

# HOW TO ANALYZE A CONFLICT: 2022 CONFLICTS UPDATE

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# Summary

- Recent Conflict of Interest Decisions
- How to Analyze a Conflict of Interest Scenario
- Rules Governing Conflicts of Interest
- Selected Examples and Hypotheticals

# Recent Decision: VA LEO 1894

- Adopted by VA Sup. Ct. on April 20, 2022
- Background:
  - Addresses conflicts of interest that arise when a lawyer represents multiple children in a tort case against day care center.
  - Lawyer is concerned that daycare may not have enough funds to fully compensate victims.

# Recent Decision: VA LEO 1894

- Holding: Lawyer may represent multiple children against same tortfeasor even when funds are insufficient to compensate victims fully.
- Analysis:
  - Lawyer cannot negotiate aggregate or interdependent settlement without informed consent of each client.
  - Lawyer must obtain informed consent in writing from next friend of each child; informed consent must disclose that should actual conflict arise, lawyer will withdraw from representing all affected clients.

# Recent Decision: RevoLaze v. Dentons

- Background:
  - Swiss Verein Dentons represented RevoLaze (patent for laser abrading – which creates faded jeans) in ITC proceeding to obtain general exclusion order to block importation by companies importing infringing products.
  - Dentons US partner identified potential conflict with Gap and represented to litigation funder that it had been cleared.
  - Gap had Dentons disqualified.
  - RevoLaze sued Dentons for malpractice.

# Recent Decision: RevoLaze v. Dentons

- Holding: Ohio Court of Appeals affirmed \$32 million malpractice verdict on April 28, 2022.
- Analysis:
  - Court found no error in trial court's verdict.
  - Dentons was common firm – had common conflict base, shared confidential information, united on website, and had same email address ending (dentons.com).
  - Dentons US should have obtained informed consent to representation, which would've included risks of disqualification.

# How to Analyze a Conflict of Interest Scenario

- 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.
  - Comment [8] to VA Rule 1.7 - "a lawyer can never adequately provide joint representation in ... child custody, child support, visitation, spousal support and maintenance or division of property [matters]."
  - 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.

# Former or Current Client?

- Rule 1.7(a)(2) applies if there is significant risk that representation of a client will be materially limited by lawyer's responsibilities to another client, former client, third person, or personal interest of lawyer.
- Rule 1.9 covers situations where a lawyer is adverse to a former client and is much more permissive, allowing the lawyer to be adverse to a former client except on matters which are the same or substantially related to the work done by the lawyer for the former client.

# Former or Current Client?

- 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.

# 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.

# 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 the clients are generally aligned in interest even though there is some difference in interest among them.” Rule 1.7, Comment 27.



# Handling Multiple Clients

- Clients should be advised that no privilege in any dispute among them and no secrets during the engagement. Rule 1.7, Comments 30-31.
- Lawyer should set forth in engagement letter reasons why lawyer believes common representation is permitted.

# Current Client Conflicts: Rule 1.7

- Rule 1.7(a)(1) – one client directly adverse to another
- Rule 1.7(a)(2) – material limitation conflict due to another client, former client or third person, or material interest of lawyer
- Waivers and advance waivers
  - Rule 1.7(b)
  - Consent and required disclosure (Comment [19])

# Current Client Conflicts

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

# 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 Or Arbitrator

# Imputation of Conflicts

- Basic Rule – Rule 1.10
  - Impact of screens
  - What constitutes “associated in a firm”
- Exception for association with prior firm
  - Rule 1.18 – Prospective Clients
  - Rule 6.5 – Walk-in Clinics

# 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 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.

# Identifying Conflicts: Example 1

- Lawyer's Firm represents Bank X on real estate (but not lending) matters; lawyer is asked to represent Borrower in a loan transaction with Bank X. Is it a conflict? Is it waivable?

# Identifying Conflicts: Example 1

- Yes, it is a conflict. In representing Borrower, the lawyer would be adverse to Bank X, also a client of the Lawyer's Firm. But the conflict is waivable. VA Rule 1.7(a)(1) and (b), Comment 6.

# Identifying Conflicts: Example 2

- Lawyer's Firm (but not lawyer) represents Borrower, lawyer leaves Firm and goes to work for Bank X and is asked to handle a loan to Borrower.
- Same as above, except that lawyer before joining Bank X worked on a matter for Borrower.

# Identifying Conflicts: Example 2

- No conflict, Rule 1.9(b) allows lawyer who leaves Firm to be adverse to clients of former Firm so long as lawyer has no relevant confidential information.
- Under Rule 1.9(b), conflict if lawyer leaving Firm has relevant confidential information. In VA, lawyer cannot be screened, but in other jurisdictions, lawyer can. Alternatively, conflict can be waived.

# Identifying Conflicts: Example 3

- Firm represents Bank X as lead bank in lending syndicate. Firm also represents Bank Y, a member of the syndicate, but not on this transaction. Bank X's and Y's interests in the deal are aligned in most but not all respects. Can firm represent Bank X in negotiations with Bank Y?

# Identifying Conflicts: Example 3

- Conflict, if Firm is negotiating with Bank Y on behalf of Bank X. Bank Y can waive conflict or Firm can eliminate conflict with limitation on scope of representation, *i.e.*, not negotiating or advising on matters between Bank X and Bank Y.

# Identifying Conflicts: Example 4

- Firm is asked by Borrower to give an opinion on a regulatory matter with respect to a loan transaction with Bank X, which Firm represents on other matters. Firm does not otherwise participate in the transaction between Borrower and Bank X.



# Identifying Conflicts: Example 4

- Answer may depend on the nature of the opinion and issue addressed in it. Standard opinion that a corporation was validly formed and remains in existence may not give rise to conflicts. More complex opinions on more nuanced subjects may create conflicts. So long as Firm is not representing Bank X in the transaction, the conflict is waivable.

# Identifying Conflicts: Example 5

- Firm represents Lender. Borrower is obligated to pay Lender's legal fees. Borrower asks for Firm's detailed billing statement to Lender.

# Identifying Conflicts: Example 5

- A client confidentiality issue, not a conflict issue. Lawyer can only disclose client confidences with client authorization. Detailed billing statements are client confidences.

# Identifying Conflicts: Example 6

- Firm represents Underwriter in a securities offering. Firm also represents a subsidiary of Issuer on other matters and Issuer itself as tax/regulatory counsel on this deal. Issuer has separate transaction counsel.

# Identifying Conflicts: Example 6

- Conflict. In representing Underwriter, Firm is adverse to Issuer who is also a client by virtue of Firm's tax/regulatory work for Issuer and perhaps as a result of Firm's work for subsidiary of Issuer. Conflict may be waivable.

See Conflicts of Interests; Waivers, Imputation of Conflicts, NYC Eth. Op. 2001-2, 2001 WL 1870202.

# Thank You!

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Questions?