



# Ohio Board of Professional Conduct

## OPINION 2020-10

Issued October 2, 2020

### **Law Firm Concurrent Representation of Adverse Clients in the Same Transaction**

**SYLLABUS:** A conflict of interest arises from a lawyer's concurrent representation of directly adverse clients in the same transaction. A law firm cannot avoid the imputation of a conflict of interest arising from the concurrent representation of two clients in the same transaction by screening separate lawyers assigned to each client.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



# Ohio Board of Professional Conduct

65 SOUTH FRONT STREET, 5<sup>TH</sup> FLOOR, COLUMBUS, OH 43215-3431

Telephone: 614.387.9370 Fax: 614.387.9379

[www.bpc.ohio.gov](http://www.bpc.ohio.gov)

HON. JOHN W. WISE  
CHAIR  
PATRICIA A. WISE  
VICE-CHAIR

RICHARD A. DOVE  
DIRECTOR  
D. ALLAN ASBURY  
SENIOR COUNSEL  
KRISTI R. MCANAU  
COUNSEL

## OPINION 2020-10

Issued October 2, 2020

### Law Firm Concurrent Representation of Adverse Clients in the Same Transaction

**SYLLABUS:** A conflict of interest arises from a lawyer's concurrent representation of directly adverse clients in the same transaction. A law firm cannot avoid the imputation of a conflict of interest arising from the concurrent representation of two clients in the same transaction by screening separate lawyers assigned to each client.

#### QUESTION PRESENTED:

Whether lawyers in a law firm may represent two directly adverse clients in the same transaction by screening separately assigned groups of firm lawyers and with the informed, written consent of the affected clients.

**APPLICABLE RULES:** Prof.Cond.R. 1.0, 1.7, 1.10

#### OPINION:

A law firm proposes to represent two long-term clients in connection with the negotiation and documentation of a transaction. The clients would be represented by two separately assigned groups of lawyers within the firm. Both clients are considered sophisticated purchasers of legal services and employ one or more in-house legal counsel on a full-time basis. The clients are aware of the fact that both use the same law firm for legal services and understand that their interests would be adverse to one another in the transaction. Each lawyer group will owe a duty of loyalty that runs only to the assigned client in connection with the transaction. As a condition to the legal representation, the clients and the law firm will agree to a consensual ethical screen. The screen will consist

of a prohibition against lawyers in either group performing any services for the other client, receiving and reviewing any information or data related to the other representation, the preservation of client secrets and confidences, the restriction of communication between lawyer groups relating to the services provided, securing documents in the firm's document management system, and affixing boxes containing client files with confidential designations. Lastly, in the event of any litigation or arbitration stemming from the representation of either client to the transaction, the law firm and its lawyers agree not to represent either client.

*Direct adversity and material limitation conflicts*

The law firm's proposal correctly identifies that a conflict of interest inherently arises from the representation of two clients in the same transaction. More specifically, the Board finds that both a direct adversity and a material limitation conflict exist under the facts presented. *See* Prof.Cond.R. 1.7, cmt. [16] (depending upon the circumstances, a material limitation conflict of interest may be present in the representation of concurrent clients in a transaction.) A direct adversity conflict prevents a lawyer from representing two clients in the same matter unless the clients give their informed, written consent to the conflict and the lawyer can provide competent and diligent representation to both clients. Prof.Cond.R. 1.7(a)(1),(b). A material limitation conflict exists where there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for a client will be materially limited by the lawyer's responsibilities to another client, a former client, a third person, or by the lawyer's own personal interests. Prof.Cond. R. 1.7(a)(2). The following are examples of interests that may impair the law firm's lawyers' individual abilities to jointly and severally consider, recommend, or carry an appropriate course of conduct for either client in the transaction: the lawyers' respective loyalty to one or both of the firm clients before or during the negotiation; the willingness to appease or maintain working relationships with other members of the firm; the difficulty in balancing of each assigned lawyer's respective competency and experience between the two lawyer groups; and the overarching goal of retaining both clients indefinitely even if the negotiation becomes adversarial.

