

**Strafford**

*presents*

# **Attorney Conflicts of Interest: Identifying and Resolving Ethical Pitfalls**

## **Strategies to Minimize the Risk of Ethics Violations and Malpractice Claims**

**A Live 90-Minute Teleconference/Webinar with Interactive Q&A**

**Today's panel features:**

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**Tuesday, June 29, 2010**

The conference begins at:

**1 pm Eastern**

**12 pm Central**

**11 am Mountain**

**10 am Pacific**

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# Conflicts of Interests

## Why are the conflicts rules important?

- Disqualification: conflicts rules are the starting place for courts to analyze disqualification issues, although courts don't strictly apply the rules

# Conflicts of Interests

## Why are the conflicts rules important (cont'd)?

- Malpractice: unhappy clients look for conflicts to bolster a malpractice claim
- Discipline: violations of the conflicts rules can lead to professional discipline

# Conflicts of Interests

## Why are the conflicts rules important (cont'd)?

- Business reasons: what cases can a lawyer accept and under what circumstances, when are waivers etc. required

# Identifying Conflicts

## Threshold Issues

- Which rules apply?
- Who is (and is not) the client?
- Is there adversity?
- Is the client a former or current client?

# Threshold Issues

## Which jurisdiction's ethics rules apply?

- Conflict rules differ from jurisdiction to jurisdiction. *Compare, e.g.,* Florida Rule of Prof. Conduct 4-1.7 *with* Texas Rule of Prof. Conduct 1.6.
- Lawyers can be subject to ethics rules of jurisdictions where they are not admitted under choice of law principles. *See, e.g.,* ABA Model Rule 8.5(b)(1) (lawyers appearing before a tribunal are subject to tribunal's ethics rules).

# Threshold Issues

## Who is the client?

- Conflicts arise in the context of a lawyer's representation of a client. *See* ABA Model Rule 1.7(a) ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . ."); Model Rule 1.9 ("[a] lawyer who has formerly represented a client . . . shall not thereafter represent another party . . .").

# Threshold Issues

## Who is the client (cont'd)?

- Generally, if there is or was no attorney-client relationship with the party asserting that a conflict exists, there is no conflict.

# Threshold Issues

## Who is the client (cont'd)?

- Typical situations where the question of who is the client can be ambiguous: husband and wife, parent and child, business partners, corporation and its CEO, brokers and purchasers/sellers.
- Membership associations: if you represent a trade association or other membership organizations, do you represent the members or just the organization?

# Threshold Issues

## Who is the client (cont'd)?

- Corporate family issues: if you represent a parent corporation, do you also represent all subsidiaries or affiliates and vice-a-versa? Default rule, subject to many exceptions, is that representation of one member of a corporate family does not mean that a lawyer represents other affiliated entities. *See* ABA Formal Opinion 95-390; Comments [21] to [26] to D.C. Rule 1.7 (setting forth various scenarios where exceptions apply).

# Threshold Issues

## Who is the client (cont'd): Practice Tips

- Specify clients in the engagement letter.
- Avoid de facto clients by identifying “non-clients” through direct communication with such “non-clients,” *see* ABA Model Rule 1.13 (f) (requiring lawyer for organization to identify client in dealings with officers or employees where organizations interests may be adverse to officer or employee).
- Do not give legal advice to or get confidential information from non-clients

# Threshold Issues

## Adversity

- Adversity is a requirement for many types of conflicts. ABA Model Rules 1.7(a)(1)(concurrent conflict exists when representation of a client is “directly adverse” to another client); 1.9 (forbidding representation of a client that is “materially adverse” to former client on same or substantially related matter).

# Threshold Issues

## Adversity (cont'd)

- If there is adversity among clients represented in the same matter, the conflict may not be waivable. ABA Model Rule 1.7(b)(3)

# Threshold Issues

## Adversity (cont'd)

- "Adversity" often easy to identify: plaintiff is adverse to defendant, buyer is adverse to seller. But some situations are ambiguous: husband and wife in estate planning, co-defendants in litigation, multiple witnesses in a white collar investigation, party in litigation and minor non-party witness such as a document custodian; multiple members of a lending syndicate.

