

Common Conflicts Issues

Chuck Regan
Risk Management and Conflicts Partner

1-312-701-7329
cregan@mayerbrown.com

May 21, 2014

Speaker

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL



cregan@mayerbrown.com
T +1 312 701 7329
F +1 312 706 8673

Chuck Regan, a partner in Mayer Brown’s Chicago office, currently serves as the Firm’s lead conflicts attorney. He advises on legal and business conflict issues, as well as other professional responsibility matters, that arise in Mayer Brown’s offices worldwide. Before taking on his conflicts responsibilities, Chuck was a litigator who focused on benefits and ERISA litigation, and he has extensive experience in pension class actions and commercial litigation. He earned an AB from the University of Chicago and a JD from Northwestern University School of Law, where he was Managing Editor of the *Northwestern University Law Review*. Before joining Mayer Brown, Chuck clerked for the Honorable Marvin E. Aspen of the United States District Court for the Northern District of Illinois.

Agenda

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- The basic conflict principles under Rule 1.7
- Issues that arise under Rule 1.7
- Imputation of conflicts
- Waivers
- Specific conflict rules under Rule 1.8
- Duties owed to former and prospective clients

Rule 1.7(a)(1) – Direct Adversity to Current Clients

Ethics–Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Rule 1.7(a)(1) implements the duty of loyalty.
- It bars representation that “will be directly adverse to another client,” unless both affected clients consent.
- Two components:
 - Cannot be adverse to client, even in an unrelated, non-contentious matter, unless both clients consent.
 - Where a firm represents client against an adversary, it cannot take on representation of adversary, even in unrelated matter, without both clients’ consent.

Rule 1.7(a)(1) – Direct Adversity to Current Clients

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Adversity does not turn on contentiousness.
- Unlike US rules, ethics rules in Europe and Asia do not include duty of loyalty, and allow law firm to be adverse to clients in matters not related to firm's work for them.
 - Where US rules are client centered, rules in Europe and Asia are matter centered.
 - Cannot act for multiple parties in same or related matter if conflict or significant risk of conflict – generally not waivable.
 - Client relation considerations remain, especially in contentious matters.

Rule 1.7(a)(2) – Material Limitation on Representation

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Rule 1.7(a)(2) says a conflict exists, requiring consent from affected client, when
 - “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.”
- “[S]ignificant risk” and “materially limited”
- Responsibilities to another client
- Personal interests of lawyer or firm

Issue or Positional Conflicts

- Under Rule 1.7, taking conflicting positions for different clients in unrelated matters is generally not a conflict.
 - Cmt [24]: “The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.”
 - However, conflict may exist “if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.”

Issue or Positional Conflicts

- Clients sometimes seek to impose duties that go far beyond the professional conduct rules.
 - E.g. “If Outside Counsel’s representation of another client will involve Outside Counsel advocating a position on a legal issue which may materially conflict with the Company’s interests, Outside Counsel is expected to bring the matter to the Company’s attention in advance of advocating such position.”

Issue or Positional Conflicts

- This is problematic for any law firm.
 - We cannot know what position might conflict with one of myriad “interests” of large organization.
 - No way to monitor compliance at any sizable law firm.
 - Duty of confidentiality to other clients would preclude disclosure until we actually take the position.
- We will fight hard to strike issue conflict provisions.
- Clients should take comfort in fact that Mayer Brown represents large corporations, and it is not in our interest to take positions likely to expand corporate liability.

Representation of Competitors

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Representations of a client’s competitors, in matters not directly adverse to the client, is not a conflict under the professional conduct rules.
 - Cmt [6] to Rule 1.7: “[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest.”

Representation of Competitors

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Nevertheless, clients sometimes ask us to inform them if and when we represent competitors.
 - Clients hire us in part because of our knowledge of legal issues affecting particular industry, but our ability to keep abreast of those issues will be severely diminished if we represent only one player in industry.
 - Client confidentiality concerns also will likely prevent us from disclosing the competitors that we represent.
 - We therefore resist requirement to disclose representation of competitors.

Corporate Family Issue – When Can a Law Firm Be Adverse to the Affiliate of a Client?

Ethics–Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- This is probably the most difficult issue conflict lawyers face on a daily basis.
- By itself, corporate affiliation will not create a conflict.
 - Cmt [34] to Rule 1.7: “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”
 - Similarly, ABA Op. 95-390: “The fact of corporate affiliation, without more, does not make all of a corporate client's affiliates into clients as well.”

Corporate Family Issue – When Can a Law Firm Be Adverse to the Affiliate of a Client?

