Conflicts of Interest: Fundamental Precepts

featuring

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For information on his new treatise, Conflicts of Interest and Law Firm Disqualification, contact Banks and Jordan Publishing www.banksandjordan.com, 510-849-0145. Mr. Flamm is also a regular speaker for CCE and has presented numerous in-house presentations www.cce-mcle.com/inhouse/inhouse.htm for some of the nation's largest law firms and corporations. Contact CCE for information on in-house speaking opportunities.
CHAPTER 3
Conflicts of Interest: Fundamental Precepts

§3.1 Introduction
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§3.1 Introduction *

It has been said that lawyers have a duty to scrupulously avoid representing conflicting interests.¹ In fact, in some jurisdictions lawyers are duty-bound to avoid placing themselves in a position where they may even appear to be doing so.² But the ethical rules do not explain exactly what is meant by a “conflict of interest.” As Justice Marshall pointed out in Cuyler v. Sullivan,³ that term is one that is “often used and seldom defined.”⁴


⁴Id. at 356 n.3. But see Haase v. Herberger, 44 S.W.3d 267, 269 (Tex. App. 2001) (“A conflict of interest is defined as ‘a real or seeming incompatibility between the interests of two of a lawyer’s clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent’”), quoting Black’s Law Dictionary 295 (7th Ed. 1999).
Courts, commentators, and the drafters of the nation’s ethical codes have indiscriminately employed the phrase “conflict of interest” to describe a host of very different types of circumstances. For example, just as a lawyer may be said to be engaged in conflicted representation whenever he concurrently represents more than one client whose interests may diverge, the term has also been used to describe that situation where the duty of confidentiality a lawyer owes to a former client may impede the lawyer’s ability to fulfill her duty of loyalty to a current client – or vice-versa. The term has also been used to refer to a wide variety of other situations, including the conundrum that arises when a lawyer’s own interests impinge upon her duty of loyalty to a current client.

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5 See Manfredi & Levine v. Superior Court, 66 Cal. App. 4th 1128, 1134-1135, 78 Cal. Rptr. 2d 494 (1998) (“conflicts of interest come in all shapes and sizes”). Also compare Robinson v. State, 750 So. 2d 58, 60 (Fla. App. 1999) (“[A conflict] occurs when counsel has a divided loyalty between two clients such that a course of action beneficial to one would be damaging to the other”) with State v. Getsy, 84 Ohio St. 3d 180, 187, 702 N.E.2d 866 (1998) (the term conflict of interest “bespeaks a situation in which regard for one duty tends to lead to disregard of another”).

6 See ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8.
§3.2 Conflicts Between Current Clients

In a case where a lawyer may not be able to faithfully discharge the duty of undivided loyalty she owes a current client, because of her concurrent duty of loyalty to another client, she may be said to have an “open file” conflict. This type of conflict can arise in two fundamentally different ways. In one scenario, the lawyer represents one client in a manner that is adverse to the interests of another current client — typically in an unrelated matter. This type of conflict is sometimes called a “direct adversity” conflict or, more simply, “adverse representation.”

In the other and far more frequent situation, a potential for conflict arises when counsel undertakes to simultaneously represent two or more clients with respect to the same matter, even though the interests of all of his clients are, or may become adverse. This type of conflict – which has been interchangeably referred to as dual, concurrent, or multiple representation – will be discussed in detail in Chapter Four.

§3.3 Direct Adversity Conflicts

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7 See, e.g., In re Bristow, 301 Or. 194, 721 P.2d 437, 441 (1986).
8 Fox Searchlight Pics. v. Paladino, 89 Cal. App. 4th 294, 301 (2001) (stating that a lawyer violates the duty of loyalty to the client by assuming a position adverse or antagonistic to the client).
9 See, e.g., In re Estate of Fogleman, 3 P.3d 1172, 1179 (Ariz. App. 2000) (“[A]ttorneys continue to owe current clients a duty of loyalty even if they are not acting as the clients’ attorneys in the precise transaction at issue”). Cf. Guerrero v. Cavey, 2000 Wis. App. 203, 617 N.W.2d 849, 854 (2000) (“[T]he circuit court is not required to make a finding that a breach of ethical standards or client confidentiality has occurred, but only to conclude that the attorney has undertaken representation that is adverse to the interests of a client”).
11 See, e.g., Smiley v. OWCP, 984 F.2d 278, 282 (9th Cir. 1993).
13 See, e.g., In re Freedom Solar Ctr., 776 F.2d 14, 17 (1st Cir. 1985).
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Rule 1.7(a) of the ABA Model Rules of Professional Conduct provides that a lawyer shall not represent a client as an advocate unless the representation will be directly adverse to another client. This is so even if the other matter is wholly unrelated, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and each client consents after disclosure or consultation.

The Model Rules were adopted by the ABA in 1983. Since then it has generally been agreed that it is ethically improper for a lawyer to assume a position that is inconsistent with the interests of a current client, on behalf of another client he represents in a different matter, without the informed consent of all concerned. This is so even when the representations are...
completely unrelated, and the lawyer has no confidences that could be used to the complaining client’s detriment.

See, e.g., Int’l Bus. Mach. Corp. v. Levin, 579 F.2d 271, 281 (3d Cir. 1978). Cf. Worldspan v. The Sabre Group Holdings, 5 F. Supp. 2d 1356, 1363 (N.D. Ga. 1998) (“The ordinary layman would be astonished to learn that a lawyer could receive substantial fees to represent a client and be able to litigate against that same client in another matter at the same time. The existence of that possibility should certainly prevent any client from placing 100% trust and confidence in his lawyer. The court believes such a possibility would not be conducive to public trust in the legal profession”); SWS Fin. Fund A, 790 F. Supp. at 1401 (stating that a client should not wake up one morning to discover that his lawyer, whom he had trusted to protect his legal affairs, has sued him, even if the suit is unrelated to any of the work the lawyer had done for his client). But see United States v. Phillips, 952 F. Supp. 480, 485 (S.D. Tex. 1996) (“Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated . . . However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless [an ethics rule] would be violated”).