# Threshold Issues

## Adversity (cont'd)

- Definitions of adversity are vague and not particularly helpful. *See, e.g.*, Comment [28] to ABA Model Rule 1.7 (can represent multiple clients who are “generally aligned” albeit with “some difference in interest among them” but cannot represent multiple parties “whose interests are fundamentally antagonistic”).

# Threshold Issues

## Adversity (cont'd)

- Adversity can arise over the course of an engagement; clients in agreement at the outset of a matter can become adverse. *E.g.*, one co-defendant in a criminal case is offered a dismissal in exchange for cooperation.

# Threshold Issues

## Adversity (cont'd)

- Adversity can arise in different ways. For example, multiple generations of a family may have differing interests with respect to a potential sale of a long-held family business. Two plaintiffs may have the same interests with respect to the litigation but may have different views about settlement or litigation tactics.

# Threshold Issues

## Adversity (cont'd)

- Adversity can sometimes be avoided through limitations on the scope of a representation. A lawyer may represent, for example, members of lending syndicate vis-à-vis the borrower but not with respect to internal syndicate issues. ABA Model Rule 1.2(c) (authorizing limitations to scope of representation with informed consent).

# Threshold Issues

## Former or Current Client Conflict?

- Rules for conflicts involving a former client are more permissive than rules governing current client conflicts. A lawyer generally cannot be adverse to a current client even on an unrelated matter. A lawyer can be adverse to a former client on unrelated matters.

# Threshold Issues

## Former or Current Client Conflict (cont'd)?

- A client represented by a lawyer on a single matter is generally a former client when that matter concludes. Comment [4] to ABA Model Rule 1.2 (“If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved.”)

# Threshold Issues

## Former or Current Client Conflict (cont'd)?

- For clients that a lawyer has represented on multiple matters over a period of time, the “client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.” *Id.* Courts have found a current attorney-client relationship even in the absence of any pending work or assignments. *E.g., Credit Index LLC v. Risk Wise LLC*, 746 NYS.2d 885, 891-92 (Sup. Ct. 2002).

# Threshold Issues

## Former or Current Client Conflict (cont'd)?

- The issue of whether an attorney-client relationship has ended may depend on how the scope of representation is described in the engagement agreement. Broad language describing a broad range of services that a lawyer or law firm can provide are likely to be used against the lawyer who claims that an attorney-client relationship has been concluded.

## Current/Former Client

- *Romano v. Ficchi*, 889 N.Y.S.2d 507 (N.Y. Sup. Ct. 2009)
  - Attorney represents purchaser of condominium.
  - Purchaser advised the attorney that she wanted to purchase the unit specifically because of the view the unit offered
  - Plaintiff alleges that attorney previously represented the seller of an adjoining real property and as a result should have known that the purchaser of the adjoining property intended to demolish the existing structure and build a larger structure which would obstruct plaintiff's view
  - Motion to dismiss legal malpractice claim denied
  - Court relies on Code of Professional Responsibility Ethical Consideration 5-1 and Disciplinary Rule 7-101

## Current/Former Client

- *Ciocca v. Neff*, 2005 U.S. Dist. LEXIS 12222 (S.D.N.Y. June 20, 2005)
  - Plaintiff retained attorney to represent him in sale of patent to third party
  - Plaintiff alleges that the attorney was conflicted by agreeing to represent that third party before the conclusion of representation of plaintiff in the sale
  - Attorney claims representation ended at closing of the patent sale
  - Court denies attorney's summary judgment motion finding issues of fact as to: (a) possible undervaluing of patent and attorney's failure to recommend appraisal; and (b) potential conflict of interest arising from dual representation.

# Adverse Current Client Conflicts

- Representation of one client “directly adverse” to another current client. ABA Model Rule 1.7(a)(1)
- Examples: suing a client; deposing a client; negotiating on behalf of one client against another.

