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Understanding Conflicts of Interest

I. Introduction

Conflicts of interest pose recurring professional responsibility and practice management challenges for lawyers and are a persistent source of professional liability exposure. Conflicts of interest may spawn breach of fiduciary duty and professional negligence allegations, require lawyers to decline desirable representations, disqualify lawyers from representations or force their withdrawal from cases, oblige law firms to disgorge fees, and strain lawyers' relationships with clients. In the insurance defense context, a conflict of interest attributed to defense counsel appointed by the insurer may cost the insurer control of the defense and require the appointment of independent counsel to represent the insured at the insurer's expense.

Although conflicts of interest arise in all practice areas, they pervade litigation. Accordingly, this chapter explores conflicts of interest that trial and appellate lawyers are likely to encounter.

II. Identifying and Classifying Clients

The essential first step in any conflict of interest analysis is identifying who the lawyer represents. It is, after all, clients to whom lawyers owe duties of confidentiality and loyalty, which underpin conflict of interest rules.[1] In

1. *See* Dynamic 3D Geosols. LLC v. Schlumberger Ltd., 837 F.3d 1280, 1286 (Fed. Cir. 2016) ("[T]here is an overriding countervailing concern suffusing the ethical rules: a client's entitlement to an attorney's adherence to her duty of loyalty, encompassing a duty of confidentiality."); SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392, 1401 (N.D. Ill. 1992) ("There are basically two purposes behind Rule 1.7. First it serves as a prophylactic to protect confidences that a client may have shared with his or her attorney. In that regard, Rule 1.9 shares the same concern as it prohibits an attorney from representing a client against a former client if the matter is 'substantially related' to the matter(s) of the former representation. The second purpose . . . is to safeguard loyalty as a feature of the lawyer-client relationship."); Antelope Valley-E. Kern Water Agency v. L.A. Cnty. Waterworks Dist. No. 40 (Antelope Valley Groundwater Cases), 241 Cal. Rptr. 3d 692, 702 (Ct. App. 2018) ("The restrictions on an attorney's ability to represent clients with interests that are . . . adverse are designed to protect two distinct values: to assure the attorney represents his or

most cases, client identities are clear. But not all cases are straightforward. Indeed, an attorney-client relationship may arise in the absence of an express contract between the lawyer and the client.[2]

State substantive law, rather than rules of professional conduct, typically governs whether parties have an attorney-client relationship.[3] The existence of an attorney-client relationship, or conversely, the absence of one, is a fact-specific inquiry.[4] That said, some guidelines concerning the creation and termination of an attorney-client relationship are useful to the overall client identity analysis.

A. Establishing an Attorney-Client Relationship

An attorney-client relationship may be expressly created through a written or oral contract. Most attorney-client relationships are created in this fashion. The execution of an engagement agreement or the payment of legal fees is significant when determining whether an attorney-client relationship exists.[5] At the same time, these formalities are not essential because an attorney-client relationship may be implied or inferred from the parties' conduct.[6] Certainly, the payment of fees does not alone determine the existence of an attorney-client relationship.[7]

her client with undivided loyalties, and to assure the attorney will preserve confidential information conveyed by the client to the attorney." (citations omitted)); N.J. Div. of Child Prot. & Permanency v. G.S., 149 A.3d 816, 831 (N.J. Super. Ct. App. Div. 2016) ("The risk in representing clients with conflicting interests is that a lawyer's divided loyalty will result in less vigorous representation of both clients, and that the lawyer will use confidences of one client to benefit the other." (citations omitted)).

2. Bistline v. Parker, 918 F.3d 849, 864 (10th Cir. 2019) (applying Utah law).

3. United States v. Williams, 720 F.3d 674, 686 (8th Cir. 2013); Rozmus v. West, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000).

4. *In re* Robbins, 192 A.3d 558, 563 (D.C. 2018); Newsome v. Peoples Bancshares, 269 So. 3d 19, 31 (Miss. 2018); *see, e.g.*, Seaman v. Schulte Roth & Zabel LLP, 111 N.Y.S.3d 266, 267 (App. Div. 2019) ("The course of conduct among the parties demonstrated by the documentary evidence, particularly the repeated communications from defendants to plaintiff clearly disclaiming an attorney-client relationship and advising plaintiff and his wife to consult independent counsel, refute plaintiff's general allegations that [the lawyer in question] was his attorney.").

5. Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000, 1004 (W.D. Wash. 2007); Mays v. Askin, 585 S.E.2d 735, 737 (Ga. Ct. App. 2003); Patel v. Martin, 111 N.E.3d 1082, 1095 (Mass. 2018).

6. *In re* Hodge, 407 P.3d 613, 648 (Kan. 2017); *Patel*, 111 N.E.3d at 1093; State *ex rel.* Couns. for Discipline of the Neb. Sup. Ct. v. Chvala, 935 N.W.2d 446, 471 (Neb. 2019).

7. Edward Wildman Palmer LLP v. Super. Ct., 180 Cal. Rptr. 3d 620, 628 (Ct. App. 2014); Rubin & Norris, LLC v. Panzarella, 51 N.E.3d 879, 891 (Ill. App. Ct. 2016); State *ex rel.* Stovall v. Meneley, 22 P.3d 124, 40 (Kan. 2001); Att'y Grievance Comm'n of Md. v. Brooke, 821 A.2d 414, 424 (Md. 2003); Fuller v. Partee, 540 S.W.3d 864, 869 (Mo. Ct. App. 2018) (quoting Fox v. White, 215 S.W.3d 257, 261 (Mo. Ct. App. 2007)); *In re* Disciplinary Action Against Ward, 881 N.W.2d 226, 230 (N.D. 2016).

In the absence of an express agreement, an implied attorney-client relationship may be found to exist when (1) a person seeks the lawyer's advice or assistance, (2) the requested advice or assistance relates to matters within the lawyer's professional competence, and (3) the lawyer expressly or impliedly agrees to provide or actually furnishes the desired advice or assistance.[8] In some cases, the third element of an implied attorney-client relationship may be established by proof of detrimental reliance, meaning that the person seeking legal services reasonably relied on the lawyer to provide them, and the lawyer, who was aware of the person's reliance, did nothing to negate it.[9]

When deciding whether an implied attorney-client relationship exists, courts focus on the would-be client's expectations and especially the reasonableness of the person's belief "'that he is consulting a lawyer in that capacity and has manifested intention to seek professional legal advice.'"[10] A putative client's unilateral belief that an attorney-client relationship exists, however, is not enough to establish one.[11] Rather, a putative client's subjective expectation that an attorney-client relationship has been formed must be accompanied by facts indicating that the person's belief is objectively reasonable.[12] At base, then, the existence of an attorney-client relationship is measured by an objective standard.[13]

By requiring evidence establishing the reasonableness of the aspiring client's subjective belief that an attorney-client relationship exists, courts ensure that an attorney-client relationship arises only when both the lawyer and client consent to its formation.[14] For example, a person's subjective belief may be deemed reasonable where the surrounding facts and circumstances put the lawyer on notice that the person intended to form an attorney-client relationship, indicate that the lawyer shared the person's subjective intent to create the relationship, or demonstrate that the lawyer acted in a manner that would prompt a reasonable person in the putative client's position to

8. *Chvala*, 935 N.W.2d at 471–72.

9. Cesso v. Todd, 82 N.E.3d 1074, 1078–79 (Mass. App. Ct. 2017) (quoting DeVaux v. Am. Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983)); *Chvala*, 935 N.W.2d at 472.

10. Diversified Grp., Inc. v. Daugerdas, 139 F. Supp. 2d 445, 454 (S.D.N.Y. 2001) (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978)).

11. *In re* Rescue Concepts, Inc., 556 S.W.3d 331, 339 (Tex. App. 2017).

12. Hinerman v. Grill on Twenty First, LLC, 112 N.E.3d 1273, 1275–76 (Ohio Ct. App. 2018); O'Kain v. Landress, 450 P.3d 508, 516 (Or. Ct. App. 2019).