Some courts have sought to qualify this prohibition by holding that, in order for representation adverse to a current client to constitute a disqualifying conflict of interest, such representation must be “directly adverse” to the interests of another client— as opposed to being merely “generally adverse.” The term “directly adverse” is, however, somewhat nebulous and factually dependent.

Of course, bringing a lawsuit against a current client would constitute an act of direct adversity. In fact, this type of conflict is considered to be so blatantly improper that Nineteenth Century Pennsylvania Supreme Court Justice George Sharswood—one of the nation’s pre-eminent early commentators on the subject of legal ethics— wrote that it “ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics.”

In one of the earliest of the modern cases to address this species of conflict, Grievance Committee v. Rottner, a firm that had filed a collection suit on behalf of one client agreed to sue that client—on behalf of another firm client—in a wholly unrelated matter. The firm attempted to defend against a subsequent disciplinary complaint by pointing out that the two suits had nothing in common, but Connecticut’s highest court flatly stated that a lawyer may not

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26 Elonex I.P. Holdings v. Apple Computer, 142 F. Supp. 2d 579, 582 (D. Del. 2001) (noting that “an impermissible conflict is not always created when a simultaneous representation concerns an unrelated matter and involves clients whose interests are only generally adverse . . .”); Chapman Eng’rs, 766 F. Supp. at 954-956 (noting that the use of the word “directly” to modify the word “adverse” suggests that “interests of clients that are only indirectly or generally adverse does not come within the scope of Rule 1.7(a)”). Cf. Sturling v. Cronin, 2002 U.S. Dist. LEXIS 137 (N.D. Ill. 2002), at *10 (stating that, where a law firm represents one client in a manner that is adverse to the interests of another current client, the latter need not show that the firm’s representation would adversely affect it at trial); Holmes v. Adrian Art Deco Rivera Hotels, 2000 U.S. Dist. LEXIS 7759, at *12-13 (S.D. Fla. 2000) (declining to adopt a magistrate’s recommendation that a non-party’s motion to disqualify be granted on the grounds that her interests were materially adverse to those of the plaintiff because, while her position as a witness for the defense might be characterized as “generally adverse” to plaintiff, a victory for plaintiff would have absolutely no adverse impact on her); Keatley v. Gee Communis., 55 Va. Cir. 128, 130 (2001) (“The mere fact that Gee is president and sole stockholder of WXGI and that GCI owns WXGI does not make an action against Gee and GCI materially adverse to WXGI, without more. Accordingly, the motion to disqualify plaintiff’s counsel is denied”).

27 Smith v. Bravo, 2000 U.S. Dist. LEXIS 11437, at *7 (N.D. Ill. 2000) (finding no merit to the claim that a lawyer could not represent a plaintiff in a civil case whose interests were directly adverse to those of a defendant in a criminal case that relied on the same operative facts). Cf. Nat’t Med. Enters. v. Godby, 924 S.W.2d 123, 132 (Tex. 1996) (“Rule 1.09 does not define “adverse,” so the district court turned, correctly, we think, to the dictionary definition of the word . . . ”); State ex Rel. McClanahan v. Hamilton, 189 W. Va. 290, 430 S.E.2d 569, 573 (1993) (“It is impossible to devise a single statement that will reveal whether an interest is adverse”). Also compare Lewis v. Nat’l Football League, 46 F.R.D. 5 (D.D.C. 1992) (finding a conflict where a firm sought to represent a putative class of football players at the same time it was representing the player’s association in a lawsuit against at least 20 members of the plaintiff class) with Georgine v. Amchem Prods., 137 F.R.D. 246, 329 (E.D. Pa. 1994) (distinguishing Lewis on the grounds that there was no direct adversity creating the impermissible conflict).

28 See, e.g., In re Dresser Indus., 972 F.2d 540, 544 n.10 (5th Cir. 1992) (“unquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients”).


30 152 Conn. 59, 203 A.2d 82 (1964).
accept representation that is adverse to a person it is presently representing, whether the matters are related or not.\textsuperscript{31}

Representation adverse to the interests of a current client is forbidden not only in litigated matters, but in transactional ones;\textsuperscript{32} and in instances where counsel engages in representation that is less directly adverse to the complaining client’s interests than suing it would be;\textsuperscript{33} as where the client is either not a named party,\textsuperscript{34} or not the party whose interests are most directly adverse.\textsuperscript{35}

In recent years, the direct adversity rule has sometimes been invoked in an attempt to bar counsel from taking such actions as agreeing to testify as an expert witness for an adverse party,\textsuperscript{36} or represent a client’s business competitor in unrelated matters.\textsuperscript{37}

\textsuperscript{31}Id. at 65. \textit{See also} Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233 n.12 (2d Cir. 1977) (“the lawyer who would sue his own client, asserting in justification the lack of ‘substantial relationship’ between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed. Putting it as mildly as we can, we think it would be questionable conduct for any attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned”), quoting Cinema 5 Ltd. v. Cinerama, 528 F.2d 1384, 1386 (2d Cir. 1976). \textit{Cf.} Bhd. Mut. Ins. Co. v. Nat’l Presto Indus., 846 F. Supp. 57, 60 (M.D. Fla. 1994) (stating that, where one partner formerly represented plaintiff and another currently represents defendant in the same litigation, it cannot be denied that there is a potential for conflict); Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (“when a client employs an attorney he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity”). \textit{But see} Rocchigiani v. World Boxing Council, 82 F. Supp. 2d 182, 189 (S.D.N.Y. 2000) (finding disqualification to be unwarranted where counsel threatened litigation, but did not sue).