# Adverse Current Client Conflicts

- Conflict exists (except in Texas) even if the matter where you are adverse to a client is unrelated to matter in which you represent such client. For example, absent a waiver, lawyer cannot sue a bank on a personal injury claim when that lawyer also negotiates leases for the bank even though the two matters are entirely unrelated.

# Adverse Current Client Conflicts

- Imputation: your conflicts are your partner's conflicts and vice-a-versa. ABA Model Rule 1.10. You cannot sue a bank on a personal injury claim even though all of the work done for the bank is (a) entirely unrelated, (b) done by other lawyers, (c) in other offices of your firm.

# Adverse Current Client Conflicts

- Screens don't cure conflicts, except in limited situations involving laterals, former government attorneys, former judges and mediators and prospective clients. ABA Model Rules 1.7, 1.9, 1.10, 1.11, 1.12 and 1.18.

# Concurrent Representation

- *Sentinel Prods. Corp. v. Platt*, 2002 U.S. Dist. LEXIS 13217 (D. Mass. July 22, 2002)
  - Law firm files a patent on behalf of the company and then, two weeks later, files two patent applications on behalf of one of the company's employees.
  - Employee's patents are granted/Company's patent is initially rejected.
  - On summary judgment, case is dismissed solely because of company's inability to show proximately caused damages.
  - While acknowledging plaintiff's theory that its patent applications may have been "delayed and narrowed because of [the employee's] patents," the plaintiff failed to submit "evidence to prove that [the law firm] intentionally or inadvertently pulled their punches in prosecuting [company's] interests"
  - "There is no evidence offered that if Sentinel had had different representation, its patent applications would have fared any better."
  - Plaintiff's expert had opined damages of \$18.9 million to \$26.8 million in lost profits.

## Concurrent Representation

- *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 (1st Dep't 2004)
  - Client brings counterclaim for legal malpractice in response to firm's fee claim
  - WGM represented Fashion Boutique in lawsuit against Fendi
  - Fashion Boutique alleges that WGM also represented Prada, parent of Fendi
  - Fashion Boutique claims that "irresolvable conflict of interest" resulted in WGM's failure to adequately utilize testimony of a former Fendi officer in opposing dismissal of claims asserted by Fashion Boutique in action against Fendi.
  - Motion to dismiss denied, but court notes "We take this occasion to note that the court erred in holding that the "but for" standard of causation, applicable to a legal malpractice claim, does not apply to the claim for breach of fiduciary duty. Instead, it applied the less rigorous "substantial factor" causative standard. We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability."

# Joint Representations

- Joint representation: representing two or more clients in the same matter.
- Examples: multiple witnesses in a white collar investigation, co-defendants in a civil suit, a corporation and its CEO, husband and wife in estate planning, entrepreneurs in the formation of a business.
- Imputation rules apply. Conflict analysis does not change if you represent one client in a joint representation and your partner represents another.

# Joint Representations

- Cannot keep secrets as between jointly represented clients and should so advise the clients. Comments [30] – [31] to ABA Model Rule 1.7.
- Lawyer must be impartial as to jointly represented clients and cannot favor one client over another.

# Joint Representations

- Differing interests and perspectives may make some joint representation impossible. Lawyer cannot represent parties who are “fundamentally antagonistic.”
- If a conflict exists, it may be unwaivable. ABA Model Rule 1.7(b)(3); see also, e.g. DC Rule 1.7(a).

