Hidden Dangers When Choosing Outside Counsel and Teaming Up with Similarly Situated Defendants: Ethical Implications of Beauty Contests, Hot Potatoes, and Joint Defense Agreements

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What are a lawyer’s ethical responsibilities when trying to fire his or her client and what can you do in response? What happens when your company requests proposals to provide legal services, and a firm that wasn’t chosen for the work decides to represent an adverse party? Can joint defense agreements be a useful tool in your litigation toolkit—or do they lead to headaches?

The “Hot Potato” Doctrine

"[A] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."\(^{ii}\)

"While the [New York] Code [of Professional Responsibility] may not expressly prevent a lawyer from dropping one client in order to represent another, it is well-settled that the duty of loyalty prevents an attorney from doing so opportunistically."\(^{iii}\)

The so-called “hot potato” doctrine arises in situations where there is a conflict of interest between one current client and another potential (or current) client. In general, the Restatement\(^{iv}\) and the courts have held that the lawyer or firm cannot play hot potato with a client, such as to keep or get a client that will likely be more lucrative.

The American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”)\(^{v}\) most relevant to the “hot potato” doctrine are Rule 1.7—which deals with current client conflicts; Rule 1.9—which deals with past client conflicts; and Rule 1.16(b)—which allows a lawyer to “withdraw from representing a client if the withdrawal can be accomplished without material adverse effect on the interests of the client.”

Current Client Conflicts

Rule 1.7 states that a lawyer cannot represent a client if a concurrent conflict exists. A concurrent conflict exists under Rule 1.7(a) if:

1. "[R]epresentation of one client will be directly adverse to another client; or"
2. "[T]here is a significant risk that representation of one or more clients will be materially limited” because of responsibilities to:
   - another client,
   - a former client,
   - a third person, or
   - a personal interest of the lawyer.

However, under the current client waiver provision of Rule 1.7(b), a lawyer can still represent a client with a concurrent conflict if a
number of criteria are met. Obviously, the representation must not be prohibited by law. In addition, the lawyer must believe that he or she will be able to competently and diligently represent each affected client. The affected clients may not be on opposing sides in the same litigation. Finally, each client must provide informed consent for the lawyer to represent both.

### Former Client Conflicts

Rule 1.9 sets forth the rules for when a lawyer may take on a new client when there is a conflict of interest between the new client and a former client.

A lawyer cannot represent a new client in a matter that is the same or substantially related to that lawyer’s representation of a former client where the new client’s interests are materially adverse. Also, a lawyer cannot knowingly represent a new client in a matter that is the same or substantially related to that lawyer’s former firm’s representation of a client whose interests are materially adverse to the new client and the lawyer has acquired protected information regarding the former client. As with Rule 1.7, a lawyer may represent these new clients if the former client gives informed written consent.

Rule 1.9 also governs a lawyer’s conduct toward former clients. For example, a lawyer who has formerly represented a client, or whose present or former firm has formerly represented that client, may not use information relating to that representation to the disadvantage of the former client (except as permitted or required by the rules), unless the information becomes generally known. The lawyer also is forbidden from revealing information related to the past representation except as otherwise permitted or required.

### Termination

Rule 1.16 allows a lawyer to withdraw from representing a client if there will be no material adverse effect of the client’s interests.

### The “Hot Potato” Doctrine in Action

So how does the potato get hot?

In general, there are three different ways that these conflicts tend to arise such that a company may find itself at odds with, and potentially seeking disqualification of its outside counsel.

1. **The outside lawyer or firm represents Client A; Client B is a potential new client but is adverse to Client A.**

   The lawyer may not represent Client B absent an informed waiver from Client A (assuming the issue is waivable). The present-client conflict may not be transformed into a former-client conflict by the lawyer’s withdrawal from the representation of Client A. A premature withdrawal violates the lawyer’s obligation of loyalty to Client A and can constitute a breach of the client-lawyer contract of employment. This might apply even if the firm properly withdraws prior to the representation of potential Client B.

