



**Tuesday, May 1**  
**11:00 am–12:30 pm**

## **801 Conflicts of Interest: Who is Your Client** *New to In-house Track*

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## OPENING PROPOSITION

Putting aside all the legalese ...

- Attorneys owe any client (current or former) a duty of loyalty and nothing should conflict with fully serving THE client ...
- Not even the interests of another client, a third party, or the attorney's personal interests

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## OPENING PROPOSITION

“Corporate counsel must, of course, deal with conflicts and possible conflicts every day ... [including] overseeing the work of outside counsel. Without first establishing the identity of the client, and without understanding the relationship of the entity client to the lawyer's immediate flesh-and-blood contacts, no conflicts analysis can ever begin.”

(“In-House Legal Department Ethical and Professional Conduct Manual”, Chapter 2: Who's the Client?, Association of Corporate Counsel)

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## OPENING PROPOSITION

- If you're new to in-house, any "conflicts" experience has likely related to law firm conflict clearances with clients
- Most conflicts materials is written from law firm perspective
- So, let's cover conflicts with a slant to what is unique about in-house practice

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## CAVEATS

- This presentation will focus on the ABA Model Rules
- Each State's attorney rules, guidelines, ethics opinions, and common law regarding ethics rules will need to be analyzed

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## WHO IS THE CLIENT?

- Answering this question is important for a number of reasons:
  - Decision-making and communication
  - Following internal policies
  - Sarbanes-Oxley
  - Attorney-client privilege
  - Duties owed under other ethics rules
  - Conflicts

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## THE ATTORNEY-CLIENT RELATIONSHIP

- Existence of an attorney-client relationship is really based on the relationship between the parties
  - Express/consensual, e.g., employment agreement
  - Inferred by courts and disciplinary authorities

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## THE EMPLOYER IS THE CLIENT

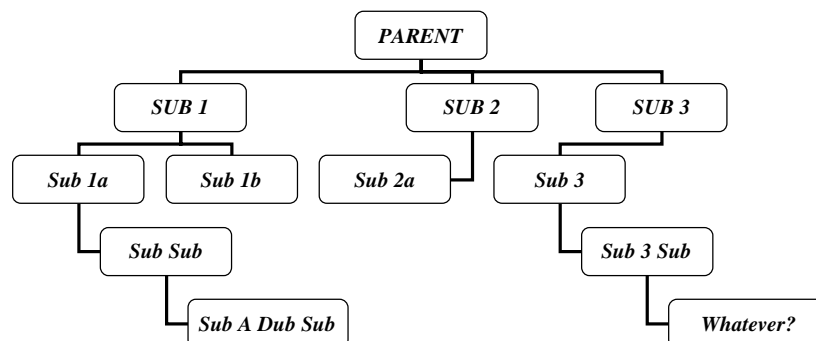
- For in-house counsel, the client is the organization that employs the attorney
  - However that organization defines itself
- Model Rule 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
  - NJ RPC 1.13(a): “A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.”

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## HOWEVER THAT ORGANIZATION IS DEFINED



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## OUTSIDE COUNSEL COMPARED

- Slightly different analysis for outside counsel
  - Comment [34] to Model Rule 1.7: a lawyer representing a corporation does not, by virtue of that representation, necessarily represent any affiliated organization
  - Outside counsel do not *per se* always represent affiliated entities of a corporate client. ABA Formal Opinion 95-390 (Jan 25, 1995)
- Scope of client relationship established by contract, i.e., retention agreement
- Note differing corporate practices to have law firms define client for conflict purposes

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## DEALING WITH CONSTITUENTS

- While in-house counsel must deal with constituents who act for the organization
- Such dealings in and of themselves do not confer client status on these constituents
  - Except for allowing privileged communications or prohibiting *ex parte* communications

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## **BUT BEWARE OF THE AMOEBA EFFECT**

If there could be adversity of interests between the organizational client and a constituent, the constituent could become a separate client for conflicts purposes

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## **POTENTIAL ADVERSE INTERESTS**

- Investigations (interviewing employees)
  - Facts may arise to indicate potential adversity of interests between constituent and organization
- Issue here is to control whether or not constituent becomes client
  - Attorney must explain that only the organization and not the individual is the client (the "Corporate Miranda" issue)
  - Or face losing effectiveness as company's counsel, e.g., company may not be able to disclose statements made by individual

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## POTENTIAL ADVERSE INTERESTS

- Litigation and dual representation
  - Arises when company and one of its constituents are jointly sued
  - Joint defense may lessen costs and help control defense
    - *Ethically* allowed under Rule 1.13(e), subject to Rule 1.7 (no conflicts or consent to conflict possible)
    - But is proposed joint representation *prudent* for all concerned, including the lawyer?