## Dual Representation

- *Swift v. Ki Young Choe*, 242 A.D.2d 188 (1st Dep't 1998)
  - Attorney represents buyer and seller in sale of real estate
  - Law firm obtains releases for any malpractice claim arising from transaction prior to closing
  - Seller claimed that after the buyer failed to make requisite payments, the law firm failed to comply with their contractual and fiduciary duties.
  - Court held it was improper to conclude in context of summary judgment that dual representation was proper as a matter of law noting that “it can only be determined at trial whether and to what extent counsel ascertained that [client] fully understood and appreciated the risk he was undertaking” by not recording mortgage
  - Court rejected release because it arose from the solicitation of a client's execution of a release during the course of representation in violation of DR 6-102(A)

## Dual Representation

- **Baldasarre v. Butler, 132 N.J. 278 (N.J. 1993)**
  - “This case graphically demonstrates the conflicts that arise when an attorney, even with both clients' consent, undertakes the representation of the buyer and the seller in a complex commercial real estate transaction. The disastrous consequences of Butler's dual representation convinces us that a new bright-line rule prohibiting dual representation is necessary in commercial real estate transactions where large sums of money are at stake, where contracts contain complex contingencies, or where options are numerous. The potential for conflict in that type of complex real estate transaction is too great to permit even consensual dual representation of buyer and seller.”
  - “Therefore, we hold that an attorney may not represent both the buyer and the seller in a complex commercial real estate transaction even if both give their informed consent.”

## Dual Representation

- *In re Wagner*, 599 N.W.2d 721 (Iowa 1999)
  - A lawyer's simultaneous representation of a buyer and a seller in the same transaction is a paradigm of a conflict of interest.
  - When an attorney "represents a client whose interests differ from those of another client, or from the respondent's own interests, the burden shifts to the respondent to prove that all the transactions were fair and equitable. Additionally, the [attorney] must prove that he or she faithfully discharged all [the attorney's] duties to the client, not only by refraining [from] any misrepresentation or concealment of any material fact, but by active diligence to see that [the respondent's] client was fully informed of the nature and effect of the transaction proposed and of [the client's] own rights and interests in the subject matter involved, and by seeing to it that [the] client either has independent advice in the matter or else receives from [the attorney] such advice as the latter would have been expected to give had the transaction been one between [the] client and a stranger."

# Dual Representation

- *Westport Bank & Trust Co. v. Corcoran, Mallin & Aresco*, 221 Conn. 490 (Conn. 1992)
  - Attorney performs title search and issues title opinion letter to client's lender
  - Attorney performed search but failed to find second mortgage in chain of title. As a result, plaintiff's mortgage was actually third mortgage
  - "A possible conflict[, however,] does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved." Rules of Professional Conduct, Rule 1.7, comment.
  - "[I]n the initial stages of a loan transaction, the lender and borrower have similar interests in securing an accurate title opinion letter. If an unforeseen conflict arises after representation has been undertaken, an attorney should withdraw from the representation of the client."
  - "That does not mean . . . that the potential for such a conflict must preclude an attorney from representing a borrower and lender simultaneously."

# Former Client Conflicts

- Basic rule: a lawyer can be adverse to a former client so long as the current matter is not the same as or “substantially related” to the prior representation by the lawyer of the now former client. ABA Model Rule 1.9

# Former Client Conflicts

- “Substantial relationship” is a fact-bound test that compares the facts and circumstances involved in the representations to determine if there is “a substantial risk that confidential factual information as would have been obtained in the prior representation would materially advance the [lawyer’s current] client’s position in the subsequent matter. Comment [3] to Rule 1.9.

# Former Client Conflicts

- Different courts have different interpretations of the “substantial relationship” test. Certainty is elusive.
- Former client conflicts are imputed so that your conflict is your partner’s conflict and vice-a-versa.

# Former Client Conflicts

- Courts frown on lawyer's dropping clients abruptly (i.e., like a "hot potato") to convert them into "former clients" and thereby take advantage of the more permissive former client conflict rules. *See, e.g., Picker Intl., Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989)

# Material Limitation Conflicts

- Basic rule: conflict exists if there is a “significant risk” that lawyer’s representation of a client may be “materially limited” by lawyer’s obligations to a third party, including another client, or the lawyer’s personal interest. “Direct adversity” is not required. ABA Model Rule 1.7(a)(2).
- Examples: lawyer asked to sue a relative; lawyer asked to negotiate a purchase of a company but has negative information about company from another client.