2. **The outside lawyer or firm represents two clients who have not previously been adverse—Client A then sues Client B.**

   Generally, the lawyer may only represent Client B, the client that is being sued. If Client A subsequently moves to disqualify, courts have generally declined to disqualify the lawyer for a conflict of interest. The primary reason is that the conflict arose from Client A’s action and not the lawyer’s or Client B’s actions.

3. **The outside lawyer or firm represents two clients who have not been previously adverse—Client A is acquired by a new company that is adverse to Client B.**

   Here again, generally the lawyer may continue to represent the non-acquired client, although he or she will have to resign the conflicting engagement absent a waiver (assuming the conflict is waivable).

How do you know for sure if you still have a relationship with an outside firm?

If a discrete task has been completed, you are a former client. But if you have worked with the firm on multiple tasks, you may still be considered a current client, even if you don’t have any active matters. Part of this depends on the admittedly subjective belief of the client—does he or she reasonably believe the relationship is active? Also, has there been any clear communication that the attorney/client relationship has been terminated?
It is commonplace for outside law firms to compete for corporate engagements. But what happens when lawyers from a firm that competed unsuccessfully for a litigation matter in one of these beauty contests ends up as your opponent’s counsel on the same matter? Are the lawyers and their firm disqualified from representing your opponent?

The answer is: **It depends.**

According to Comment 2 of ABA Model Rule 1.18, a “prospective client” is someone who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. However, a company that communicates with a lawyer for the purpose of disqualifying the lawyer is not a prospective client. Likewise, a company that communicates information unilaterally without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a relationship also is not a prospective client.

Rule 1.18 prohibits a lawyer from using or revealing confidential information learned in discussions with the prospective client except as permitted under Rule 1.9 governing former clients, with two exceptions:

- where the Model Rules "would permit or require with respect to a client" or
- "when the information has become generally known."

A lawyer who learned confidential information from a prospective client cannot represent a client if the client’s interests are materially adverse to those of a prospective client—in the same or a substantially related matter—if potential use of that information could be significantly harmful to the prospective client in that matter. The disqualification is imputed to other members of the lawyer’s firm.

However, under Rule 1.18(d)(1), even if the lawyer receives disqualifying information, he may represent an adverse party in the matter if the affected client and the prospective client give "informed consent, confirmed in writing." Also, under Rule 1.18(d)(2), the lawyer may represent an adverse party if the lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine" whether to undertake the representation and

- "the disqualified lawyer is timely screened from participating in the matter" and is given no fees; and
- "written notice is promptly given to the prospective client."

A scenario in which a district court denied disqualification is found in *Tiversa Holding Corp. v. LabMD, Inc.*, 2013 WL 6796538, at *3-4 (W.D. Pa. Dec. 20, 2013). There, lawyers from a firm met with prospective client LabMD about initiating a lawsuit against Tiversa in Pennsylvania. Subsequently, different lawyers from the same firm represented Tiversa and sued LabMD. The district court did not disqualify the firm or lawyers because there was no evidence that:

- the information obtained by the lawyers in the initial discussions would be "significantly harmful" to LabMD;
- there was a discussion of LabMD as a potential defendant in Pennsylvania or its options if sued by Tiversa for claims now at issue in the case;
- the law firm’s knowledge from the meeting would hinder LabMD’s defense;
- legal advice was provided, documents were shared, or there was a substantive discussion of the prior litigation; or
- the law firm’s measures taken to protect the information were insufficient.

You should familiarize yourself with Rule 1.18 or its counterpart in states applicable to your practice. Also, when conducting a “beauty contest” among several firms, determine how much information is necessary to provide to outside litigation counsel. Finally, consider how you would respond to a firm’s request to condition participation in a beauty contest on your company’s informed consent.

**Joint Defense Agreements (“JDAs”)**

*What are the potential risks of joining a joint defense and are there strategies to avoid or minimize these risks?*

The joint defense doctrine (or common interest doctrine) is an extension of (or exception to) the attorney-client privilege. Such an agreement allows communication of confidential and privileged information with third parties who have a common legal interest without waiving other applicable privileges. Most circuits have adopted the doctrine, and the Third Circuit has one of the most expansive views of scope of the protection.