13. Barkerding v. Whittaker, 263 So. 3d 1170, 1182 (La. Ct. App. 2018).

14. *See* Cohen v. Jaffe Raitt Heuer & Weiss, P.C., 768 F. App'x 440, 444 (6th Cir. 2019) (recognizing that attorney-client relationships require mutual assent; one party alone cannot create an attorney-client relationship); People v. Shepherd, 99 N.E.3d 513, 518 (Ill. App. Ct. 2018) (explaining that an attorney-client relationship is voluntary and contractual; it requires both parties' consent); Stephens v. Three Finger Black Shale P'ship, 580 S.W.3d 687, 721 (Tex. App. 2019) ("Evidence must exist that both parties intended to create an attorney–client relationship.").

rely on the lawyer's professional advice.[15] Similarly, if a lawyer holds herself out to third parties as representing someone, or acts on that person's behalf, that conduct may evidence an attorney-client relationship.[16]

B. Establishing the Attorney-Client Relationship in Insurance Defense Representations

Conflicts have long been acute in insurance defense practice. Conflicts of interest here trace directly to questions of client identity and, specifically, to the concept of dual representation, commonly described as the dual client doctrine. The dual client doctrine holds that a lawyer appointed by an insurance company to defend its insured represents both the insurer and the insured, meaning that the defense lawyer has an attorney-client relationship with both. As the court in *National Union Fire Insurance Co. v. Stites Professional Law Corp.*[17] once explained, "As long as the interests of the insurer and the insured coincide, they are both clients of the defense attorney and the defense attorney's fiduciary duty runs to both the insurer and the insured."[18] A defense lawyer therefore serves two masters in any given case. The problems created by the dual client doctrine rest on the premise that a defense lawyer cannot loyally represent the insured in a case in which the insured's and the insurer's interests conflict given the defense lawyer's typical ongoing business relationship with the insurer. Forced to choose between a repeat client and the insured, the reasoning goes, defense counsel will side with the insurer.

The dual client doctrine appears to represent the majority rule;[19] however, many jurisdictions hold that the insured is the defense lawyer's sole

15. DG Cogen Partners, LLC v. Lane Powell PC, 917 F. Supp. 2d 1123, 1137 (D. Or. 2013) (quoting *In re* Conduct of Weidner, 801 P.2d 828, 837 (Or. 1990)).

16. *See, e.g.*, *In re* Persaud, 467 B.R. 26, 40 (Bankr. E.D.N.Y. 2012) (explaining that regular communications relating to the subject of the representation as well as activity by the lawyer and the client in furthering the objectives of the representation are pertinent to the analysis); Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F. Supp. 360, 367 (S.D.N.Y. 1992) (noting that a lawyer creates a presumption of an attorney-client relationship by entering an appearance in a proceeding); Davis v. State Bar, 655 P.2d 1276, 1278 (Cal. 1983) (mailing letters to third parties in which the lawyer claimed that he represented the client evidenced an attorney-client relationship).

17. 1 Cal. Rptr. 2d 570 (Ct. App. 1991).

18. *Id.* at 575.

19. *See, e.g.*, Mt. Vernon Fire Ins. Co. v. VisionAid, Inc., 875 F.3d 716 724 (1st Cir. 2017) (interpreting Massachusetts law); Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1331 (9th Cir. 1995) (interpreting Alaska law); Lee v. Med. Protective Co., 858 F. Supp. 2d 803, 806 (E.D. Ky. 2012) (interpreting Kentucky law); Mitchum v. Hudgens, 533 So. 2d 194, 198 (Ala. 1988); Bank of Am., N.A. v. Super. Ct., 151 Cal. Rptr. 3d 526, 536 (Ct. App. 2013); Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone, 93 Cal. Rptr. 2d 534, 542–44 (Ct. App. 2000); Pa. Ins. Guar. Ass'n v. Sikes, 590 So. 2d 1051, 1052 (Fla. Dist. Ct. App. 1991); Coscia v. Cunningham, 299 S.E.2d 880, 881 (Ga. 1983); Huang v. Brenson, 7 N.E.3d 729, 739 (Ill. App. Ct. 2014); Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 161 (Ind. 1999); Teague v. St. Paul Fire & Marine Ins. Co., 10 So. 3d 806, 832 (La. Ct. App. 2009); McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1235 (Mass. 1982); Moeller v. Am. Guarantee & Liab. Ins. Co., 707 So.

client.[20] At least one state holds that in a case defended under a reservation of rights, the insurer's reservation trumps otherwise acceptable dual representation and transforms the insured into the defense lawyer's sole client.[21]

In fact, the dual client and sole client models are best thought of as default rules. Generally, whether a defense lawyer represents the insurer in addition to the insured—the insured is always a defense lawyer's client—is a matter of contract.[22] Beyond that, the existence of an attorney-client relationship is a question of fact just as in other settings. Consequently, an insurance carrier and the lawyer it hires to defend its insured can share an attorney-client relationship in any given case depending on their conduct and understanding.

Applying an objective standard, defense lawyers likely will be deemed to have an attorney-client relationship with insurers that engage them. Defense lawyers supply insurers with legal advice intended to benefit them in conducting the insured's defense. For instance, defense lawyers advise insurers on verdict value, settlement value, the likelihood that an insured will be found liable, the assessment of comparative fault, whether there are other potential defendants to be joined or against which cross-claims might be asserted, the prospects for winning by dispositive motion, whether the case should be settled or tried, the expected composition of the jury pool, the judge's reputation, the skill of the plaintiff's attorney, prospects on appeal in the event of an unfavorable trial outcome, and more. Insurers expect to receive such advice from defense counsel and incorporate it when making

2d 1062, 1070 (Miss. 1996); State Farm Mut. Auto. Ins. Co. v. Hansen, 357 P.3d 338, 343 (Nev. 2015); Lieberman v. Emp'rs Ins., 419 A.2d 417, 423–25 (N.J. 1980); Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 45–46 (N.C. Ct. App. 2005); United States Fid. & Guar. Co. v. Pietrykowski, No. E99-38, 2000 WL 204475, at *3–4 (Ohio Ct. App. Feb. 11, 2000); Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 607 (Utah 2003); *In re* Illuzzi, 616 A.2d 233, 236 (Vt. 1992); Barry v. USAA, 989 P.2d 1172, 1175 (Wash. Ct. App. 1999); Juneau Cnty. Star-Times v. Juneau Cnty., 824 N.W.2d 457, 467 (Wis. 2013).

20. *See, e.g.*, Cont'l Cas. Co. v. Pullman, Comley, Bradley & Reeves, 929 F.2d 103, 108 (2d Cir. 1991); *In re* A.H. Robins Co., 880 F.2d 694, 751 (4th Cir. 1989); U.S. Underwriters Ins. Co. v. Tauber, 604 F. Supp. 2d 521, 532 (E.D.N.Y. 2009); Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 957 (E.D. Va. 2005) (discussing Virginia law); Essex Ins. Co. v. Tyler, 309 F. Supp. 2d 1270, 1272 (D. Colo. 2004) (discussing Colorado law); Gibbs v. Lappies, 828 F. Supp. 6, 7 (D.N.H. 1993); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990); Higgins v. Karp, 687 A.2d 539, 543 (Conn. 1997); Finley v. Home Ins. Co., 975 P.2d 1145, 1153 (Haw. 1998); Hackman v. W. Agric. Ins. Co., No. 104,786, 2012 WL 1524060, at *15 (Kan. Ct. App. Apr. 27, 2012); Kirschner v. Process Design Assocs., Inc., 592 NW.2d 707, 711 (Mich. 1999); *In re* Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 814 (Mont. 2000); Feliberty v. Damon, 527 N.E.2d 261, 265 (N.Y. 1988); Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270, 272 (S.C. 2019); Givens v. Mullikin, 75 S.W.3d 383, 396 (Tenn. 2002); Stewart Title Guar. Co. v. Sterling Sav. Bank, 311 P.3d 1, 3 (Wash. 2013); Barefield v. DPIC Cos., 600 S.E.2d 256, 270 (W. Va. 2004).

21. Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 169 P.3d 1, 8 n.10 (Wash. 2007).

22. Unauthorized Practice of Law Comm. v. Am. Home Assur. Co., 261 S.W.3d 24, 42 (Tex. 2008).

critical decisions, both points being known to the defense lawyers willingly supplying the advice.[23]

Courts increasingly recognize the importance of fact-specific inquiry into the existence of an attorney-client relationship between a liability insurer and the lawyer the carrier appoints to defend its insured.[24] In *Paradigm Insurance Co. v. Langerman Law Offices*,[25] for example, the Arizona Supreme Court embraced the general rule that the existence of an attorney-client relationship turns on whether (1) the would-be client has manifested to the lawyer its intent that the lawyer provide legal services for it and (2) the lawyer manifests her consent to do so.[26]

The Minnesota Supreme Court modified the general rules concerning the creation of attorney-client relationships in *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*,[27] to provide a "bright-line rule to determine whether defense counsel represents the insurer as well as the insured."[28] Under the *Pine Island* approach,

> [I]n the absence of a conflict of interest . . . , the insurer can become a co-client of defense counsel based on contract or tort theory if two conditions are satisfied. First, defense counsel or another attorney must consult with the insured, explaining the implications of dual representation and the advantages and risks involved. . . . Second, after consultation, the insured must give its express consent to the dual representation.[29]

Without this consultation and the insured's express consent, the insured is the defense lawyer's sole client.[30]

The *Pine Island* approach has some flaws. First, it ignores the logical argument that the insured has already agreed to the attorney's dual representation by purchasing an insurance policy that grants the insurer the right to control the defense.[31] Second, it is not clear why the insured alone should

23. On the other hand, a defense lawyer might reasonably argue that in furnishing such information to an insurer, she is simply evaluating the case for the insurer in the justifiable belief that offering the evaluation is compatible with her relationship with the insured, and that no attorney-client relationship results. *See* Model Rules of Prof'l Conduct R. 2.3(a) (2020). The problem with that argument in the absence of an express disclaimer of an attorney-client relationship is that it does not account for the insurer's expectations.

24. *See, e.g.*, CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, No. 11-4753, 2013 WL 315716, at *2–5 (E.D. Pa. Jan. 28, 2013) (discussing Pennsylvania law); Pa. Nat'l Mut. Cas. Ins. Co. v. Perlberg, 819 F. Supp. 2d 449, 454–55 (D. Md. 2011) (applying Maryland law); Swiss Reinsurance Am. Corp. v. Roetzel & Andress, 837 N.E.2d 1215, 1220–21 (Ohio Ct. App. 2005).

25. 24 P.3d 593 (Ariz. 2001).

26. *Id.* at 595–96 (quoting the Restatement (Third) of the Law Governing Lawyers § 14 (2000)).

27. 649 N.W.2d 444 (Minn. 2002).

28. *Id.* at 451.

29. *Id.* at 452 (citations omitted).

30. *Id.* at 451.

31. Mora v. Lancet Indem. Risk Retention Grp., Inc., 773 F. App'x 113, 117–18 (4th Cir. 2019).

control whether the insurer should have the benefits of an attorney-client relationship with the defense lawyer. In most cases, after all, only the insurer's money is at stake.

Finally, defense lawyers who do not want an attorney-client relationship with an insurance company are free to structure their engagements so that the insured is their sole client. This can be accomplished in an engagement letter sent to the insurer in which the lawyer specifies that the insured is her sole client. The use of such an engagement letter is important given that an attorney-client relationship between the defense lawyer the insurer can generally be implied from their conduct and communications. Even if the lawyer gives the insurer the sort of advice described above, the insurer should not be able to claim an implied attorney-client relationship with the lawyer because the engagement letter's contrary terms render the insurer's expectation of an attorney-client relationship objectively unreasonable. Where the defense lawyer has disclaimed an attorney-client relationship with the insurer, a court should conclude that the defense lawyer is simply evaluating the matter for the insurer in furtherance of the lawyer's representation of the insured.[32]

C. Terminating the Attorney-Client Relationship

Once an attorney-client relationship is established, the lawyer cannot easily end it. Lawyers may withdraw from representations only for good reason and, at least insofar as litigation is concerned, upon reasonable notice. Moreover, in litigation, the court must grant the lawyer's motion to withdraw; unless the court does so, the attorney-client relationship continues to the conclusion of the litigation.[33] In contrast, a client may fire a lawyer at any time and for any reason, or for no reason.[34]

The determination of when an attorney-client relationship ends ordinarily is a question of fact.[35] Only when the evidence presented is sufficiently clear that reasonable minds cannot differ may the issue be decided as a matter of law.[36]

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32. *See* Model Rules of Prof'l Conduct R. 2.3(a) (2020) ("A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.").

33. Maddox v. State, 407 P.3d 152, 163 (Haw. 2017); State v. Payne, 855 N.W.2d 783, 787 (Neb. 2014).

34. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 689 (7th Cir. 2011); Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); Model Rules of Prof'l Conduct R. 1.16 cmt. 4 (2020).

35. *In re* Rossana, 395 B.R. 697, 702 (Bankr. D. Nev. 2008); Lindsley v. Roe, 964 N.E.2d 1063, 1068 (Ohio Ct. App. 2011).

36. *Lindsley*, 964 N.E.2d at 1068.

Courts regularly assess the ways in which an attorney-client relationship may conclude. The relationship clearly may terminate by the explicit statement of either the lawyer or the client.[37] For example, a lawyer might specify in an engagement letter that her representation of the client will cease when she sends a final invoice for services or the lawyer might send a disengagement letter upon completion of the matter. Overt acts inconsistent with the continuation of the attorney-client relationship may also terminate the relationship. Examples of inconsistent conduct include the client filing a professional grievance against the lawyer, a client hiring another lawyer to perform the task for which the first lawyer was retained, or the client refusing to pay the lawyer's bill.[38]

Absent express statements or overt acts by either the lawyer or the client, an attorney-client relationship ends when circumstances imply that it would be objectively unreasonable to continue to bind the parties to each other.[39] When determining the posture of the attorney-client relationship on an implied basis, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.[40] In that regard, the scope of a lawyer's representation loosely falls into one of three categories: (1) the client hires the lawyer as general counsel with the expectation that the lawyer will handle all legal matters that may arise for the client; (2) the client retains the lawyer to handle all matters that arise in a specific practice area, such as employment, litigation, real estate, or tax; or (3) the client engages the lawyer to represent the client in a discrete matter or matters.[41] For all three categories, unless the client fires the lawyer, or the lawyer withdraws from the representation, the attorney-client relationship continues as long as the

37. *See* Artromick Int'l, Inc. v. Drustar Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991) ("Of course, the simplest way for either attorney or client to end the relationship is by expressly saying so."); *see, e.g.*, NuStar Farms, LLC v. Zylstra, 880 N.W.2d 478, 481 (Iowa 2016) (recounting that the lawyer informed the clients by e-mail that he would not represent them in any future matters and that the clients acknowledged that they understood the e-mail to sever the attorney-client relationship); Rusk v. Harstad, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

38. *See Artromick Int'l, Inc.*, 134 F.R.D. at 230–31 (ruling that the alleged client was a former client because he had refused to pay the attorney's bill and thereafter retained other lawyers to work in areas in which that attorney had previously performed); DeLeo v. Nussbaum, 821 A.2d 744, 750 (Conn. 2003) ("A de facto termination [of the attorney-client relationship] occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney." (footnotes omitted)); Estate of Mitchell v. Dougherty, 644 N.W.2d 391, 400 (Mich. Ct. App. 2002) (retaining alternate counsel is proof of a client's termination of a lawyer's representation).