# Material Limitation Conflicts

- Examples (cont'd): lawyer asked to argued directly contrary legal positions in simultaneous proceedings in the same jurisdiction; lawyer is a defendant in an action and represents co-defendants in the same matter; lawyer develops sexual relationship with client.

# Material Limitation Conflicts

- Not every “limitation” is material. Some are de minimus. For example, a lawyer could sue Bank of America in a lease dispute even though the lawyer’s child received 100 shares of BofA stock as a bequest. (Disclosure to the client is always prudent.)

# Material Limitation Conflicts

- Conflicts based on a lawyer's personal interest are not imputed. ABA Model Rule 1.10. Otherwise material limitation conflicts are imputed.

## Personal Conflicts

- *Rhodes v. Buechel*, 258 A.D.2d 274, 275 (1st Dep't 1999)
  - Patent attorney sued his former clients for breach of fiduciary duty based upon client's failure to make payments to attorney under agreement that gave attorney interest in client's patents in lieu of payment of any attorney's fees
  - Court "rescinded *ab initio* any interest [the attorney] held"
  - "The record supports the trial court's findings that neither the initial arrangement nor its subsequent incarnations were entered into upon adequate disclosure to [the client] of other possible fee arrangements and potential conflicts of interest, or with the aid of independent counsel retained for the purpose of safeguarding defendants' interests."

# Personal Conflicts

- *Profit Sharing Trust for Marprowear Corp. v. Lampf, Lipkind, Prupis, Petigrow & Labue, P.A.*, 267 N.J. Super. 174 (1993)
  - Law firm asked long term client to invest money in insurance group.
  - Without advice from independent legal counsel, client invested over \$400K in insurance group relying on assurance of firm's attorneys.
  - Law firm did not reveal the fact that attorneys of law firm were directors of insurance group or that firm also represented insurance group.
  - Insurance group eventually filed for bankruptcy.
  - “Lawyers who fail to inform clients of their own interests, fail to advise clients to seek other counsel, unabashedly sell their clients the notion that an investment with them or their colleagues is a good and safe one, and use their clients as sources of investment funds, must accept responsibility for the outcome. Lawyers may not burrow their way into their clients' confidences and then exploit those confidences for their own ends. This is the law in New Jersey”
  - “While violations of ethical standards do not per se give rise to tortious claims, the standards set the minimum level of competency which must be displayed by all attorneys. Where an attorney fails to meet the minimum standard of competence governing the profession, such failure can be considered evidence of malpractice.”

# Personal Conflict

- *Blegen v. Superior Court*, 125 Cal. App. 3d 959, 178 Cal. Rptr. 470 (2d Dist. 1981)
  - Legal malpractice claim against attorney who possessed medical degree and legal degree
  - Defendant knew client was in need of immediate remedial surgery and permanency of injury resulting from postponing surgery
  - Advised client to forgo surgery pending resolution of a medical malpractice action in order to increase the monetary value of the medical malpractice case, and continued to advise the client to forgo surgery even after he knew malpractice suit was time barred.
  - Court held, alleged behavior demonstrated a conscious disregard for the petitioner's safety sufficient to sustain claim for punitive damages, despite absence from complaint of the terms "willful," "fraudulent," "malicious," and "oppressive."
  - Court found arguments disputing severity of medical injuries claimed by client and whether it was unreasonable of client to forgo surgery merely because client's attorney allegedly advised client to forgo surgery were factual in nature, to be resolved at trial

## Personal Conflict

- *Mangan v. Rumo*, 209 F.R.D. 29 (D. Me. 2002)
  - Client entered into attorney-client relationship with the attorney, attorney used information gained in relationship to initiate a sexual relationship, manipulated client to maintain continuing sexual relationship at time when she would have chosen to cease contact with him, and attorney did not cease the relationship "upon evidence that [she] wished to do so," threatening to "take her down with him" if she exposed him.
  - Punitive damages available in legal malpractice claims