The specific requirements to invoke the joint defense doctrine are:
• communications are made in the course of a joint defense or common legal interest (not a common commercial interest);
• communications are made to further the joint defense effort;
• communications are made in confidence; and
• privilege has not been waived.

There are a number of notable benefits for your company to enter a JDA. This approach can produce lower litigation costs as well as provide a united defense, promote a more efficient use of outside counsel time and resources, and enhance information sharing.

Potential problems include conflicts, both current and future; members who join but don't contribute ("free-riders"); and potentially a greater risk exposure for client members.

The most common conflicts questions (and the least settled among the courts) are what relationship arises between a lawyer and the non-client members of the joint defense group ("JDG") and how does that impact future representation? For example, a lawyer represents Company A and joins a JDG comprised of Company A and Company B. The case concludes and the JDA is dissolved. Complications then can arise when the lawyer or his firm later represents an unrelated party in a matter adverse to Company B.

The ABA's view is that while a lawyer "would almost surely have a fiduciary obligation to the other members of the consortium . . . [h]e would not, however, owe any ethical obligation to them, for there is simply no provision of the Model Rules imposing such an obligation."xii

Likewise, the D.C. Bar has taken the stance that "[j]oint defense agreements do not create 'former client' conflicts under Rule 1.9 because members of a joint defense group do not become the lawyer's 'clients' by virtue of such agreements."xiii

However, this majority view that no ethical duty is created by a JDA is not accepted in all jurisdictions. Also, be aware that the fiduciary duty may give rise to future conflicts.

What about future representation?

Sometimes, screening and conflicts waivers may not be enough. An implied attorney-client relationship can lead to disqualification of a lawyer based on a duty of confidentiality and disqualification of his or her firm based on imputation.

For example, in Roosevelt Irrigation District v. Salt River Project Agricultural and Power District, 810 F. Supp. 2d 929 (D. Ariz. Aug. 26, 2011), the defendants moved to disqualify plaintiff's counsel based on the participation of lawyers from plaintiff's counsel’s firm in JDAs involving defendants in other cases.xiv The court assessed whether (1) there was an actual exchange of relevant confidential information between the lawyers in the JDG; (2) the former representation related to the JDG was "the same or substantially related" to the current litigation; and (3) the current client’s interest were "materially adverse" to the interests of the party claiming to be protected by the JDA.xv

The court found an implied attorney-client relationship between some lawyers and the other JDG members limited to the extent there was an actual transfer of relevant confidential information. Although plaintiff’s firm screened the lawyers, the court imputed the lawyers’ disqualifying conflicts to plaintiff’s firm under Arizona law.xvi

In other instances, screening and conflicts waivers may not be enough.

In In re Gabapentin Patent Litigation, 407 F. Supp. 2d 607 (D.N.J. 2005), two lawyers represented a defendant in a JDA (and exchanged confidential information) but left their firm and joined a firm that subsequently represented an adverse party in the same litigation. The lawyers were screened from the case and the new firm obtained waivers regarding the adverse representation—but only from the defendant they had represented. The court disqualified the lawyers and their new firm because they did not obtain waivers from all of the members of the JDA.

Practice tips for avoiding JDA problems include:

• inserting a provision in the agreement expressly disavowing any attorney-client relationship between the lawyers and any non-client members of the agreement;
• ensuring that the lawyer signs the JDA and excluding the client from participating in joint defense meetings;
• including a provision waiving future conflicts that stem from participation in the JDG;xvii
• considering an exclusion process for free riders; and
• possibly entering non-client JDA members into the firm conflicts database.

The substance of this article was presented to members of the Greater Philadelphia Chapter of the ACC by Mr. Herman, Ms. Cramer, Kim Jessum of Heraeus Inc. and Alexander Plache of Saint-Gobain Corporation.

Picker Int’l v. Varian Assoc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) superseded by rule on other grounds as recognized by,


Always consult the rules, case law and legal ethics opinions of applicable jurisdiction(s). A particular jurisdiction may follow rules modeled after the ABA Model Rules, the ABA Model Code, or both.