\textsuperscript{32}\textit{See, e.g.}, CAL. RULES OF PROF’L CONDUCT, Rule 3-310, Discussion (“Subparagraphs (C) (3) is intended to apply to representations of clients in both litigation and transactional matters”). \textit{Cf.} Maritrans v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277 (1992).


\textsuperscript{34}\textit{See, e.g.}, Westinghouse Elec. Corp. v. Kerr_McGee Corp., 580 F.2d 1311, 1314 (7th Cir. 1978); Oxford Sys. v. Cellpro, 45 F. Supp. 2d 1055 (W.D. Wash. 1999) (“[t]hat Becton is not a party to the securities action does not alter the fact that [counsel] is representing a client with interests directly adverse to Becton in a substantially related matter”); Chateau de Ville Prods. v. Tams_Witmark Music, 474 F. Supp. 223 (S.D.N.Y. 1979) (refusing to permit counsel to represent both plaintiffs and an alleged but unnamed co_conspirator); Franklin v. Callum, 782 A.2d 884, 887 (N.H. 2001) (“even if [counsel] does not represent the district in this specific dispute . . . a conflict exists because [his] representation of the Project is directly adverse to the interests of the New Hampshire District”); Comm. on Legal Ethics, 433 S.E.2d 579; In re Estate of Koch, 849 P.2d at 993; Canon Sch. Dist. v. W.E.S. Constr. Co., 177 Ariz. 431, 868 P.2d 1014, 1022-1023 (Ariz. App. 1993) (a lawyer is precluded from making legal arguments contrary to an existing client’s interests, even if that client is not a party to the action in which such arguments are to be made). \textit{See also} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. No. 93-377. \textit{Cf.} In Re Gopman, 531 F.2d 262 (5th Cir. 1976).

\textsuperscript{35}\textit{See} Oyster v. Bell Asbestos Mines, 568 F. Supp. 80, 82 (E.D. Pa. 1983) (holding that third-party defendants were “derivatively adverse” to plaintiffs).

\textsuperscript{36}\textit{Compare} Cmwlth. Ins. Co. v. Stone Container Corp., 2001 U.S. Dist. LEXIS 21293, at *14, 26-27 (N.D. Ill. 2001) (finding that Rule 1.7(b) does not “preclude a law firm that is currently representing a client from accepting a concurrent engagement to act as a testifying expert for a third party who is an adversary of the client in unrelated litigation, when there is no evidence that any confidential communications could or would be shared”) \textit{with} Am. Air., Inc. v. Sheppard, Mullin, Richter & Hampton, 96 Cal. App. 4th 1017, 1036 (2002) (finding that, where a lawyer designated as a Rule 30(b)(6) deponent was required to act in one party’s best interests, and where that requirement might oblige him to disclose the confidences of another party, a potential for conflict existed, and disagreeing with Stone to the extent that court concluded that use of the word “representation” in the Model Rules meant that there must be an attorney-client relationship with both clients involved for there to be a potential...
conflict). Bethlehem Steel Corp., 654 N.E.2d at 1169 (“[t]he requirement of loyalty can be no less compelling when an attorney acts as a witness against a client rather than undertaking representation adverse to the client”).

37 See NordicTrack v. Consumer Direct, 158 F.R.D. 415, 421 (D. Minn. 1994); Maritrans, 529 Pa. at 266 (Nix, C.J., dissenting). See also Avianca, Inc. v. Corriea, 705 F. Supp. 666, 680 & n.4 (D.D.C. 1989) (finding obvious conflict in a situation where a law firm was simultaneously representing a corporate client and a company owned by the company’s highest ranking officer, where both companies were involved in the same industry and would likely compete for business opportunities with the same third parties).


§3.3 Genesis of the Direct Adversity Rule

The concept that a lawyer must not simultaneously represent parties who are opposed in interest is not a novel one.\textsuperscript{38} It can be traced back at least as far as the biblical Book of Matthew, which decrees that “no one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despise the other.”\textsuperscript{39}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{38} In re Direct Satellite Communs., 96 B.R. 507, 523 (Bankr. E.D. Pa. 1989).
\item \textsuperscript{39} See \textit{MATTHEW} 6:24 (King James Ed.). \textit{See also} Cinema 5 Ltd. v. Cinerama, 528 F.2d 1384, 1386 (2d Cir. 1976) (because no man can serve two masters, a client has a right to expect that he would accept no retainer to do anything that might be adverse to his client’s interests); In re Greater Pottstown Cmty. Church, 80 B.R. 706, 712 (Bankr. E.D. Pa. 1987) (“at least since biblical times, conflicts of interest have been perceived as fundamentally destructive”); In re Chou-Chen Chems., 31 B.R. 842, 849 (Bankr. W.D. Ky. 1983) (noting that the prohibition against conflicts runs “as deep as the pre-Biblical injunction to do good and eschew evil”).
\end{enumerate}
\end{footnotesize}
This edict has long been applied to lawyers.\textsuperscript{40} Certainly, by the beginning of the Seventeenth Century it was well settled that a lawyer could not concurrently represent parties who had opposing interests.\textsuperscript{41} The rationale for these early holdings was that a client who learns that her lawyer is simultaneously representing an adversary – even with respect to a matter wholly unrelated to the one for which counsel was retained – cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship.\textsuperscript{42} Courts have also voiced concern about the possibility that the loyalty a lawyer owes to one current client might cause him to temper his representation of another client.\textsuperscript{43}

\textsuperscript{40} See, e.g., McGlothlin v. Connors, 142 F.R.D. 626, 635 (W.D. Va. 1992); Clinard v. Blackwood, 1999 Tenn. App. LEXIS 729, at *25-27 (1999) (noting that the prohibition against serving two masters is enforced using conflict rules developed by the courts long before the organized bar began adopting ethics codes). Cf. United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991) (stating that an actual conflict exists when a lawyer is actively engaged in legal representation which requires him to account to two masters, and it can be shown that he took action on behalf of one; the effect of which will, of necessity, adversely affect the defense of the other); In re Estate of Koch, 18 Kan. App. 2d 188, 849 P.2d 977, 993 (1993); J.K. & Susie L. Wadley Research v. Morris, 776 S.W.2d 271, 284 (Tex. App. 1989) (Howell, J., concurring); Hartford Acc. & Indem. Co. v. Foster, 528 So. 2d 255, 269 (Miss. 1988) (opining that any lawyer who attempts to represent two adverse masters places himself in a precarious, perilous position). But see Humphrey v. State, 244 Ga. App. 808, 812 (2000).