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## POTENTIAL ADVERSE INTERESTS

- Similarly, adverse interests could arise between an affiliated entity and the organization → likely in an M & A context
- The nature of a deal could mean future separation of interests, e.g., through sale, spin-offs, joint venture
  - At what point would this affect the definition of organizational client under Model Rule 1.13?
  - At what point in deal is it ethical or prudent to no longer represent the affiliated entity?

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## DOES A CONFLICT EXIST?

- Different perspectives of in-house counsel as opposed to private practitioner
  - Exclusivity of representation
  - Dual role of in-house counsel
    - Business Advisor
    - Legal Counsel
      - Not just Privilege issues
- Model Rules of Professional Conduct
  - Rule 1.7 – Current Clients
    - See, also, Rule 1.8 for Specific Rules
  - Rule 1.9 – Former Clients

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## MODEL RULE 1.7: CURRENT CLIENTS

- Two types of concurrent conflicts:
  - “Directly adverse” situations with another client.  
Rule 1.7(a)(1)
  - Representation is “materially limited” (Rule 1.2(a)(2) due (among others) to:
    - *Personal interest of attorney*
    - *Concurrent representation with affiliate*

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## Personal Interest of Attorney

You are in-house counsel for a publicly-traded company.

Your daughter has been a franchisee of your company since before your employment with your company.

Her company is not your client.

*Does a conflict exist?*

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## Personal Interest of Attorney

- A conflict exists, notwithstanding your non-representation of daughter's company.
  - The rule does not require actual representation of another client. It's enough if:
    - Representation of existing client is "materially limited" by attorney's personal interest.
    - Loyalty to and independent judgment toward existing client is or can be compromised.
  - Furthermore, "Personal Interest" goes beyond the Model Rules as it relates to the issue of financial interests.
    - Stock Exchange Listing Guidelines for publicly-traded companies (direct or indirect financial interests, including immediate family).
    - Corporate counsel is likely either a §16 insider or an "employee with access" to material, non-public information.

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## Concurrent Representation with Affiliate

You are corporate counsel for XYZ Corp. Your company recently purchased another company and continues to operate it as a wholly-owned subsidiary. Mutual interests of company and affiliate are entirely compatible.

To save money, and as a service to the subsidiary, you have been appointed the corporate counsel for the subsidiary. Your duties at XYZ continue as usual.

***Does a conflict exist?***

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## Concurrent Representation with Affiliate

- A conflict probably does not (yet) exist; **EVEN SO:**
  - Obtain an informed, written consent from both clients for dual representation.
  - Conflict can arise due to future divergence of interests
    - Consent must anticipate future conflicts to afford protection.
      - Whether consent is "informed" depends upon the extent to which the client reasonably understands the material risks.
      - If the consent is general and open-ended, the consent will likely be ineffective.
- **NOTE: This is not a real good idea for the long term!**
  - Executives tend not to understand or appreciate the professional risks to the attorney.
  - Particularly when clients are in separate jurisdictions (different rules).

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## MODEL RULE 1.9: FORMER CLIENTS

- A conflict with a former client may exist when:
  - Representing a current client in the **same or substantially related matter** as prior representation where current client's **interests are materially adverse** to interest of former client. Rule 1.9(a)
  - Representing a client in the same or substantially related matter . . . where interests are materially adverse, **and when the lawyer has acquired information** protected by Rule 1.6 (Confidentiality of Information) and 1.9(c). Rule 1.9(b)
  - A lawyer cannot **use or reveal** a former client's **protected information to the disadvantage of the former client** except as these Rules permit or require or where the information becomes generally known. Rule 1.9(c)

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## Duties to Former Clients

When you were a private practitioner, your law firm represented a real estate development company in forming a partnership with a large retail company for the development of a shopping center. Your personal involvement in the transaction was minimal.

The retail company has now hired you as its in-house counsel and desires to sever the partnership with the developer in order to negotiate a new partnership deal with another developer.

*Does a conflict exist?*

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## Duties to Former Clients

A conflict may exist, but then again . . . maybe not!

### ● Ask yourself:

- Is this a “same or substantially related matter”?
- Are interests of former and current client “materially adverse”?
- What was the extent of your involvement in the original deal?
- Are you in possession of information from the former client that can be used or revealed to its disadvantage?
  - Is there a difference between imputed knowledge (information) and actual knowledge in this situation?