## Personal Conflict

- Scarborough v. Napoli, Kaiser & Bern, LLP, 63 A.D.3d 1531 (4th Dep't 2009)
  - Underlying medical malpractice action dismissed due to attorneys' failure to file a timely note of issue
  - Attorneys ask plaintiff to sign a stipulation of discontinuance with respect to the already-dismissed underlying action
  - Attorneys hit with legal malpractice claim as well as claim under NY Judiciary Law §487 which allows recovery for treble damages

# CONFLICT RESOLUTION

- WITHDRAWAL FROM REPRESENTATION
- CLIENT CONSENT
- CONFLICT WAIVERS
- ENGAGEMENT LETTERS
- CONFLICT CHECKS

# CONFLICT RESOLUTION

- WITHDRAWAL FROM REPRESENTATION
  - Permissive and Mandatory Withdrawal
    - Must seek court's permission
    - Must take reasonable steps to avoid foreseeable prejudice to the client's rights
    - Notice
    - Substitution of attorney

# CONFLICT RESOLUTION

- MANDATORY WITHDRAWAL
  - Attorney is discharged
  - Client asserts improper purpose
  - Continued employment will violate the rules of professional conduct or other law
  - Attorney's physical or mental condition renders it unreasonably difficult to effectively carry out the representation

# CONFLICT RESOLUTION

- PERMISSIVE WITHDRAWAL
  - No material adverse effect to the client
  - Client misconduct
  - Continued employment will violate rules
  - Best interests of client
  - Attorney's physical or mental condition renders it difficult to effectively carry out representation
  - Client assents to withdrawal
  - Other good cause
  - Unreasonable financial burden on the attorney - ABA 1.16

# CONFLICT RESOLUTION

- POST-WITHDRAWAL DUTIES
  - Papers, Property, and Fees
  - Continuing Duty of Confidentiality

# CONFLICT RESOLUTION

- CLIENT'S CONSENT TO CONFLICT
  - Representation is Permitted with Informed Written Consent When:
    - The lawyer reasonably believes the lawyer will be able to provide competent and diligent representation
    - The representation is not prohibited by law
    - The representation does not involve the assertion of a claim by one client against another client represented by the lawyer

# CONFLICT RESOLUTION

- INFORMED WRITTEN CONSENT - ABA
  - The client must be made aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of the client
  - Information required depends on the nature of the conflict and the nature of the risks involved
  - Writing is required to impress the seriousness of the decision
  - Client may revoke consent at anytime

# CONFLICT RESOLUTION

- INFORMED WRITTEN CONSENT - CA
  - The Client Must:
    - Discuss potential drawbacks of the subject representation with the attorney or independent counsel
    - Be made aware of the potential dangers and possible consequences of the representation
    - Know his or her right to conflict-free representation and
    - Voluntarily wish to waive such right

# CONFLICT RESOLUTION

- **FORMER CLIENT'S CONSENT - ABA**
  - An attorney must obtain a former client's consent when he/she represents a new client in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client
    - Matters are substantially related if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter

# CONFLICT RESOLUTION

- FORMER CLIENT'S CONSET – CA
  - An attorney shall not accept employment adverse to a former client where, by reason of the representation of the former client, the attorney has obtained confidential information material to the employment unless he/she obtains informed written consent from the former client
  - No “substantial relation” test

# CONFLICT RESOLUTION

- ENGAGEMENT LETTERS
  - PROSPECTIVE CONFLICT WAIVERS - ABA
    - Comment [22] to Model Rule 1.7
      - Subject to same limitations as waiver of a current conflict
      - Effectiveness of waiver is determined by extent to which client understands the material risks
      - Consent is most likely to be effective if the client is independently represented in giving consent and the consent is limited to future conflicts “unrelated to the subject of the representation” (not substantially related to)
    - Limitations Stated in ABA Formal Op. 05-436
      - Consent is not effective if conflict is not waivable
      - Waiver needs to be specific and in writing
      - Waiver of future conflicts does not constitute the client’s informed consent to the disclosure or use of the client’s confidential information against the client
      - Informed consent may be required from the client that is to be represented in the latest matter