§3.5 Closed File Conflicts

Since a lawyer is duty-bound to maintain her former client’s confidential information – as well as to vigorously, even zealously\(^\text{44}\) pursue her current client’s interests\(^\text{45}\) – it can readily be seen that, in a situation where a lawyer who possesses a former client’s confidences is in a position to disclose or use that information to benefit a current client, a conflict of interest may arise.\(^\text{46}\) In addition, while lawyers may not owe former clients the same degree of loyalty they owe current clients, a former client is ordinarily entitled to expect that her lawyer will remain loyal to her interests with respect to those matters on which the lawyer previously represented her.\(^\text{47}\) For these reasons, lawyers in California\(^\text{48}\) and some other jurisdictions\(^\text{49}\) are forbidden from doing

\(^{45}\) See, e.g., Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980) (opining that a lawyer’s current client has the right to expect that counsel will expend every energy and tap every legitimate resource in the exercise of independent professional judgment on the client’s behalf). Cf. In re H. Children, 160 Misc.2d 298, 608 N.Y.S.2d 784, 785 (1994) (to fulfill that obligation, a lawyer is expected to use all available information).

\(^{47}\) Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (“[T]hat expectation is worthy of protection in this Court.”). Cf. Culp, 934 F. Supp. at 398 (noting that an argument that challenged counsel learned no information that could be used against his former client “ignores the fact that under the ethical canon a duty of loyalty exists apart and distinct form the duty to maintain client confidences . . .”).

\(^{48}\) See Wutchumna Water Co. v. Bailey, 216 Cal. 564, 573-574, 15 P.2d 505, 509 (1912) (“[a]n attorney is forbidden to do either of two things after severing his relationship with a former client. He may not do anything in any matter which will injuriously affect his former client in any matter in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship.”). See also Damron v. Herzog, 67 F.3d 211, 216 (9th Cir. 1995) (“Certainly with respect to the specific subject matter of the initial representation, there is a continuing duty of loyalty”); In re Marriage of Zimmerman, 16 Cal. App. 4th 556, 562 (1993). Cf. Elan Transdermal v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1387 (N.D. Cal. 1992).

\(^{49}\) See, e.g., State ex rel. Keenan v. Hatcher, 557 S.E.2d 361 n.8 (W. Va. 2001) (pointing out that the Restatement of the Law Governing Lawyers (Third) “prohibits a lawyer from undertaking a representation that involves an attack on the work that was performed for a former client”); In re Estate of Adkins, 874 P.2d 271, 273 (Alaska 1992) (noting that the crux of the issue was
anything that would injuriously affect a former client with respect to a matter on which the lawyer represented that client, whether such actions would involve the use of any confidential information received from the former client or not.\textsuperscript{30}

\textsuperscript{30}Smiley v. OWCP, 984 F.2d 278, 282 (9th Cir. 1993) (stating that a lawyer should not render professional services to an adverse party “whether it be in the same case or not, because the attorney must not] assume a position hostile to his client, and one inimical to the very interests he was engaged to protect”), quoting In re Boone, 83 Fed. 944, 952 (C.C.N.D. Cal. 1897); Sullivan County Reg. Refuse Disposal Dist. v. Town of Acworth, 141 N.H. 479, 483, 686 A.2d 755 (N.H. 1996) (“even in the absence of any confidences, an attorney owes a duty of loyalty to a former client that prevents that attorney from attacking, or interpreting, work she performed, or supervised, for the former client”). Cf. Terrebonne, Ltd. v. Murray, 1 F. Supp. 2d 1050, 1058 n.5 (E.D. Cal. 1998); Griffith v. Taylor, 937 P.2d 297, 303 (Alaska 1997).
The type of conflict which is said to arise when a lawyer may be in a position to adversely use a former client’s confidences for the benefit of a current client – or take other improper actions that would adversely impact upon a former client’s interests – is occasionally referred to as a “closed file” conflict.\textsuperscript{51} This type of conflict accounts for a very high percentage of the disqualification decisions which have been reported in the jurisprudence.\textsuperscript{52}

§3.6 Conflicts Between Lawyer and Client

Just as a lawyer may not allow the interests of one current client to impede his duty of loyalty to another, he may not permit his own interests to constrain the exercise of his independent judgment on behalf of a current client. Should counsel fail to heed this admonition, the court may disqualify him, or order other sanctions.

53 See, e.g., State v. Martinez, 31 P.3d 1018 (N.M. App. 2001); Schenck v. Hill, Lent & Troscher, 530 N.Y.S.2d 486, 487 (1988) (“[t]o hold otherwise would be to ignore the overriding public interest in the integrity of our adversary system”). Cf. Harrison v. Fisons Corp., 819 F. Supp. 1039, 1042 (M.D. Fla. 1993) (“[T]he practice of law has taken on the attributes of business while shedding elements of professionalism. Yet, there remain important distinctions between the attorney-client relationship and that formed between a buyer and seller in ordinary commerce. The unique role of lawyers in access to the administration of justice, their monopoly in the authority to practice law, and the special trust reposed by clients all require that lawyers look to something beyond their immediate pecuniary interests in dealing with conflicts”); In re Henley, 267 Ga. 366 (1996).