## HOW IS CONFLICT RESOLVED?

- Full disclosure!
  - You can't keep this stuff a secret!
- Informed, Written Consent
  - By appropriate constituent of client
- Don't let the rules trump common sense!
  - Just because there's a rule (or lack of a rule) doesn't necessarily make it right.
    - Lawyers to HP (“pretexting” scandal): Investigative techniques “not generally unlawful”



## Closing

### ● Resources:

- <http://www.acc.com>
  - <http://www.abanet.org/cpr/home.html>
  - <http://lawlibrary.rutgers.edu/ethics/search.html>
  - <http://www.law.cornell.edu/ethics/>
  - <http://www.freivogelonconflicts.com>
- 
- **Also Model Rule 1.13: Organization as Client**
  - **Link to State Resources**
    - California State Bar Rules 3-300 & 3-310
    - Maine State Bar Rules 3.4(b) et seq.
    - New York State Bar Canon 5

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ST. LOUIS, MAY 1, 2007**

**CONFLICTS OF INTEREST, IDENTIFYING THE CLIENT**

*Note: The following conflict examples were prepared by Lee Braem based upon a 2006 review of ethics opinions of the ABA, NJ, NY, and PA relating to conflicts under Model Rule 1.7 or 1.9 or equivalent State ethics or disciplinary rules. RPC refers to NJ's Rules of Professional Conduct. When reviewing the ABA Model Rules, it is highly suggested to read the accompanying Comments.*

**In-House attorney suing former employer (RPC 1.9; also RPC 1.6)**

- *Parker v. M&T Chemicals, Inc.*, 236 N.J. Super. 451 (App. Div. 1989) (in-house lawyer covered by NJ's "Whistle Blower's Act")
- ABA Formal Opinion 01-424 (Sept. 22, 2001) (may sue for retaliatory discharge as long as due care taken not to disclose confidential client information)
- Philadelphia Bar Association Ethics Opinions 96-8 and 99-6 (in-house counsel suing in compensation dispute)

**Asking in-house attorney to sign non-compete**

- NJ RPC 1.9 (duty to former client) vs. RPC 5.6 (no agreement to restrict practice). *See*, ABA Formal Opinion 94-381 (May 9, 1994) (terms of agreement violate Model Rule 5.6(a))
- NJ's Advisory Committee on Professional Ethics, Opinion 708: RPC 5.6 invalidates portions of a company-wide non-compete as applied to in-house counsel

**Lawyer serving as director of client corporation must consider certain ethics issues**

- ABA Formal Ethics Opinion 98-410 (Feb. 27, 1998) and Advisory Committee on Professional Ethics 462 (Nov. 10, 1980) (dual role of attorney)
- Advisory Committee on Professional Ethics Opinion 693 (Nov. 4, 2002) and 655 (Dec. 9, 1991) (concurrent conflicts)
- *See also*, Model Rule 1.7, Comment [35]

**Employment of former in-house counsel by law firm (or another law department) and representation adverse to former employer must look to RPC 1.9**

- Advisory Committee on Professional Ethics Opinion 654 (Oct. 17, 1991) (analyzing "same or a substantially related matter" test); *See also*, ABA Formal Ethics Opinion 99-415 (Sept. 8, 1999)

**Shareholder derivative actions (possible conflict between organization and its governing body that in-house lawyer must assess)**

- *See* Model Rule 1.13, Comment [14]; Section 14:4-5, Michels, New Jersey Attorney Ethics (Gann Law Books, Newark, 2000)

**Unforeseen developments, such as corporate transactions, creating conflicts after representation starts**

- RPC 1.16 (withdrawing from representation). Model Rule 1.7, Comment [5]
- RPC 1.8(g) aggregate settlement of claims against clients

**Personal interests should not be permitted to have adverse effect on representation of organization (relationship with constituents, job security concerns, employment opportunity)**

- RPC 1.8. *See* Model Rule 1.7, Comments [10 - 12]

**Attorney responding to employee questions when answering internal compliance hotline must be ready to read an “adverse interest script” if caller discloses adversity (callers more likely to have interests adverse to organization)**

- New York State Bar Association, Committee on Professional Ethics, Opinion 650 (6/30/93)

**Firm disqualification based on representation of former subsidiary**

- *Oswall v. Tekni-Plex, Inc.*, 691 A.2d 889 (N.J. Super. 1997)(law firm that had represented Old Sub of Parent on env’l matters cannot defend Parent in post-sale suit regarding env’l issues brought by NewParent)
- *G.F. Industries v. American Brands, Inc.*, 245 N.J. Super 8 (N.J. App. 1990)(law firm for Seller disqualified from defending Seller in action brought by Purchaser of Sub because firm had done extensive work for Sub prior to sale)

**Firm representation of trade associations vs. individual member company**

- If law firm representing trade association also forms client relationship with a member, firm will be restricted in its freedom to oppose the member.

**Ethics resources on the web:**

<http://www.acca.com>  
<http://www.abanet.org/cpr/home.html>  
<http://lawlibrary.rutgers.edu/ethics/search.html>  
<http://www.law.cornell.edu/ethics/>  
<http://www.freivogelonconflicts.com>