39. *Artromick Int'l, Inc.*, 134 F.R.D. at 230.

40. *Id.*

41. Nat'l Med. Care, Inc. v. Home Med. of Am., Inc., No. 00-1225, 2002 WL 31068413, at *4 (Mass. Super. Ct. Sept. 12, 2002).

lawyer remains responsible for a pending matter because the lawyer has accepted responsibility to bring the matter to a successful conclusion.[42] With respect to categories one and two, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the reasonable expectation remains that the lawyer will handle all matters for the client in the future as they arise.[43] In the third category, where a lawyer agrees to undertake a specific matter on the client's behalf, the attorney-client relationship typically ends once the matter is concluded.[44]

III. Concurrent Client Conflicts of Interest

Once clients are identified and classified, it is time to examine potentially applicable rules of professional conduct. Where current clients are concerned, conflicts of interest are governed by Model Rule of Professional Conduct 1.7, which provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

42. *Id.*

43. *See* Berry v. McFarland, 278 P.3d 407, 411 (Idaho 2012) (explaining that if a lawyer agrees to handle any matters a client may have, the attorney-client relationship continues until either the lawyer or client terminates it); Model Rules of Prof'l Conduct R. 1.3 cmt. 4 (2020) ("If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.").

44. Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); DeLeo v. Nussbaum, 821 A.2d 744, 750 (Conn. 2003); *Berry*, 278 P.3d at 411; *Nat'l Med. Care, Inc.*, 2002 WL 31068413, at *4; Model Rules of Prof'l Conduct R. 1.3 cmt. 4 (2020); *see also* Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 389 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); Thayer v. Fuller & Henry Ltd., 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the related action has concluded or when the lawyer has exhausted all remedies in the case and declines to perform additional services).

> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.[45]

The restrictions that Model Rule 1.7(a) imposes on individual lawyers generally apply equally to law firms. This is because, with some exceptions, individual lawyers' conflicts of interest are imputed to all other lawyers in the same firm.[46]

A. Direct Adversity Conflicts

As noted above, Model Rule 1.7(a)(1) first establishes that a lawyer has a conflict of interest when the representation of one client will be directly adverse to another current client.[47] The rule does not attempt to define "direct adversity" or to explain when concurrent representations are "directly adverse," although the comments to Model Rule 1.7 offer examples.[48] Some courts have attempted to define "direct adversity," although they have not necessarily achieved clarity in doing so.[49] In any event, Model Rule 1.7(a)(1)'s use of the adverb "directly" to modify "adverse" separates these conflicts from other conflicts premised upon clients' general or indirect adversity.[50]

Celgard, LLC v. LG Chem, Ltd.[51] is an interesting direct adversity conflict case arising out of patent litigation in a North Carolina federal court. Celgard manufactured lithium battery components. It sued LG Chem, which was also in the lithium battery business, for allegedly infringing Celgard's '586 patent in the course of manufacturing and selling LG Chem's lithium batteries. Celgard's lawsuit sought both damages and injunctive relief against LG Chem. Celgard's complaint named only LG Chem and affiliated companies as defendants; the complaint made no mention of LG Chem's customers.[52]

After filing its complaint, Celgard moved to preliminarily enjoin LG Chem from continuing to infringe the '586 patent either directly or by

45. Model Rules of Prof'l Conduct R. 1.7 (2020).
46. *Id.* R. 1.10(a); *see also Ex parte* Osbon, 888 So. 2d 1236, 1238 (Ala. 2004) (asserting that "Rule 1.10(a) requires a law firm to be treated as a single attorney").
47. Model Rules of Prof'l Conduct R. 1.7(a)(1) (2020).
48. *Id.* R. 1.7 cmts. 6 & 7.
49. *See, e.g.*, Bryan Corp. v. Abrano, 52 N.E.3d 95, 103 (Mass. 2016) (stating that direct adversity "involves a conflict between the legal rights and duties of clients").
50. Chapman Eng'rs, Inc. v. Nat. Gas Sales Co., 766 F. Supp. 949, 956 (D. Kan. 1991); Ill. Adv. Op. 95-15, 1996 WL 478489, at *4 (Ill. State Bar Ass'n 1996).
51. 594 F. App'x 669 (Fed. Cir. 2014).
52. *Id.* at 670–71.

inducing others by continuing to sell its batteries to customers, such as the computer and electronics giant Apple. Soon thereafter, Celgard sent Apple a copy of its motion and asked to work with Apple to find a mutually beneficial business arrangement to resolve the issues around LG Chem's alleged infringement of Celgard's intellectual property.[53]

The district court granted Celgard's request to preliminarily enjoin LG Chem and its affiliates but stayed that injunction a few days later. The respected global law firm Jones Day then entered its appearance in the litigation on behalf of Celgard. Jones Day's representation of Celgard against LG Chem was troublesome, however, because (1) Apple was a current client of Jones Day in unrelated commercial litigation matters and (2) Celgard's injunction covered custom lithium batteries manufactured by LG Chem that Apple incorporated in its products.[54]

Apple repeatedly asked Jones Day to withdraw from Celgard's representation, but the firm refused to do so.[55] Jones Day apparently tried to appease Apple by promising that it would not represent Celgard in any matters adverse to Apple, including licensing negotiations.[56] The firm's proposed compromise did not satisfy Apple, which moved to intervene in the case to seek Jones Day's disqualification.

The *Celgard* court agreed with Apple that Jones Day's representation of Celgard compelled the firm's disqualification under North Carolina ethics rules.[57] As the court explained, North Carolina Rule 1.7(a) prohibits representation when the representation will be directly adverse to another client.[58] Here, Jones Day's representation of Celgard was directly adverse to Apple's "interests and legal obligations" and "was not merely adverse in an 'economic sense.'"[59] Consequently, Jones Day's duty of loyalty to Apple prevented the firm from further representing Celgard.[60]

The *Celgard* court noted that where a law firm obtains an injunction on behalf of one client that limits another client's activities, Federal Circuit precedent supported the recognition of a direct adversity conflict.[61] Here, the burden placed on the attorney-client relationship between Apple and

53. *Id.* at 671.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* (explaining that the Federal Circuit applies regional circuit law in disqualification matters, and the Fourth Circuit, which covers North Carolina federal courts, in turn, applies the professional conduct rules of the forum state—here, North Carolina).
58. *Id.* (quoting N.C. Rules of Prof'l Conduct R. 1.7(a) (alteration in the original)).
59. *Id.*
60. *Id.*
61. *Id.* (quoting Freedom Wireless, Inc. v. Boston Commc'ns Grp., Inc., No. 2006-1020, 2006 WL 8071423, at *3 (Fed. Cir. Mar. 20, 2006)).

Jones Day "extend[ed] well beyond the sort of unrelated representation of competing enterprises allowed under Rule 1.7(a)."[62] Apple faced both the possibility of having to find a new battery supplier to replace LG Chem and targeting by Celgard in an effort to exploit the injunction to leverage a business relationship. Thus, in every pertinent sense, Jones Day's representation of Celgard was adverse to Apple.[63]

It was irrelevant to the *Celgard* court that Apple was not named as a defendant in the lawsuit. In the court's view, both ethics rules and case law established that "the total context, and not whether a party is named in a lawsuit," controls the question of whether the adversity between current clients is sufficient to disqualify a law firm.[64]

In conclusion, the *Celgard* court granted Apple's motions to intervene and to disqualify Jones Day. The court allowed Celgard 60 days to secure new counsel.

Although many lawyers probably contemplate direct adversity being an issue in related matters, *Celgard* illustrates the more nuanced point that a lawyer's representation of a client may be directly adverse to another client even if the matters are unrelated.[65] From lawyers' standpoint, the lack of relation between the concurrent matters is no defense to a direct adversity conflict,[66] although it may bear on whether the clients may consent to the conflict, or whether the law firm's disqualification is required. Nor may a lawyer overcome a direct adversity conflict on the basis that the client to whom the lawyer is directly adverse is represented by another lawyer in the matter.[67] In sum, if a lawyer represents one client against another client that the lawyer (or the lawyer's firm) simultaneously represents in an unrelated matter, there is a direct adversity conflict.