54 See, e.g., Waters v. Kemp, 845 F.2d 260, 263 (11th Cir. 1988); Wallace, Saunders v. Louisburg Grain, 824 P.2d 933 (Kan. App. 1992); Grunberg v. Feller, 505 N.Y.S.2d 515, 518 (1986) (opining that, if he was allowed to continue to represent respondent, counsel would not be able to separate the fine line between his own interests and those of his client). Cf. In re Strutz, 652 N.E.2d 41, 47 (Ind. 1995) (“The Code . . . does not preclude an attorney from being an entrepreneur or engaging in any other lawful profession. However, it does provide that if there is a conflict between these personal interests and professional obligations, the latter must prevail”); Sauer v. Greene, 574 N.E.2d 542, 544 (Ohio App. 1989) (holding that the trial court did not abuse its discretion by disqualifying a lawyer from representing tenants in a suit for collection of rent and eviction where counsel had made a bid to purchase the property in question and, therefore, had an interest in the subject of the litigation). But see Essex County Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 429 (D.N.J. 1998) (“[b]ecause of the virtually limitless cases in which a ‘conflict’ may theoretically arise when a lawyer’s self-interest is implicated, there is a very real danger of analyzing these issues not on fact but on speculation and conjecture. Accordingly, when a [conflict] issue arises based on a lawyer’s self-interest, a sturdier factual predicate must be evident than when a case concerns multiple representation”).

55 See Hawk v. State Bar, 45 Cal. 3d 589, 600, 247 Cal. Rptr. 599, 754 P.2d 1096 (1988). See also Keller v. Mobil Corp., 55 F.3d 94, 98 (2d Cir. 1995) (finding that a conflict arose where the only impediment to settlement was a sanction order against counsel). Cf. N. Star Hotels v. Mid-City Hotel Assocs., 118 F.R.D. 109, 112 (D. Minn. 1987) (noting that, while financial adversity has not yet been held to fall squarely within Rule 1.7(a), there is nothing precluding it from doing so); FDIC v. Frazier, 637 F. Supp. 77, 80-81 (D. Kan. 1986). But see Garcia v. Bunnell, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994) (“It is not logically necessary that the approach of these [multiple representation] cases also apply to conflicts between a defendant’s and the attorney’s own interests”).
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Of course, virtually every representation is burdened by the lawyer’s personal interests to some degree.\(^\text{56}\) For this reason, not every interest is deemed to warrant disqualifying counsel.\(^\text{57}\) On the contrary, to be disqualifying the lawyer’s interest must usually be a pecuniary one.\(^\text{58}\) Nevertheless, there are times when interests that are not pecuniary – such as a lawyer’s desire to curry favor with a prospective employer,\(^\text{59}\) avoid exposure to malpractice liability,\(^\text{60}\) or forestall a government investigation into his own wrongful conduct\(^\text{61}\) – may be found to justify disqualifying counsel.

\(^{56}\) See, e.g., Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir.1995) (noting that a lawyer’s self-interest is, in theory, inherent in every case in which he participates); In re Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (finding that a lawyer’s continued representation of a client was materially limited by his own interest in avoiding malpractice for filing the client’s claim in the wrong state); In re Hawkins, 695 N.E.2d 109 (Ind. 1998) (finding that a lawyer’s sexual relations with client materially limited his representation of her).

\(^{57}\) See In re Martin, 817 F.2d 175, 181 (1st Cir. 1987) (observing that any attorney, other than one working purely as a volunteer, has a financial interest in the matters entrusted to his care; in that sense, there is always some danger that the lawyer’s judgment will be shaded by his own economic welfare, “[y]et, that risk, standing alone, seems acceptable”); Doe v. Lee, 2001 U.S. Dist. LEXIS 21276, at *4 (M.D. Ala. 2001) (finding no “explicit prohibition against an attorney’s representation of a client when a potential witness in the case is married to the attorney”). Also compare Essex County Jail Annex Inmates, 18 F. Supp. 2d at 432 (ordinarily, negotiating a fee agreement with a client does not present a conflict) with Winkler v. Keane, 7 F.3d 304, 307 (2d Cir. 1993), cert. denied, 114 S. Ct. 1407 (1994) (holding that a contingency fee agreement created an actual conflict).

\(^{58}\) See, e.g., Cal Pak Deliv. v. United Parcel Serv., 52 Cal. App. 4th 1, 60 Cal. Rptr. 2d 207, 213 (1997) (finding that, where counsel surreptitiously contacted the opposing party and offered to dismiss a client’s action in return for payment of fees directly to the attorney, the failure of the trial court to take immediate remedial action by disqualifying counsel would constitute “an abdication of judicial responsibility, violating the public trust and exposing judicial institutions to public obloquy”). But see In re Advisory Comm. on Prof’l Ethics, 162 N.J. 497, 514 (N.J. 2000) (Stein, J., dissenting) (“Typically, a lawyer’s disqualifying personal interest is a financial or professional interest that is adverse to the client’s interests. The interest of Petitioner that the Court concludes is disabling is dissimilar to the various disqualifying interests of lawyers cited by the Restatement”).

\(^{59}\) United States v. Ellison, 798 F.2d 1102, 1106 (7th Cir. 1986) (finding a conflict where counsel explicitly advised the defendant to plead guilty to avoid “making waves” with federal prosecutors with whom counsel would be working in the future). Cf. Brown v. City of Oneonta, 203 F.3d 153, 155 (2d Cir. 1999) (disqualification unwarranted absent “demonstrable evidence” that counsel’s representation was “adversely affected” by his interest in obtaining employment with his client’s adversary, with whom he had interviewed on at least 3 occasions in the two months prior to oral argument); United States v. Horton, 845 F.2d 1414, 1420 (7th Cir. 1988); State v. Poutre, 581 A.2d 731, 736 (Vt. 1990) (noting that, while a lawyer might possibly “pull punches” when cross-examining a client of a future employer, this does not warrant a per se rule of actual conflict).