*Imputation of Conflicts of Interest*

Relevant to the conflict of interest analysis in this matter is the issue of imputation within the law firm of the respective conflicts. In a law firm setting, a lawyer cannot represent a client when the lawyer reasonably knows that any one of them practicing alone would be prohibited from doing so under Prof.Cond.R. 1.7. Prof.Cond.R. 1.10(a). For the purpose of analyzing conflicts of interests arising in a law firm, the firm is treated as one lawyer, and a conflict created by the representation of a client by a lawyer in a firm is imputed to the other lawyers in the firm. *Id.*

The proposed consensual screen between groups of lawyers combined with the informed consent of the clients is offered in an effort to avoid the imputation of the conflict of interests that inherently exist in a concurrent representation. Screening is defined in Prof. Cond. R. 1.0 and employed to prevent a disqualified lawyer's access to confidential client information. It is not identified as an acceptable method for the amelioration of imputed concurrent conflicts under the circumstances at issue here. *See also*, Prof.Cond.R. 1.10 (addressing the use of ethical screens in particular circumstances.) Isolating a single lawyer from client information by way of an ethical screen is very different from organizing two teams of lawyers within the same firm for the purpose of contending against each other in the service of two of the firm's clients who wish to enter into a business transaction. The Rules of Professional Conduct do not expressly recognize the combined use of screening and client consent in the manner proposed by the law firm where the individual members of each team would be disqualified from the proposed representation due to the imputation of conflicts. The firm's proposal would require a departure from the rules governing the imputation of conflicts that the Board is unwilling to endorse.

In a transaction involving adverse clients, it would be extremely difficult, if not impossible, due to the directly adverse or material limitation conflicts that are present, for even one lawyer to competently and diligently represent both clients in the proposed transaction requiring the negotiation of material terms. While transactional clients may share a common goal and there may be some tentative agreement as to certain terms of the transaction, additional material terms that may not have been addressed before negotiations began may result in disagreements that would place a jointly retained lawyer in the impossible situation of negotiating for each client while maintaining a duty

of loyalty to both. R.I. Ethics Op. 2017-02. In such a situation, the lawyer's independent professional judgment and ability to provide competent and diligent representation to both clients would be compromised. *See, e.g., Stark Cty. Bar Assn. v. Erzagos* (1982), 2 Ohio St.3d 59, 44 N.E.2d 1286 (lawyer disciplined under former Code of Professional Responsibility for representing three adverse parties in the same transaction.)

In a law firm setting, due to the imputation of conflicts among lawyers, the same types of issues and problems may arise for separately assigned lawyers in a concurrent representation that cannot be adequately resolved through a combination of client consent and screening. Consequently, a law firm's obligations and loyalties to the respective clients may become so divided that the law firm, treated as one lawyer through imputation, could not reasonably believe that it would be able to provide competent and diligent representation to both clients. *See Prof.Cond.R. 1.7, cmt. [38]* (some conflicts are nonconsentable because a lawyer cannot represent both clients competently and diligently.)

Other jurisdictions have also found concurrent representation in a transaction of adverse clients by the same law firm or lawyer to be problematic. For example, one jurisdiction has opined that if corporate clients request that the same firm represent both of them in the purchase and sale of a subsidiary and the dual representations require lawyers in the firm to directly negotiate the substantive business terms with each other, then the existence of direct adversity would preclude such concurrent representation even with client consent. N.Y.Ethics Op. 2001-2. In another jurisdiction, even the most basic of real estate transactions has been determined to be improper for concurrent representation, including an arm-length sale between a willing buyer and seller, regardless of the consent of the parties to a waiver of the conflict. Ill. St. Bar Assn. Adv. Op. 17-04. *See also* N.Y. St. Bar Assn. Op. 807 (2007) (the buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest).

The transaction between the two clients in the question presented is undoubtedly more complicated than a simple real estate transaction and therefore creates a greater potential for issues to arise during the negotiation that would render it impossible for the

firm to provide diligent and competent representation to both clients while maintaining loyalty to both clients.

**CONCLUSION:** The steps proposed by the law firm in order to represent the two clients underscore the inherent nature of the conflict of interests that exist in the concurrent representation of two or more firm clients in the same transaction. The key features of the law firm's proposal to resolve the conflicts, a combination of client consent and the screening of two groups of assigned lawyers, is not provided for in the Rules of Professional Conduct as a method to ameliorate conflicts arising from concurrent representation in the same law firm. The firm's proposal would require a departure from the rules governing the imputation of conflicts that the Board is reluctant to endorse. For the foregoing reasons, the Board concludes that the law firm's proposed concurrent representation of the two adverse clients in the same transaction is not permissible.