62. *Id.* at 671–72.

63. *Id.* at 672.

64. *Id.* (citing *Freedom Wireless*, 2006 WL 8071423, at *2; Arrowpac Inc. v. Sea Star Line, LLC, No. 3:12-cv-1180-J-32JBT, 2013 WL 5460027, at *10 (M.D. Fla. Apr. 30, 2013)).

65. El Camino Res., Ltd. v. Huntington Nat'l Bank, 623 F. Supp. 2d 863, 877 (W.D. Mich. 2007) (quoting Fla. Ins. Guar. Ass'n, Inc. v. Carey Canada, Inc., 749 F. Supp. 255, 259 (S.D. Fla. 1990)); Model Rules of Prof'l Conduct R. 1.7 cmt. 6 (2020).

66. *See, e.g.*, GSI Commerce Sols., Inc. v. BabyCenter, L.L.C., 618 F.3d 204, 210 (2d Cir. 2010) ("In this respect, it will not suffice to show that the two matters upon which an attorney represents existing clients are unrelated."); Reed v. Hoosier Health Sys., 825 N.E.2d 408, 412 (Ind. Ct. App. 2005) ("Reed contends IRPC 1.7(a)'s use of 'directly' indicates there must be some relation between the suits before disqualification is proper. . . . However, IRPC 1.7(a)'s use of 'directly' refers to the adverse effect to the client not the attorney-client relationship." (citations to the record omitted)).

67. Quinn v. Anvil Corp., No. C08-0182RSL, 2008 WL 11344647, at *2 (W.D. Wash. Aug. 27, 2008).

B. Material Limitation Conflicts

The second type of concurrent conflict of interest—a material limitation conflict—arises when there is a significant risk that a lawyer's representation of a client will be materially limited by the lawyer's responsibilities to someone else, or by the lawyer's own interests.[68] Material limitation conflicts are more subtle than direct adversity conflicts and require a lawyer to evaluate whether there is a significant risk that her ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by her other responsibilities or interests.[69] Normally, there is some pull on the lawyer's judgment or something about the situation that prompts the lawyer to reflect on the propriety of accepting both representations.[70] To use a common example, conflicts of interest attributable to the tripartite relationship of insurance defense are generally classified as material limitation conflicts. Courts that discuss conflicts in the insurance defense context commonly refer to Rule 1.7(a)(2) in doing so.[71]

Material limitation conflicts require careful study of the facts and circumstances of each matter. Indeed, by their very nature, the concepts of materiality and significant risk are case-specific.

The mere suggestion of a potential conflict of interest, or a mere possibility of divergent interests, is insufficient to create a material limitation conflict.[72] The conflict must be clear and specific; it cannot rest on speculation. As the Iowa Supreme Court explained in *Bottoms v. Stapleton*,[73] "only an actual conflict of interest, as defined in [Rule 1.7(a)(2)], will justify [a lawyer's] disqualification."[74] *Bottoms* reflects the majority rule.[75]

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68. Model Rules of Prof'l Conduct R. 1.7(a)(2) (2020).

69. *Id.* R. 1.7 cmt. 8.

70. *See* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Willey, 889 N.W.2d 647, 653–54 (Iowa 2017) ("The key questions a lawyer must ask are whether it is likely a difference of interests will occur between the clients and, if so, whether that difference in interests will interfere with the lawyer's ability to offer independent, professional judgment to each client." (citation omitted)); Commonwealth v. Cousin, 88 N.E.3d 822, 834–38 (Mass. 2018) (discussing situations that may present Rule 1.7(a)(2) conflicts); State *ex rel.* Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 736 (Mo. 2004) (noting that this kind of conflict of interest "in effect forecloses alternatives that would otherwise be available to the client").

71. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Hansen, 357 P.3d 338, 341–42 & n.6 (Nev. 2015); Arden v. Forsberg & Umlauf, P.S., 402 P.3d 245, 250 (Wash. 2017).

72. *In re* Penning, 930 A.2d 144, 155–56 (D.C. 2007); Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd., 197 P.3d 1051, 1059 n.33 (Nev. 2008).

73. 706 N.W.2d 411 (Iowa 2005).

74. *Id.* at 417.

75. *See, e.g.*, Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 145 (4th Cir. 1992); P&L Dev. LLC v. Bionpharma Inc., No. 1:17CV1154, 2019 WL 357351, at *4 (M.D.N.C. Jan. 29, 2019) (quoting Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 514, 517 (M.D.N.C. 1996)); Guillen v. City of Chi., 956 F. Supp. 1416, 1422 (N.D. Ill 1997); *Frank Settelmeyer & Sons, Inc.*, 197 P.3d at 1059 n.33.

Although it is true that speculation about a conflict of interest will not trigger Rule 1.7(a)(2), lawyers must not allow the language of the rule to distract them. The reference in Model Rule 1.7(a)(2) to "a significant risk" of a material limitation on a lawyer's ability to represent a client should not be understood to mean that there is a *potential* conflict of interest in such a situation. Rather, when a lawyer recognizes that there is a significant risk that her representation of a client will be materially limited by her responsibilities to another client, a former client, or a third person, or by her personal interests, she has an *actual* conflict of interest.[76] Any disadvantage or harm to the client attributable to the conflict may be only potential or prospective, but the conflict of interest under Model Rule 1.7(a)(2) is real and immediate. As a result, the lawyer must obtain any affected client's informed consent to the conflict if the lawyer wishes to go forward with the representation.

C. The Representation of Multiple Parties in Litigation

The representation of multiple parties in litigation is a regular source of conflicts. Naturally, multiple parties often would like to be represented by a single lawyer to reduce litigation costs. For example, a liability insurer that is obligated to defend multiple insureds would prefer for obvious economic reasons to have a single lawyer represent all the insureds. Representation by a single lawyer can also have other advantages, such as the presentation of a coordinated or unified litigation strategy. And the parties have a common interest: winning the case. But multi-party representations in which the parties' interests appear to be aligned at the outset may not be harmonious, or parties' interests may diverge over time. To offer a few examples, co-plaintiffs may disagree over whether to settle or on what terms. Defendants may have cross-claims or indemnification claims against one another that a disinterested lawyer would conclude should be asserted in the litigation. The representation of both a corporation and its employee may turn out to be impossible if a dispute develops over whether the employee was acting in the course and scope of her employment. The need to assert comparative fault may dislocate defendants' interests. Parties represented by a single lawyer may need to assert inconsistent legal theories.[77]

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76. *Bottoms*, 706 N.W.2d at 417.

77. In the insurance defense context, a defense lawyer's conflict of interest arising out of the representation of multiple insureds may entitle the insureds to independent counsel at the insurer's expense. *See, e.g.*, Univ. of Miami v. Great Am. Ins. Co., 112 So. 3d 504, 508 (Fla. Dist. Ct. App. 2013) ("[I]n defense of both co-defendants, Great American's counsel would have had to argue conflicting legal positions, that each of its clients was not at fault, and the other was, even to the extent of claiming indemnification and contribution for the other's fault. . . . [T]his legal dilemma clearly created a conflict of interest . . . sufficient to qualify for indemnification for attorney's fees and costs for independent counsel.").

A lawyer who is unable to represent multiple parties because of their inconsistent arguments, claims, or positions is generally deemed to have a material limitation conflict. Indeed, that is an archetypal material limitation conflict: the lawyer's representation of one client is materially limited by the lawyer's responsibilities to another client. In comparison, if a lawyer were to pursue a cross-claim on behalf of one defendant against another defendant that the lawyer also represents, for example, the lawyer would have a direct adversity conflict.