\(^{60}\) Paramount Commun. v. Donaghy, 858 F. Supp. 391, 398 (S.D.N.Y. 1994) (noting that it had been asserted that counsel must be disqualified because its self-interest in ensuring that its malpractice not be revealed gave it an unacceptable interest).

\(^{61}\) Virgin Islands v. Zepp, 748 F.2d 125, 128 (3d Cir. 1984). But cf. United States v. Salerno, 868 F.2d 524, 540-541 (2d Cir. 1989) (finding no actual conflict where defense counsel, who was being investigated by the government, was allegedly unusually cooperative with the government in defendant’s case).
Some ethical rules – such as ABA Model Rule 1.8(j) and its Model Code counterpart, DR 5-103(A) – prohibit lawyers from acquiring proprietary interests in litigation. Pursuant to those rules, a lawyer’s acquisition of even a relatively small interest in a litigation, or a party to it, may result in disqualification of the lawyer who possesses that interest – and perhaps his firm as well. Disqualification may also sometimes be ordered in a situation where counsel enters into a media rights contract with a criminal defendant, or is the object of a motion in which sanctions against both lawyer and client have been sought.

62 See also MODEL CODE OF PROF’L RESPONSIBILITY, EC 5-3, 5-7. Cf. Sauer v. Xerox Corp., 85 F. Supp. 2d 198, 201 (W.D.N.Y. 2000) (opining that the magistrate properly found that challenged counsel had violated DR5-103(A), but stating “I am not convinced that disqualification is the best remedy”); Baker v. BP Am., 768 F. Supp. 208, 213 (N.D. Ohio 1991); State ex rel. Torsok v. Wesson, 1999 Ohio App. LEXIS 3581, at *20 (indicating that, should the case proceed on remand, the trial court must determine whether a violation of DR 5-103 warranted disqualification); Landsman v. Moss, 180 A.D.2d 718, 720-721, 579 N.Y.S.2d 450 (1992) (finding a DR 5-103(A) violation, but that “[i]n view of the lengthy history of this action . . . it was improvident of the court to disqualify the plaintiff’s counsel . . .”); Connor v. State Bar, 50 Cal.3d 1047, 1058 (1990).

63 See, e.g., Norma Bros. & Manheimer Corp. v. Earl’s Fashions, 1984 WL 166, at *2 (S.D.N.Y. 1983) (disqualifying counsel because he was an assignee of the accounts receivable upon which the action was based). Cf. Alayo I Carreras v. Cable W. Corp., 624 F. Supp. 1167, 1168 (D.P.R. 1986) (lawyer with a pecuniary interest in a parent corporation sought to act adversely to the parent on behalf of a subsidiary). But see Albert v. Bianchi, 266 A.D.2d 419, 421, 698 N.Y.S.2d 545 (1999) (affirming an order denying a disqualification motion because it could not be said that counsel acquired a proprietary interest in the subject matter of the litigation); Otwell v. Floyd County Bd. Of Comm’rs, 200 Ga. App. 596, 408 S.E.2d 799, 800 (1991) (holding that a lawyer representing a county in an action to enjoin construction of a county government center did not have to be disqualified on the ground that he allegedly owned land adjacent to the proposed construction site, where the record was devoid of any evidence that the lawyer had any interest in the litigation or that plaintiff would be harmed thereby). Also compare Simms v. Exeter Architectural Prods., 668 F. Supp. 668, 676-677 (M.D. Pa. 1994) (even a de minimis stock interest may prevent counsel from being able to represent a corporation) with Syscon Corp. v. United States, 10 Ct. Cl. 200, 204 (1986) (noting that a rule that would prohibit house counsel from ever serving their employers as litigation counsel if they own stock in the corporation seems overly stringent and inconsistent with present reality).


65 See People v. Gacy, 125 Ill. 2d 117, 134 (1988) (finding no conflict where counsel rejected defendant’s offer to grant him book rights), cert. denied, 490 U.S. 1085 (1989); Maxwell v. Superior Court, 30 Cal. 3d 606 (Cal. 1982) (vacating a disqualification order because a publication rights contract between defendant and his lawyer did not “render counsel ineffective per se”). Also compare Beets v. Collins, 65 F.3d 1258, 1273 (5th Cir. 1995) (“[t]his court joins other[s] who have uniformly denounced the execution of literary and media rights fee arrangements between attorneys and their clients during the pendency of a representation”) with Dumond v. State, 743 S.W.2d 779, 785 (Ark. 1988) (finding no actual conflict in a media rights contract between the lawyer and defendant and his wife).

66 Compare Healey v. Chelsea Res., Ltd., 947 F.2d 611, 623 (2d Cir. 1991) (opining that a sanctions motion directed against both a client and a lawyer, which attacks the factual basis for a suit, will almost inevitably put them in conflict) with Cunningham v. Hamilton County, 527 U.S. 198 (2000) (noting that, unlike witnesses, lawyers assume an ethical obligation to serve their clients’ interests, and that this obligation remains even when counsel might have a personal interest in seeking vindication from a sanctions order).
§3.6

In some cases a lawyer may be permitted to represent a client, despite having a pecuniary interest in the client’s matter.\(^67\) To avoid violating the ethical prohibition, and being disqualified, it is incumbent upon counsel to fully disclose the nature of that interest,\(^68\) as well as its possible adverse effect on the client.\(^69\) Counsel must then obtain the client’s informed consent to continue to represent the client, despite the conflict.\(^70\)

§3.7 Lawyers Acting in Dual Roles

\(^{67}\) See, e.g., Fox Searchlight Pics. v. Paladino, 89 Cal. App. 4th 294, 302 (2001) ("[I]n the absence of an actual conflict between the opposing party and her attorneys the other party should not be able to create one through the simple expediency of threatening to file a suit against the attorneys"). Cf. Greenfield & Co. v. Alderman, 52 Pa. D. & C. 4th 96, 110 (2001) ("the mere existence of potential claims against the attorney does not automatically disqualify [him] . . . [r]ather, the question is whether the existence of potential claims so affects the adequacy of representation as to mandate disqualification because the lawyer or law firm is unlikely to advise the client to pursue such claims").