See Santacroce v. Neff, 134 F. Supp. 2d 366 (D.N.J. 2001); Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992). In Kabi, for example, the defendant’s law firm (Firm A) had represented the plaintiffs in a case and had done continuing patent litigation consulting work for plaintiffs. When plaintiffs sued defendant, defendant hired Firm A to represent it in the case. Firm A did not seek a waiver from plaintiffs and plaintiffs eventually moved to disqualify Firm A from representing the defendant. The District of Delaware court found that Firm A had violated Rule 1.7 because there was an ongoing relationship with the plaintiffs that had not been properly terminated, and thus the firm could not represent the defendant in the matter. This was true even though the firm was acting in a consulting capacity for the plaintiffs and had not appeared on any of the pleadings.

See Delaware State Bar Association Committee on Professional Ethics Opinion 2003-1; cf. Madukwe v. Delaware State Univ., 552 F. Supp. 2d 452 (D. Del. 2008). In Madukwe, the district court found that disqualification was proper under Rule 1.9 (as adopted by the District of Delaware per D. Del. LR 83.6(d)) and did not reach the issue under Rule 1.7. See 552 F. Supp. 2d at 459-63. It was questionable whether the employee-client relationship had been properly terminated such that Rule 1.7 would not apply. Regardless, because the court found that disqualification was proper under the more lenient Rule 1.9 standard, it would have reached a similar conclusion under the Rule 1.7 standard.


See ABA Model Rule 1.3, Comment 4.

The Association of the Bar of the City of New York City Committee on Professional and Judicial Ethics Formal Opinion 2013-1 examines a few “beauty contest” scenarios.

Comment 8 to ABA Model Rule 1.18 states that the notice should include a general description of the subject matter about which the lawyer was consulted and the screening procedures employed.


Roosevelt Irrigation involved a CERCLA action brought by Plaintiff Roosevelt Irrigation District (“RID”) against various defendants to recover millions spent cleaning up contaminated groundwater. Several defendants in the lawsuit had been involved in JDGs formed in response to allegations of liability for groundwater contamination. Lawyers with Firm A representing plaintiffs had previously represented other members of those JDGs in different cases. Different lawyers with Firm A brought the action for RID against defendants, and certain defendants moved to disqualify plaintiff’s counsel from Firm A based on the previous participation of other lawyers from Firm A in JDGs for other JDG members.

810 F. Supp. 2d at 977. For several defendants, the court found that the prongs were satisfied and the lawyers involved in the JDG on behalf of companies that were not named in the CERCLA suit owed a duty of confidentiality to the other members. Id. at 970-71, 973-74. The court imputed those duties to the firm and disqualified Firm A. Id. at 972, 974-75. Although Firm A screened the JDG lawyers soon after it was retained by plaintiffs, under Arizona law, screening is only available when the personally disqualified lawyer joins a new law firm. Id. at 972, 974-75. Here, the JDG lawyers worked for Firm A during participation in the JDG and, thus,
screening was not available as a remedy. Some jurisdictions are less strict and might not disqualify the firm.

In the case where the lawyer represented a member of the JDG before joining Firm A and there was no evidence that the lawyer exchanged confidential information in the JDG, the court did not disqualify the attorney. 810 F. Supp. 2d at 977-79. Even if confidential information had been exchanged, the court would not have imputed the disqualification to Firm A under Arizona law because the lawyer was properly screened and notice was provided to defendants. Id. at 979-81.

As noted above, the Arizona screening law applies only when a lawyer who previously represented a member of the JDG becomes associated with a new firm, not when lawyers participate in the JDA while associated with the firm. Other states may differ.

Some courts will enforce such provisions, while others may not. See, e.g., All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., 2008 WL 5484552 (N.D. Cal. Dec. 18, 2008).

Additional Resources

- Sample Joint Defense/Common Interest Agreement
- Waiver Of Conflicts & Retention Agreement to Hire a Common Of Counsel for Specific Limited Purposes
- Level the Playing Field and Protecting Privilege with Common Interest Agreements
- Litigation Clients Oversight Committee And Project Statement Of Principles
- Cooperative Defense Groups - Strategies For Cost Effective Collaboration