Lawyers who are considering representing multiple parties in litigation need to carefully analyze that approach before agreeing to do so. Lawyers in this situation need to not only identify conflicts of interest but also determine whether any conflicts may be cured by the affected parties' consent. Even where a conflict may be consentable, it may be strategically or tactically preferable to have separate lawyers for each party despite the increased cost.

Once a law firm has carefully considered the situation and decided to undertake a joint representation, some basic precautions at the outset of the representation are generally in order. First, explain in writing the advantages and disadvantages of the joint representation and outline reasonable alternatives. Further explain that if a conflict develops between the clients and they cannot work it out between themselves, the firm will likely need to withdraw from the representation altogether.

Second, if your engagement letter includes a provision stating that you may withdraw from one joint client's representation upon the emergence of a conflict of interest but continue to represent the other joint client, make sure the clients understand the effect of that provision—including your ability to use the dropped client's confidential information in the continuing representation if your engagement letter allows for that possibility. If you can identify circumstances that might trigger that provision, do so in the engagement letter.

Third, explain in writing how you plan to treat confidential client information. The preferred approach in most cases is to state that you intend to share any information material to the representation with all clients in the group. Insofar as information material to the representation is concerned, there will be no secrets between the joint clients.

Fourth, if clients' consent to a conflict of interest is required, be sure to confirm their informed consent in writing. The disclosures required to achieve informed consent will vary with the matter and the client. Firms may prefer that clients sign waiver letters or forms rather than simply confirming the clients' consent in a letter or e-mail message from the responsible lawyer.

Finally, be sensitive to any subsequent changes in the relationship between the clients. If their relationship evolves, it may be necessary to consider the effect of those developments on the firm's representation of them.

D. Obtaining Client Consent to a Conflict

Once it is determined that a concurrent client conflict exists, the next question is whether the conflict may be cured by client consent. In other words, is it possible for the concurrent representations to proceed notwithstanding the lawyer's conflict of interest because the clients will waive the conflict? Again, not all conflicts are consentable or, in common parlance, "waiveable."

A conflict of interest is consentable if three conditions are met. First, the lawyer must reasonably believe that she will be able to competently and diligently represent each affected client.[78] Second, the representation must not be "prohibited by law."[79] Third, the representation cannot "involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal[.]"[80] Unless these three requirements are satisfied, the lawyer should not even attempt to obtain the client's informed consent to the conflict, confirmed in writing, which is the final step necessary for the lawyer to undertake the representation.[81]

1. A Reasonable Belief of Competent and Diligent Representation

For a conflict of interest to be consentable, Model Rule 1.7(b)(1) requires the lawyer to reasonably believe that she can competently and diligently represent each affected client.[82] If the lawyer cannot clear this initial hurdle, client consent is impossible; indeed, the lawyer cannot even seek the client's consent.[83] A surprising number of lawyers seem to glide past this requirement, blithely confident in their ability to ably represent their clients notwithstanding the clients' competing interests. This is no time for complacency, however. Model Rule 1.7(b)(1) imposes an objective standard.[84] Accordingly, a lawyer's subjective, good faith belief that she can fulfill her professional obligations to the affected clients despite any competing interests or obligations is immaterial.[85]

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78. Model Rules of Prof'l Conduct R. 1.7(b)(1) (2020); *see* Johnson v. Clark Gin Serv., Inc., No. 15-3290, 2016 WL 7017267, at *11 (E.D. La. Dec. 1, 2016) (stating that in multiple client representations, "the question of consentability must be resolved as to each client"); State *ex rel.* Horn v. Ray, 325 S.W.3d 500, 507 (Mo. Ct. App. 2010) ("The question of consentability must be resolved as to each client.").

79. Model Rules of Prof'l Conduct R. 1.7(b)(2) (2020).

80. *Id.* R. 1.7(b)(3).

81. *Id.* R. 1.7(b)(4) (requiring "informed consent, confirmed in writing").

82. *Id.* R. 1.7(b)(1).

83. Carnegie Cos. v. Summit Props., Inc., 918 N.E.2d 1052, 1067 (Ohio Ct. App. 2009).

84. People v. Mason, 938 P.2d 133, 136 (Colo. 1997); *In re* Stein, 177 P.3d 513, 519 (N.M. 2008); Ferolito v Vultaggio, 949 N.Y.S.2d 356, 363 (App. Div. 2012); Ill. Adv. Op. 09-02, 2009 WL 8559340, at *3 (Ill. State Bar Ass'n 2009).

85. *In re Stein*, 177 P.3d at 519; *see, e.g.,* So v. Suchanek, 670 F.3d 1304, 1310–11 (D.C. Cir. 2012) (rejecting as irrelevant the lawyer's subjective belief that no conflict existed in a joint

Under the objective standard, the facts and circumstances that the lawyer "knew or should have known at the time of undertaking or continuing a representation" are relevant, as opposed to what became known to the lawyer later or could not have been reasonably anticipated by the lawyer.[86] Thus, a lawyer must familiarize herself with the facts underlying the proposed representation to determine whether she can competently and diligently represent each affected client.

While lawyers must honestly assess the circumstances and make a reasonable judgment that competent and diligent representation is achievable, best practices dictate that they not make that determination in isolation. In short, when deciding whether to accept or continue a representation despite a concurrent conflict of interest, disinterested lawyers in the firm should participate in the analysis.

2. Representations Prohibited by Law

Model Rule 1.7(b)(2) bars representations that are prohibited by law.[87] Thus, if a court rule, a rule of professional conduct, a statute, or controlling case law forbids dual representation in the situation at hand, the issue of client consent is irrelevant because the representation may not proceed anyway.[88]

Government agencies are frequent litigants, and they often turn to outside law firms for representation. Unfortunately for lawyers, in some states, government agencies may not be permitted to consent to conflicts of interest. *State ex rel. Morgan Stanley & Co. v. MacQueen*[89] is an illustrative case.

MacQueen involved a lawsuit by the State of West Virginia against three financial institutions to recover a state fund's investment losses.[90] The West Virginia Attorney General appointed the law firm of Wolff Ardis to represent the State.[91] Wolff Ardis also represented seven employees of the State Treasurer's office when they were noticed for deposition as non-party

representation; rather, the analysis depended on whether an objective observer with the lawyer's knowledge of the circumstances would have reasonably doubted his ability to undertake the joint representation); Robertson v. Wittenmyer, 736 N.E.2d 804, 807–08 (Ind. Ct. App. 2000) (finding that the lawyer could not have reasonably believed that the representation of one client against another was permissible).

86. Restatement (Third) of the Law Governing Lawyers § 121 cmt. c(iv) (2000).

87. Model Rules of Prof'l Conduct R. 1.7(b)(2) (2020).

88. *See, e.g.*, Brown v. Kelton, 380 S.W.3d 361, 366 (Ark. 2011) (holding that an Arkansas statute prohibited an insurance company from using in-house lawyers to defend its insureds); Baldasarre v. Butler, 625 A.2d 458, 467 (N.J. 1993) (adopting a bright-line rule prohibiting lawyers from representing the buyer and seller in complex commercial real estate transactions even with consent); Iowa Rules of Prof'l Conduct R. 32:1.7(c) (2012) (barring the representation of both parties in a marriage dissolution).

89. 416 S.E.2d 55 (W. Va. 1992).

90. *Id.* at 56–57.