\(^{68}\) See Succession of Lawless, 573 So. 2d 1230, 1233-1234 (La. App. 1991) (noting that, when a lawyer acquires a pecuniary interest in an estate he must make a full disclosure to those involved and make certain his interest will not compromise his representation).

\(^{69}\) In re Kenyon, 327 S.C. 308, 309-310, 491 S.E.2d 252 (1997) ("[w]hen an attorney has a personal stake in a business in which his client is involved, he must see to it that his client understands that his objectivity and his ability to give his undivided loyalty may be affected. The attorney should ensure that his client is fully aware of the risks inherent in the proposed transaction and of the need for independent and objective advice"); Comm. on Legal Ethics v. Cometti, 189 430 S.E.2d 320, 325 (W. Va. 1993). Cf. In re Huddleston, 655 So. 2d 416, 422 (La. App. 1995) (noting that, when counsel’s interest is adverse to his client’s, counsel’s duty requires him to disclose his adverse interest and obtain consent).

A conflict of interest may sometimes arise in a situation where a lawyer acts in dual roles; as where a lawyer simultaneously serves as both a private attorney and a legislator.\textsuperscript{71} A dual role conflict may also arise in a situation where a lawyer both represents an entity client and serves on its board of directors or trustees.

It is not uncommon for lawyers to be invited to serve on the boards of the clients they represent, and it has generally not been deemed to be unethical for them to do so. But such a dual role is fraught with potential perils, including an increased likelihood that the lawyer will be disqualified from representing the corporation in litigation.

§3.8 Parallel Representation

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72 See In re Mortg. & Realty Trust, 195 B.R. 740, 746 (Bankr. C.D. Cal. 1996) (noting that, while lawyers “have served as directors of corporations for many years,” the court “has found very few relevant reported decisions”).


74 See Ga. Pac. Corp. v. G.A.F. Corp., 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996) (noting that the attorney-client privilege which ordinarily attends conversations between officers or directors and outside counsel may be lost); Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990) (noting that a firm’s work product could become subject to discovery in the same way as the files of the corporation itself); N.Y. State Bar Ass’n Comm. On Prof’l Ethics. Op. 589, 1988 WL 236147 (noting that a lawyer, in such a circumstance, may have a heightened duty of disclosure).

75 See, e.g., In re Mortg. & Realty Trust, 195 B.R. at 745 (holding that the challenged firm must be disqualified because one of its lawyers served on the debtor’s board of trustees while the transaction at issue was being considered by the board); Harrison v. Keystone Coca-Cola Bottling Co., 428 F. Supp. 149 (M.D. Pa. 1977).
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A conflict concern may arise in a situation where a lawyer attempts to concurrently represent different plaintiffs in different matters against a single defendant who has limited assets out of which to satisfy an adverse judgment. The few courts that have analyzed whether such “parallel representation” constitutes a disqualifying conflict have reached different conclusions. In some cases the conflict inherent in this type of situation was deemed to be too speculative to warrant the drastic measure of disqualifying counsel from representing one set of plaintiffs. But other courts have arrived at the opposite conclusion.

§3.9  Conflict Detection and Avoidance

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A lay person has no duty to ferret out possible conflicts of interest, or other ethical misconduct, and state
his lack of consent thereto.\textsuperscript{78} On the contrary, the obligation to identify\textsuperscript{79} and disclose\textsuperscript{80} all
potential conflicts rests squarely on counsel.\textsuperscript{81}


\textsuperscript{79}Realco Servs. v. Holt, 479 F. Supp. 867, 875 (E.D. Pa. 1979) (a practitioner has a duty to actively seek out possible
conflicts of interest).

\textsuperscript{80}E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 398 (S.D. Tex. 1975); Kala v. Aluminum Smelting & Ref. Co., 81 Ohio St. 3d 1, 12 (1998) (“a law firm contemplating hiring counsel who had been directly involved on the opposing side also has a duty to
disclose to its own client that such a hiring may place the firm in conflict and could result in disqualification. The law firm may
have to subordinate its desire to augment its staff against its duties to its client . . .”).

