Introduction

Conflicts of Interest from the law firm perspective

Conflicts of interest are challenging to law firm attorneys.

We could talk all afternoon about conflicts of interest rules, nuances to rules and hypotheticals, but I’m going to be brief:

1. Identify the two most fundamental rules that apply to identifying conflicts and resolving conflicts with our clients.

2. Go through a couple of examples in which conflicts too frequently arise with our municipal and transit agency clients.

3. And discuss a couple of unique situations that we’ve encountered recently that required some thoughtful reflection on our part.

Now, I’m basing this discussion on the North Carolina Ethics Rules, but the NC rules are based on the ABA Model Code, so my rules analysis should apply generally in most of your states.

First Basic Rule:

A conflict of interest arises whenever the representation of a law firm client becomes directly adverse to another current law firm client on any matter, whether or not the matters have anything to do with each other.

This is primarily an issue of loyalty; clients expect complete loyalty of their lawyer and their law firm.

The broad scope rule makes it pretty easy to spot a conflict situation.

My general rule is if there’s any doubt, assume there’s a conflict and get waivers.

NC Rule 1.7(a)(1), Comment 1

NC: 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. COMMENT: Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third
person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former clients conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(f) and (c).

ABA: 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. COMMENT: Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former clients conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(e) and (f).

Second Basic Rule – to Resolve a Conflict:

A conflict may be waived only if both clients affected by the conflict give their informed, written consent to the waiver.

NC Rule 1.7(b)(4), Comment 2

NC: Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing. COMMENT: Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

ABA: Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, confirmed in writing. COMMENT: Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

Written Consent and Informed Consent:

Scope of the representation of both clients

What could happen during representations that might create adversity between the parties that cannot be waived – lawyer will have to withdraw representation.

There are other rules addressing conflicts and conflict waivers, but these are the two rules most fundamental to most conflict situations.

They cause aggravation only because the firm or the attorneys involved have to tell their clients about the conflict, potentially jeopardizing the engagement.

Then the attorney and the client have to chase down the waivers.
In the meantime, no work on the matter can proceed, and the firm’s internal administrative and accounting processes necessary to open the matter are ground to a halt until the conflict waivers are obtained.

So aside from the basic rules, here are a couple examples of conflict situations that I think are pertinent to municipal and transit attorneys.

**Hypothetical 1:** (Addresses the question of who is the actual client, not whether or not there is a conflict)

You are General Counsel of a transit agency. One of your Board members, who sits on the Board’s Personnel Committee, calls you and instructs you to engage a law firm to assist the Committee in conducting an internal investigation into possible procurement collusion by the General Manager with an outside contractor. When you call your outside counsel for assistance, she asks:

Who will be the law firm’s client in this representation?

- [ ] The Personnel Committee?
- [ ] The Board of Directors?
- [x] The agency acting through its Board of Directors?

The default position is that a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents, not the constituents themselves.

Of course, it’s possible to represent a constituent within the organization, but this understanding must be set out clearly at the initial engagement stage.

*It is still possible, though, to undo any attorney-client privilege to the constituent by revealing confidential information to individuals outside the constituent.*

What if the Personnel Committee includes an Assistant General Manager or other Board members friendly to the General Manager in a meeting with the outside counsel in which confidential information is revealed?

NC Rule 1.13(a)

NC: A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

ABA: A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
Hypothetical 2:  Prospective consent to withdraw from representing an accommodation client.

Your law firm has been representing both a public transit client and its General Manager in a procurement lawsuit by a disgruntled contractor claiming a conflict of interest and abuse of authority by the General Manager in selecting a rival contractor to build a bus maintenance facility. Your engagement letter with the General Manager specifically provides that the firm’s primary representation is of the transit agency, and it permits you to withdraw from representing him (while continuing to represent the agency) if adversity develops between them. Adversity has now developed, but the General Manager claims you cannot withdraw your representation from him.

May the firm withdraw representation from the General Manager in this situation?

YES, PROBABLY

Joint representation of a client and an individual employee is permissible and is often done for the sake of efficiency and to minimize legal fees.

If the client and individual interests diverge, however, a firm may discontinue representation of the “accommodation” client if:

a. the initial engagement letter to the employee clearly provided that they were an accommodation client; or

b. circumstances suggest the employee was an accommodation client: long term prior representation of the client prior to the engagement, a more limited scope of representation of the employee and a broader representation of the client in other matters, and the absence of any expectation of confidentiality by the employee of information provided to the lawyer.

This can be avoided by carefully crafting the retainer letter to provide consent to withdrawal from representation of the employee if interests diverge.

An interesting twist: What if the General Manager had actually brought the outside counsel with him to the agency based on years of past dealings and representation at other agencies: The same allegations arise, and there is no clear consent in the initial engagement letter.
Above factors are undermined. The transit agency may be perceived as the accommodation client. At a minimum, the law firm may not be presumed to have the right to withdraw representation of the General Manager without doing the same with the agency.

NC Rule 1.13, Comment 10

NC: COMMENT: There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflicts of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

ABA: COMMENT: There are times when the organization’s interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflicts of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

**Hypothetical 3:** Sometimes ethical rules are not applicable and you have to look elsewhere for guidance.

The Mayor of a major city is also a partner in a law firm. The law firm represents a separate regional public transit authority responsible for the development of a regional transit system in a tri-city metropolitan area. The Mayor would like to use his elected position to take the lead on advocacy efforts to establish a local funding option that would benefit the regional transit authority.

May the law firm continue to represent the public transit authority?

YES

NO

Standard ethical rules not helpful.

Have to look at the conflict of interest rules of the city council.

*Use of Official Position for Private Gain – a public official may not use official position for private gain* (City of Raleigh Conflict of Interest Policy, Section 3)

This is a hopefully a rare situation, but it demonstrates that what’s best for the client is not necessarily paid legal service– there may sometimes be political or other considerations that come into play.

**Hypothetical 4:** Another example of law firm attorneys participating in board activities.
A Board member of a statewide transportation authority is also a partner in a law firm. The law firm is interested in bidding on an RFQ for legal services to represent the authority. The authority was recently absorbed into the state’s department of transportation, and all decisions related to the RFQ for legal services will be made by the secretary of the department of transportation. Nonetheless, the authority’s board has not been dissolved.

May the law firm respond to the RFQ for legal services issued by the authority?

**YES**

**NO**

**YES, PROBABLY**

No conflicts of interest rule on point.

Both the authority and the DOT had conflicts of interest rules similar to the City of Raleigh.

The situation appears to present a relational conflict of interest, and the appearance of impropriety is often as problematic as actual impropriety.

Question is who is the client?

Although it still exists, the Board would not exercise control over the decision-making process related to RFQ.

Partner declined an invitation to be reappointed to the Authority by the Governor (which is what happens). Board member still should not participate in RFQ or legal services.

**CONCLUSION**

Very brief survey of conflicts of interest from the law firm perspective, and we’ll make available some materials in the updated seminar CD, or we’ll send them to you separately.

Thank you very much.