91. *Id.* at 57.

witnesses.[92] The defendants argued that these concurrent representations posed a conflict of interest because the State had alleged that unnamed Treasurer's office staff members had played a role in causing the subject losses.[93]

The court determined that the State's allegations concerning the Treasurer's office created a disqualifying conflict of interest for Wolff Ardis.[94] The State argued that Wolff Ardis should not be disqualified because the seven staff members to be deposed had waived any conflicts.[95] The problem, however, was that the State also had to consent to Wolff Ardis's multiple representations, which was impossible under West Virginia law.[96] The court so concluded based on its statement in an earlier case that "'where the public interest is involved, an attorney may not represent conflicting interests even with the consent of all concerned.'"[97] This rule rests on the rationale that it is "'essential that the public have absolute confidence in the integrity and impartiality of our system of justice.'"[98] In light of the public interest inherent in the State's attempt to recoup its investment losses, the State could not consent to "a dual representation which involve[d] such adversity of interests as to raise even the appearance of such impropriety."[99]

At least three courts have similarly held that governmental entities may not consent to conflicts of interest.[100] New Jersey, which was one of the earliest states to take this position, now enforces its prohibition on public agency conflict waivers through New Jersey Rules of Professional Conduct 1.7(b)(1) and 1.9(d).[101] The better view, however, holds that government clients' ability to consent to conflicts of interest should be evaluated under the customary rules governing conflicts. To the extent the public interest is implicated, citizens have vested their faith in the public officials from whom consent is being sought. Those officials owe a public trust. When government officials believe it is reasonable to consent to conflicts of interest, they are presumably acting in the public interest. Moreover, rules of professional conduct protect government clients against their lawyers' potentially adverse

92. *Id.*
93. *Id.* at 56, 59.
94. *Id.* at 59–60.
95. *Id.* at 60.
96. *Id.*
97. *Id.* at 60 (quoting Graf v. Frame, 352 S.E.2d 31, 38 (W. Va. 1986)).
98. *Id.* (quoting *Graf*, 352 S.E.2d at 38).
99. *Id.*
100. Guthrie Aircraft, Inc. v. Genesee Cnty., N.Y., 597 F. Supp. 1097, 1098 (W.D.N.Y. 1984); *In re* Sup. Ct. Advisory Comm. on Prof'l Ethics Op. No. 697, 911 A.2d 51, 57 (N.J. 2006); City of Little Rock v. Cash, 644 S.W.2d 229, 235 (Ark. 1982), *overruled on other grounds by* T & T Chem., Inc. v. Priest, 95 S.W.3d 750, 753 (Ark. 2003).
101. N.J. Rules of Prof'l Conduct R. 1.7(b)(1) (2018) (providing that a public entity cannot consent to a concurrent client conflict of interest); *id.* R. 1.9(d) (governing public entities and former client conflicts).

interests just as they do private clients. Consistent with this view, several bar ethics committees have reasoned that government agencies or entities may waive conflicts of interest in most instances,[102] as have several courts.[103]

3. Representing Opposite Sides in the Same Lawsuit

Model Rule 1.7(b)(3) prohibits any representation that involves the "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal[.]"[104] Indeed, a lawyer's or law firm's simultaneous representation of opposing parties in the same case is perhaps the most appalling conflict of interest conceivable.[105] Client consent to such a conflict is ineffective.[106]

4. Obtaining the Clients' Informed Consent, Confirmed in Writing

Finally, if a lawyer has met the requirements of Model Rules 1.7(b)(1)–(3), she may cure a concurrent client conflict of interest by obtaining the affected clients' informed consent to the conflict and confirming it in writing.[107] A client's mere knowledge of a conflict is not sufficient for informed consent. Rather, informed consent requires a client's agreement "to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[108] The disclosures and explanation required to achieve informed consent depend on "the nature of the conflict

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102. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-405, at 4–5 (1997); D.C. Bar, Legal Ethics Comm., Op. 268, at 1 (1996); Ill. Adv. Op. 12-12, 2012 WL 2308109, at *4 (Ill. State Bar Ass'n 2012); N.Y. Ethics Op. 629, 1992 WL 465631, at *4 (N.Y. State Bar Ass'n, Comm. on Prof'l Ethics 1992).

103. *See, e.g.*, City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193, 205 (N.D. Ohio 1976); Miller v. Norfolk & W. Ry. Co., 538 N.E.2d 1293, 1295–97 (Ill. App. Ct. 1989); State *ex rel.* Nixon v. Am. Tobacco Co., 34 S.W.3d 122, 135–36 (Mo. 2000); Pfizer, Inc. v. Farr, No. M2011-01359-COA-R10-CV, 2012 WL 2370619, at *13 (Tenn. Ct. App. June 22, 2012).

104. Model Rules of Prof'l Conduct R. 1.7(b)(3) (2020).

105. *See* Synergy Tech & Design, Inc. v. Terry, No. C 06-02073 JSW, 2007 WL 1288464, at *7 (N.D. Cal. May 2, 2007) (quoting Flatt v. Super. Ct., 885 P.2d 950, 954 (Cal. 1994)); *see also* Jedwabny v. Phila. Transp. Co., 135 A.2d 252, 254 (Pa. 1957) ("No one could conscionably contend that the same attorney may represent both the plaintiff and defendant in an adversary action."); Vinson v. Vinson, 588 S.E.2d 392, 396, 398–99 (Va. Ct. App. 2003) (noting the trial court's observation that the lawyer's representation of both the husband and wife in a divorce constituted a gross conflict of interest and upholding the trial court's sanctions award).

106. *See* Model Rules of Prof'l Conduct R. 1.7 cmt. 23 (2020) ("Paragraph (b)(3) prohibits representation of opposing parties in litigation, *regardless of the clients' consent*." (emphasis added)); *see, e.g.*, Nunez v. Lovell, Civ. No. 2005-7, 2008 WL 4525835, at *3–6 (D.V.I. Oct. 3, 2008) (disqualifying a lawyer who represented the plaintiffs and a defendant in the same case despite the clients' consent to the conflict).

107. Model Rules of Prof'l Conduct R. 1.7(b)(4) (2020).

108. *Id.* R. 1.0(e).

and the nature of the risks" involved in the representation.[109] And while a lawyer need not disclose to a client facts or implications about which the client already knows,[110] a lawyer who withholds or glosses over material information pertinent to the client's decision whether to consent to the conflict assumes the risk that the client will in fact be uninformed and that any consent obtained will prove to be invalid.

The amount of information necessary for the client to make an informed decision varies but often pivots on the client's level of sophistication, education, and experience, and whether the client has independent counsel.[111] The more experienced a client is in legal matters generally, and in making decisions of the type involved in the case in which consent is sought in particular, the less information and explanation needed for a client's consent to be informed.

Depending on the complexity or nature of the matter, the lawyer may want to advise the client to seek independent counsel to help evaluate the conflict of interest. Generally, a client who is represented by independent counsel is presumed to have given informed consent to the proposed course of conduct.[112] This is true regardless of whether the other lawyer is the client's in-house counsel or an outside lawyer.[113] When possible, lawyers should give clients adequate time to consider the information bearing on their decisions or to consult independent counsel. Recommending that the client wait a reasonable time before consenting to the conflict will blunt any later argument that the client was unable to reflect on the situation or solicit another lawyer's advice.

As for the writing requirement when obtaining a client's consent to a conflict, it is essential to remember that Model Rule 1.7 does not require a client's written consent to a conflict of interest; it requires that the client's consent be confirmed in writing.[114] Thus, a lawyer may obtain the client's consent in a meeting or over the telephone, for example, and comply with the rule through a confirming letter, e-mail message, or text message.[115] State rules of professional conduct, however, may vary.[116]

109. *Id.* R. 1.7 cmt. 18; *see also* MJK Fam. LLC v. Corp. Eagle Mgmt. Servs., Inc., 676 F. Supp. 2d 584, 597 (E.D. Mich. 2009) ("The amount of disclosure required . . . depends on the circumstances.").

110. Galderma Labs., L.P. v. Actavis Mid Atl. LLC, 927 F. Supp. 2d 390, 401–03 (N.D. Tex. 2013).

111. *Id.* at 401.

112. Model Rules of Prof'l Conduct R. 1.0 cmt. 6 (2020).

113. *Galderma Labs.*, 927 F. Supp. 2d at 401.