Ethics–Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Exceptions:

- Where “the circumstances are such that the affiliate should also be considered a client” – a fact and circumstances test
- Where “the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client”
- Where lawyer and client have an understanding that lawyer will avoid representation adverse to affiliates
 - Many of you do present agreements to us – a business decision for us whether to accept.
 - When we do agree, we want to have clarity as to what is covered.

Representing Entity and Constituents

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- An issue faced by both in-house and outside counsel.
- Rule 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
 - Tension between duties to entity and relationship with persons who run it.
- Representation of both entity and officer, director, or “other constituent” allowed as long as no conflict – 1.13(g)
 - What to do if unforeseen adversity develops
 - Confidentiality considerations

Representing Entity and Constituents

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Sometimes, it is necessary to alert constituents that it is the entity you are representing.
 - Rule 1.13(f): “In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.”
- This is to avoid a later claim that you were also representing the constituent.

Rule 1.10 – Imputation of Conflicts of Interest: General Rule

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- As a general matter, if one lawyer in a firm has a conflict, all lawyers in the firm have a conflict.
 - “(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

Waivers

- Under Rule 1.7(b), a lawyer may represent a client, notwithstanding a conflict, if four conditions are met:
 - (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;
 - (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.

- Is the conflict one that can be waived?
 - Cmt [15] to Rule 1.7: “Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.”
- Consent must be “informed.”
- Waivers are narrowly construed.
- Many jurisdictions require consent to be confirmed in writing.
- Advance waivers.

Rule 1.8 – Conflict of Interest: Specific Rules

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- 1.8(a) – Strict requirements for business transactions with clients.
- 1.8(b) – Lawyer may not use information relating to the representation of the client to the disadvantage of the client.
- 1.8(c) – Lawyer may not solicit a substantial gift from the client, unless the client is a relative.
- 1.8(d) – Lawyer may not, before representation is over, make an agreement for literary or media rights concerning the conduct of the representation.

Rule 1.8 – Conflict of Interest: Specific Rules

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- 1.8(e) – Limits the financial assistance that a lawyer can provide to a client to advancing (or in the case of indigent clients, paying) costs and expenses of litigation.
- 1.8(f) – Rules for accepting payment for representation from someone other than client – must have client’s consent, and must not interfere with lawyer’s independence, or with protection of client’s confidences.
- 1.8(g) – In joint representations, lawyer cannot make aggregate settlement of claims, or, in criminal case, aggregate agreement as to guilty plea, without informed consent.

Rule 1.8 – Conflict of Interest: Specific Rules

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- 1.8(h) – Lawyer may not make a prospective agreement to limit lawyer’s liability for malpractice, unless client is independently represented, and may not settle a malpractice claim against unrepresented client or former client without advising in writing of the desirability of seeking independent legal counsel.
- 1.8(i) - Lawyer may not acquire proprietary interest in litigation, other than a lien to cover expenses and fees, or a reasonable contingent fee.

Rule 1.8 – Conflict of Interest: Specific Rules

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- 1.8(j) – Prohibits a lawyer from having sexual relations with a client unless a prior sexual relationship existed.
 - When client is organization, cmt [19] states that lawyer is prohibited from having sexual relationship with “a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization’s legal matters.”
- 1.8(k) – Except for the bar on sexual relationships with client under 1.8(j), specific conflict rules in Rule 1.8 are imputed to all lawyers in firm.

Rule 1.9 – Duties to Former Clients

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Lawyer cannot be adverse to former clients in matters that are substantially related to the work done for them, unless consent obtained.
 - Rule 1.9(a): “A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.”
- A means of protecting client confidences.

Rule 1.9 – Duties to Former Clients

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Is the client a former client?
 - Often answer is not clear.
- Substantially related
 - Where two matters “involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.” Cmt [3]
- Materially adverse

Rule 1.18 – Duties to Prospective Client

Ethics—Obligations and Risks
WEBINAR SERIES FOR IN-HOUSE COUNSEL

- Lawyer generally cannot reveal confidences learned.
- Lawyer who met with prospective client may not be adverse in discussed matter if information learned “could be significantly harmful” to prospective client, unless prospective client agrees, either before or after consultation.
- Even in absence of such agreement, other lawyers in firm may act adversely if lawyer who met with prospective client screened from matter.
 - Some jurisdictions require notice to prospective client.

Questions?

Chuck Regan
Risk Management and Conflicts Partner

1-312-701-7329
cregan@mayerbrown.com

MAYER • BROWN

Thank you!