# CONFLICT RESOLUTION

- PROSPECTIVE CONFLICT WAIVERS - CA
  - Formal Opinion 1989-115 (No Rule of Professional Conduct is violated by an attorney requiring the client's advance waiver if the client is informed of the potential risks that are foreseeable at the time of the consent)
    - Factors to consider
      - Temporal scope of waiver
      - Quality of the conflict discussion with the client
      - Specificity of the waiver
      - Nature of the actual conflict
      - Client Sophistication
      - Interests of justice
    - Specificity Required
    - Validity depends on degree of involvement if potential conflict ripens into actual conflict

# CONFLICT RESOLUTION

- CONFLICT CHECKS
  - Create Office Routine
    - Name all clients/parties
    - Name all witnesses/consultants
    - Name of responsible attorney
    - Description of the subject matter
    - File name and/or number
    - Procedures in place to ensure prompt response

## Conflicts in the Headlines

- Hawaii law firm sued \$25M for conflict of interest – Pacific Business News Friday (March 5, 2010)
  - Legal malpractice surrounding the sale of a Saipan hotel in 2004 brought by minority shareholders
  - Plaintiff's claim that the attorneys also represented the hotel's majority shareholder and worked on a supposed reorganization of the hotel that meant selling the shares for a cheaper price than they were worth.
  - The families claim that the lawyers "pushed through the transaction over the objection of minority shareholders, who they also represented, without disclosing the true facts and circumstances, knowing that the minority shareholders' holdings would be rendered almost worthless by the transaction."
  - \$25 million in damages sought
- Dealers sue GM, law firm for \$750M – TheStar.com (January 22, 2010)
  - Former General Motors dealership is suing GM and a law firm for \$750 million in damages in a class action claim for allegedly breaching franchise laws and failing to disclose a conflict of interest during the company's restructuring.
  - The claim alleges that the firm did not tell dealers that it was representing them at the same time the firm acted for the federal government which had demanded the reduction in dealerships as part of the GM bailout

## Conflicts in the Headlines

- Fogler Rubinoff sued for \$25M over alleged conflict – LawTimes (April 12, 2010)
  - \$25-million conflict of interest lawsuit arising from a protracted dispute over a building development
  - Law firm retained by one of the two co-venturers to defend action brought by other venturer.
  - Plaintiff claims that law firm acquired information about it while representing the venture and then used information to squeeze out venturer and also would use information in pending lawsuit
- McGuireWoods Denied Fee in \$49M BAR/BRI Settlement; Conflict Cited – ABA Journal (Feb 18, 2010)
  - Federal judge ruled that McGuireWoods could not recover any attorney's fees in a \$49 million antitrust settlement with BAR/BRI parent company West Publishing Corp.
  - Law firm lost out on \$12 million in fees because of a conflict of interest
  - McGuireWoods offered incentive payments to some but not all of the class representatives. As a result, the interests of those plaintiffs clashed with others in the class represented by McGuireWoods.

## Conflicts in the Headlines

### ■ Lawyer Possibly Disciplined in Twins Stadium Conflict of Interest Case (March 26 2010)

- A prominent attorney and his law firm may be reprimanded over the handling of the land deal involving the new Twins stadium
- The firm allegedly represented one of the companies that owned the land the ballpark now sits on while also representing Hennepin County, which was trying to buy the land.
- The Office of Lawyers Professional Responsibility wants the state Supreme Court to discipline the attorney.

### ■ Obermayer law firm fires Rotwitt – Philly.com (May 27, 2010)

- Attorney who earned fees from both sides of a deal to build a new family court was fired by his law firm.
- Attorney was to earn a \$3.9 million fee from government but also received \$500,000 in additional fees as a co-developer on the project in a handshake deal with a local developer.