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## **Conflicts Revisited, Part 3: Eliminating Conflicts**

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We began this series with a look at current client conflicts. Next, we surveyed former client conflicts. This month, we'll conclude with a discussion of structuring representations to eliminate conflicts altogether.

### ***Structuring Representations***

To have a multiple client conflict, we need two basic ingredients. First, we need multiple clients. Second, those multiple clients need to be “directly adverse” in the same matter. To borrow from RPC 1.7(b)(3), “directly adverse” generally means putting yourself in a position where you need “to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client[.]” Therefore, if the representation can be structured so that the positions of multiple clients are aligned, then there is no conflict.

There are two keys to making this approach work. First, it is critical to define the clients and the scope of the representation in an engagement letter. The engagement letter allows both the clients and the lawyer to discuss and mutually agree on the parameters of the representation. Second, it is equally critical that the lawyer then act in conformance with the engagement agreement. The best engagement letter ever crafted will not do the lawyer any good if the lawyer doesn't follow it.

We'll look at three examples illustrating this technique: one from defense litigation; one from claimants' litigation; and one from business transactions.

***Example 1: Defense Litigation***

A classic example in defense litigation comes from the product liability context. In many circumstances, both a product manufacturer and a product seller are named as defendants. The reasons are many, ranging from tactical (such as trying to foster "finger pointing" among the defendants) to strategic (such as naming a local seller to defeat removal based on federal diversity jurisdiction). Although the seller may have contractual or common law indemnity rights against the manufacturer, it often makes sense from their perspective to make common cause and simply argue that there was nothing wrong with the product. If the manufacturer and the seller agree among themselves to postpone any indemnity issues to another day and another forum using different counsel, then it is normally possible for one lawyer (or firm) to represent both defendants. In our example, the defense lawyer's only job is to argue that there is no defect in the product and, therefore, the positions of the manufacturer and the seller are aligned—eliminating the potential conflict.

***Example 2: Claimants' Litigation***

An equally classic example from the claimants' side also comes from the product liability context. In many circumstances, multiple plaintiffs may want to use the same lawyer or firm to handle their claims. Again the reasons are many,

ranging from tactical (such as spreading common costs over a greater number of cases) to strategic (such as gaining settlement leverage from the strength of numbers). In some situations, however, the resources available to pay claims may be limited by insurance coverage or the defendant's overall assets. The Oregon State Bar in Formal Ethics Opinion 2005-158 (available on the Bar's web site at [www.osbar.org](http://www.osbar.org)) counsels that a single lawyer or firm can still represent multiple claimants in this context if: (1) the lawyer's job is limited to creating the largest possible fund (by settlement or award); and (2) the clients agree among themselves on allocation of any common fund either by agreeing to specific shares or a mechanism, such as arbitration (not involving the lawyer), to do so. In our example, by defining the scope of the representation, the lawyer can align the positions of the clients against their common opponent—eliminating the potential conflict.

***Example 3: Business Transactions***

A ready example from transactional work comes from the “corporate family” context. As corporations have grown larger and more diverse by both geography and business line, it has become harder to determine in many situations if a non-wholly owned subsidiary or affiliate should be considered a member of the same corporate family for conflict purposes. For example, if your firm represents “Attenuated Subsidiary A” in an environmental matter, can you take on an unrelated business transaction for a local company against

“Attenuated Affiliate B” without a conflict waiver even though they share some degree of common corporate lineage? The American Bar Association in Formal Ethics Opinion 95-390 (available on the ABA Center for Professional Responsibility’s web site at [www.abanet.org/cpr](http://www.abanet.org/cpr)) suggests that a firm can do so *if* it limited its representation to the specific subsidiary for which it is handling—in our example—the environmental work.

### ***Summing Up***

As these examples highlight, the absolutely critical elements to avoiding conflicts through structuring representations are to define the client and the scope of the work involved at the outset through an engagement agreement with the client and then following that agreement.

### **ABOUT THE AUTHOR**

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