\textsuperscript{81}See, e.g., Jenkins v. Sterlacci, 849 F.2d 627 (D.C. Cir. 1988); Smith v. Whatcott, 757 F.2d 1098, 1099 (10th Cir. 1985)
(noting that the only precaution taken against possible conflicts was to compare a list of the current clients of each firm. “No
attempt was made to identify former clients”); Felix v. Balkin, 49 F. Supp. 2d 260 (S.D.N.Y. 1999) (“It is the lawyer, not the
client, who has the obligation to search out and disclose potential conflicts, for it is the lawyer’s obligation to put the client in
position to protect himself by retaining substitute counsel if he so desires”); Terrebonne, Ltd. v. Murray, 1 F. Supp. 2d 1050,
1069 (E.D. Cal. 1998) (“[I]t is not for the client to conduct legal analysis and conclude that no [conflict] exists. Rather, it is
incumbent upon the attorney to disclose all facts of the prospective conflict and to thoroughly advise the client, in clear language,
of the potential or, in this case the actual [conflict] which is present or could arise . . .”); Kabi Pharm. v. Alcon Surgical, 803 F.
Webber, Jackson & Curtis Inc., 565 F. Supp. 663, 673 (N.D. Ill. 1983) (“[t]he most troublesome aspect of the motion is that the
[challenged firm’s] clearance procedures are apparently confined to a files check [which may not] reveal even the most obvious
conflict”); Humphrey v. State, 244 Ga. App. 808 (2000) (“law firms are expected to screen prospective clients for possible
conflicts and decline representation where one exists”). Cf. Carlyle Towers Condo. Ass’n v. Crossland Savs., 944 F. Supp. 341,
that the plaintiff “has no conflict detection system”); Image Tech. Servs. v. Eastman Kodak Co., 820 F. Supp. 1212, 1217 (N.D. Cal. 1993) (observing that, while a firm is charged with the responsibility of performing conflict checks upon taking on a new client, the client is under no such obligation);
(Mullarkey, J., dissenting) (“We cannot expect lay persons to have the legal sophistication to identify and resolve a problem which apparently escaped the understanding of two sets of lawyers and the trial judge”).
Law firms commonly attempt to discharge this duty by performing what is commonly referred to as a "conflicts check." There is no bright line test for what must be done in order to perform an adequate check. At a minimum, however, the procedure will usually involve running a computer search before accepting a representation, employing available technology, to ascertain whether the firm represents – or previously represented – any clients who may have an interest adverse to the prospective client in the new matter. Many firms will also circulate a document – commonly referred to as a “new case memorandum” – to all firm employees.

Courts have sometimes criticized law firms for failing to adopt adequate conflict-avoidance procedures. Even when such measures are undertaken in good faith, however, they will not disclose every possible conflict. By way of example, changes in a client’s mode of internal operation that are unknown to the lawyer can create a conflict potential that a firm’s conflict avoidance mechanisms may be unable to diagnose.

Courts have been reluctant to fault a firm for its inability to detect conflicts of this nature. Nevertheless, because failure to detect any conflict may result in disqualification, lawyers should be vigilant to the possibility that changes in the conflict landscape may require that a new conflicts analysis be done at some point after the initial check has been performed.

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82 See, e.g., GATX/Airlog Co. v. Evergreen Int’l Air., 8 F. Supp. 2d 1182, 1188 (N.D. Cal. 1998), vacated as moot (9th Cir. 1999); In re Estate of Fogleman, 3 P.3d 1172, 1178-1180 (Ariz. App. 2000) (“That some partners of a firm may not know clients of others in the firm provides no defense. Any time a law firm undertakes representation of a client, it has an obligation to do a conflicts check to ensure that no conflict exist between clients”).

83 Pennwalt v. Plough, 85 F.R.D. 264, 273 (D. Del. 1980) (emphasizing the need for law offices to use the utmost vigilance and, to the extent feasible, make maximum use of current technology as an aid in avoiding potential conflicts).

84 See, e.g., Hughes, 565 F. Supp. at 673 (noting that the firm had not circulated a new case memorandum, which may have tipped it off to the conflict problem). Cf. In re Jaeger, 213 B.R. 578, 587 (Bankr. C.D. Cal. 1997) (while many firms have a computer database on which they rely for initial conflict screening, there is “no substitute for the actual circulation of conflicts memos”); Chem. Bank, 1994 U.S. Dist. LEXIS 5120, at *8.

85 In re Jaeger, supra at 586-587 & nn.8-9 (Bankr. C.D. Cal. 1997) (“The beginning of an attorney’s file for a new matter should contain three types of documents . . . the engagement letter, which spells out the scope of the representation that the attorney is to undertake for the client . . . a memo disclosing the results of the internal conflicts check . . . [and], if the engagement involves the representation of more than one client, the file should contain the informed written consent of each client in the engagement. These documents should be at the beginning of the file, so that there is never any doubt that they have been obtained and preserved . . .”).

86 See, e.g., Lemelson v. Apple Computer, 1993 U.S. Dist. LEXIS 20132, at *28-29 (D. Nev. 1993) (“It appears to the Court that both clients are ‘innocent’ in this case. It is the attorney who is at fault . . . by not checking for a conflict . . . by having a cumbersome conflicts checking system, and by being willing to drop one client that had brought in a very small amount of income at that point to accept a major case from another . . .”); Green v. Montgomery County, Ala., 784 F. Supp. 841, 849 (M.D. Ala. 1992) (noting that challenged counsel could have adopted appropriate conflict-avoidance procedures which probably would have averted the problem). Cf. Jenkins v. Sterlacci, 849 F.2d 627, 633 (D.C. Cir. 1988) (observing that it would not unreasonably burden the firm’s conflict-avoidance procedure if partners were expected to notify each other of the special masters before whom they are appearing).

87 See Pennwalt, 85 F.R.D. at 273.

88 See Oxford Sys. v. Cellpro, 45 F. Supp. 2d 1055 (W.D. Wash. 1999) (finding that the challenged firm promptly performed a conflicts check, but disqualification was warranted anyway).

89 See GATX/Airlog Co., supra at 1188 (“When a firm knows that a client is actively engaged in settlement negotiations with another ‘party’ [it] has a responsibility to run a conflicts check”), vacated as moot (9th Cir. 1999). Cf. Uniweld Prods. v. Union Carbide Corp., 385 F.2d 992, 994 (5th Cir. 1967) (noting that a search of a client index file was made in April 1966 but, when a decision was made to add defendants several months later, the client index files were not again checked); Asbestos Claims...
Facility v. Berry & Berry, 219 Cal. App. 3d 9, 27-28, 267 Cal. Rptr. 896 (1990) (noting that the Manual for Complex Litigation alerts counsel to the possibility of disqualification because an adverse party is a current or former client, and that warning extends not just to persons and companies formally aligned as adverse parties, but to others whose posture might change as the litigation progresses).