore the rules.

May lawyers who ignore the conflicts rules face the following sanctions:

(a) Embarrassment?

YES

NO

(b) Discharge by an angry client?

YES

NO

(c) Loss of fees?

YES

NO

(d) Malpractice claim by an angry client?

YES

NO

(e) Suspension or revocation of their license to practice law?

YES

NO

(f) Federal prison term?

YES

NO