114. Model Rules of Prof'l Conduct R. 1.7(b)(4) (2020).

115. *See id.* R. 1.0(n) (indicating that e-mail and text messages are "writings" in this context).

116. *See, e.g.*, Cal. Rules of Prof'l Conduct R. 1.7(a) & (b) (2018) (requiring each client's "informed written consent" to concurrent conflicts of interest).

5. The Enforceability of Advance Conflict Waivers

While lawyers may seek consent from clients at the time a conflict of interest arises, it is also ethically permissible for lawyers to obtain advance consent to future conflicts of interest.[117] In fact, this practice is common where sophisticated clients are concerned. The overarching test for the enforceability of advance conflict waivers remains the client's informed consent to the conflict.[118] The lawyer bears the burden of proving the client's informed consent.[119]

Whether a court will consider consent to an advance waiver informed ordinarily depends on several factors, including the waiver's specificity and scope, the caliber of the discussion between the lawyer and the client concerning the conflict, the nature of the actual conflict, the client's sophistication, whether independent counsel represented the client in giving consent, and the interests of justice.[120] Like any other agreement between a lawyer and a client, a court will narrowly construe the scope of an advance waiver and resolve any ambiguities against the lawyer.[121]

Galderma Laboratories., L.P. v. Actavis Mid Atlantic LLC[122] is currently the leading case upholding an advance waiver. Beginning in 2003, Vinson & Elkins, LLP (V&E) advised Galderma Laboratories, a global dermatology company, on employment and benefits issues. In its engagement letter, V&E sought Galderma's consent to the following waiver of future conflicts of interest:

> We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that

117. Model Rules of Prof'l Conduct R. 1.7 cmt. 22 (2020); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436, at 1, 4–5 (2005); D.C. Bar, Legal Ethics Comm., Op. 309, at 5 (2001) [hereinafter D.C. Op. 309]; N.Y.C. Ethics Op. 2006-1, 2006 WL 1662501, at *1 (Ass'n of the Bar of the City of N.Y., Comm. on Prof'l & Jud. Ethics 2006) [hereinafter N.Y.C. Ethics Op. 2006-1].

118. *Galderma Labs.*, 927 F. Supp. 2d at 396; Visa USA, Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003); N.Y.C. Ethics Op. 2006-1, *supra* note 117, 2006 WL 1662501, at *1.

119. *Galderma Labs.*, 927 F. Supp. 2d at 398.

120. Lennar Mare Island, LLC v. Steadfast Ins. Co., 105 F. Supp. 3d 1100, 1115 (E.D. Cal. 2015) (citing *Visa USA*, 241 F. Supp. 2d at 1106); W. Sugar Coop. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074, 1082–83 (C.D. Cal. 2015) (citing *Visa USA*, 241 F. Supp. 2d at 1106).

121. *See, e.g.*, GSI Commerce Sols., Inc. v. BabyCenter, LLC, 618 F.3d 204, 212–13 (2d Cir. 2010) (concluding that the lawsuit in question did not fall into the category of cases covered by the parties' advance waiver provision); *In re* Rail Freight Fuel Surcharge Antitrust Litig., 965 F. Supp. 2d 104, 118 n.12 (D.D.C. 2013) (rejecting the law firm's argument that the advance waiver covered the client's entire corporate family); Brigham Young Univ. v. Pfizer, Inc., No. 2:06-CV-890 TS BCW, 2010 WL 3855347, at *2–3 (D. Utah Sept. 29, 2010) (construing the advance waiver to apply to the law firm's clients with open intellectual property matters as of the day the consenting client signed the agreement, as opposed to covering all of the law firm's current and future clients with intellectual property matters).

122. 927 F. Supp. 2d 390 (N.D. Tex. 2013).

> we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with ours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.[123]

Quinton Cassady, Galderma's general counsel and a very experienced lawyer, signed the letter and thereby agreed to V&E's engagement terms.

In 2012, while V&E was still advising Galderma on employment issues, Galderma hired another law firm to file patent litigation against Activis Mid Atlantic, LLC. At that time, V&E had represented Activis on intellectual property matters for six years. V&E filed an answer and counterclaims on Activis's behalf. After V&E refused Galderma's requests to withdraw from representing Activis based on the advance waiver, Galderma moved to disqualify V&E. The issue for the court was "whether or not Galderma, a sophisticated client, represented by in house-counsel gave informed consent when it agreed to a general, open-ended waiver of future conflicts of interest in V&E's 2003 engagement letter."[124]

Focusing on the 2003 engagement letter, the court concluded that the information disclosed was reasonably adequate for a client to form informed consent.[125] First, the letter identified a course of conduct regarding concurrent conflicts of interest: V&E could represent clients whose interests conflicted with Galderma's interests unless the adverse representation was substantially related to Galderma's representation or there was a reasonable probability that V&E could use Galderma's confidential information to its disadvantage. Second, the letter explained the material risk in waiving future conflicts: V&E could advocate for another client directly against Galderma. Third, the letter explained an alternative course of conduct for Galderma: it could engage different employment counsel if it did not wish to consent to V&E's terms and conditions.[126]

The *Galderma* court recognized that "[i]n many cases, and for many clients," V&E's general, open-ended advance waiver "would likely not be reasonably adequate to allow a client to make an informed decision."[127]

123. *Id.* at 393.
124. *Id.* at 394.
125. *Id.* at 399.
126. *Id.* at 399–400, 401.
127. *Id.* at 405–06.

The court explained that most clients are not positioned to understand the material risks from the open-ended language of the waiver itself.[128] At the same time, however, V&E's waiver was "reasonably adequate to allow clients in some circumstances to understand the material risk of waiving future conflicts of interest."[129] In the court's view, such circumstances existed here given Galderma's sophistication and representation by independent counsel in the form of its in-house general counsel.[130]

Galderma possessed a high level of business sophistication based on its global operations, worldwide sales of $1.87 billion, and filing of over 5,500 patent applications and patents.[131] Galderma also was a highly experienced consumer of legal services.[132] The company was then involved in over a dozen lawsuits, routinely hired multiple large law firms to advise it on various issues and litigate in courts across the country, and agreed to at least two other advance waivers with another large law firm.[133] Galderma had its own legal department led by Cassady, who had long practice experience.[134] These circumstances, coupled with the advance waiver language itself, established the informed consent necessary to enforce the advance waiver against Galderma.

Based on the fact-intensive nature of the informed consent inquiry, there are few bright line rules guiding lawyers as to the enforceability of advance waiver provisions. For that matter, because of the frequent difficulty of achieving informed consent, advance waiver provisions that might be characterized as open-ended are notoriously unreliable insurance against future disqualifying conflicts despite their ethical permissibility.[135] On the other hand, the closer the actual conflict of interest is to that which the parties contemplated at the time the client agreed to the advance waiver, the more likely it is that a court will enforce the waiver. Furthermore, while a clear link between the prospective and actual conflicts is certainly desirable, a lack of specificity regarding an identifiable future client or matter encompassed by the waiver does not necessarily render an advance conflict waiver

128. *Id.* at 397.
129. *Id.* at 401.
130. *Id.* at 401–04.
131. *Id.* at 402.
132. *Id.*
133. *Id.*
134. *Id.* at 403.
135. *See, e.g.*, S. Visions, LLP v. Red Diamond, Inc., 370 F. Supp. 3d 1314, 1327 (N.D. Ala. 2019) ("[G]iven the advance waivers' lack of specificity, the lack of evidence that Red Diamond was fully counseled regarding their import, and especially the fact that directly adverse litigation between two direct competitors like Red Diamond and Southern Visions is an extremely serious conflict most clients would be unwilling to waive, the court is unable to conclude that the advance waivers, standing alone, provided Red Diamond's effective consent to this conflict."); Mylan, Inc. v. Kirkland & Ellis LLP, No. 15-581, 2015 WL 12733414, at *18–19 (W.D. Pa. June 9, 2015) (rejecting an advance conflicts waiver for lack of informed consent).