



Kentucky Bar Association Annual Convention

# **MORE THAN A LAWYER**

Lexington, Kentucky  June 13-15, 2018

## **THE ETHICS OF JOINT REPRESENTATION IN BUSINESS TRANSACTIONS**

Sponsor: Business Law Section

CLE Credit: 1.0 ethics

Wednesday, June 13, 2018

3:35 p.m. - 4:35 p.m.

Bluegrass Ballroom II

Lexington Convention Center

Lexington, Kentucky

## **A NOTE CONCERNING THE PROGRAM MATERIALS**

The materials included in this Kentucky Bar Association Continuing Legal Education handbook are intended to provide current and accurate information about the subject matter covered. No representation or warranty is made concerning the application of the legal or other principles discussed by the instructors to any specific fact situation, nor is any prediction made concerning how any particular judge or jury will interpret or apply such principles. The proper interpretation or application of the principles discussed is a matter for the considered judgment of the individual legal practitioner. The faculty and staff of this Kentucky Bar Association CLE program disclaim liability therefore. Attorneys using these materials, or information otherwise conveyed during the program, in dealing with a specific legal matter have a duty to research original and current sources of authority.

**Printed by: Evolution Creative Solutions  
7107 Shona Drive  
Cincinnati, Ohio 45237**

**Kentucky Bar Association**

# TABLE OF CONTENTS

The Presenters.....	i
Ethical Considerations of Joint Legal Representation in Business Transactions .....	1
Ethics in Transactional Matters: Avoiding Conflicts of Interest.....	15



## THE PRESENTERS



J. Brandon Johnson  
Richardson and Richardson, PSC  
10345 Linn Station Road  
Louisville, Kentucky 40223

**J. BRANDON JOHNSON** is an attorney with Richardson and Richardson, PSC in Louisville and concentrates his practice in the area of business law. He is a graduate of Western Kentucky University and received his J.D. from the Louis D. Brandeis School of Law at the University of Louisville. Mr. Johnson is a member of the Kentucky, Indiana and American Bar Associations. He is a member of the KBA's Young Lawyers Division and serves as chair of the Business Law Section.

Amy E. Richardson  
Harris, Wiltshire & Grannis, LLP  
1919 M Street NW, 8<sup>th</sup> Floor  
Washington, DC 20036



**AMY E. RICHARDSON** is a partner with the law firm of Harris, Wiltshire & Grannis, LLP and practices in Washington, D.C. and Raleigh, North Carolina. She focuses on complex civil litigation and legal ethics and malpractice. Ms. Richardson counsels and represents lawyers and law firms in disciplinary investigations and prosecutions and malpractice matters. Her disciplinary experience includes matters before the USPTO's Office of Enrollment and Discipline (OED) and the Office of Professional Responsibility (OPR). She counsels and advises lawyers and law firms in partner admissions and departures, and law firm dissolutions. Ms. Richardson teaches ethics and professional responsibility at the Georgetown University Law Center. She has been recognized by *Super Lawyers*, *Chambers USA: America's Leading Lawyers for Business*, and ranked among *Business North Carolina* magazine's "Legal Elite." Ms. Richardson received her B.A. from the University of North Carolina at Chapel Hill and her J.D. from Duke University School of Law.



Shannon "A.J." Singleton  
Stoll Keenon Ogden, PLLC  
300 West Vine Street, Suite 2100  
Lexington, Kentucky 40507-1801

**SHANNON "A.J." SINGLETON** is a member in the Lexington office of Stoll Keenon Ogden, PLLC and serves as deputy general counsel. He practices in the areas of business litigation and legal ethics. Mr. Singleton received his B.A. from Furman University and his J.D. from the University of Washington School of Law. He is a member of the Kentucky, Georgia and American Bar Associations; and, serves as vice chair of the ABA's Professional Responsibility Committee, as well as chair of the Henry Clay Memorial Foundation.

# ETHICAL CONSIDERATIONS OF JOINT LEGAL REPRESENTATION IN BUSINESS TRANSACTIONS

Shannon "A.J." Singleton, Amy E. Richardson, and J. Brandon Johnson

---

## I. SUMMARY

This presentation provides an ethics focused continuing legal education program designed for discussion and notetaking. Certain ethics rules related to business transactions will be presented and discussed with certain case and ethics opinion analysis. We believe this information is important to all transactional law practitioners; however, litigators may also be interested in a better understanding of Kentucky's disqualification rules. We will address the following topics: 1) transactional conflict rules; 2) clients; 3) waivers; and 4) privileges. An outline of the materials, a copy of the PowerPoint materials, case law and ethics opinions discussion, ethics rules, and templates for your consideration are included herein.

## II. POWERPOINT OVERVIEW

### A. Transactional Conflict Rules

1. Transactions governed by Rule 8.5.
2. Concurrent Client Representation: Rule 1.7.
3. Former Client Representation: Rule 1.9.
4. Imputation: Rule 1.10.

### B. Clients

1. You are my client?!
2. Accidental and *de facto* clients.
3. Adversity.
4. Current v. former clients.
5. Multiple clients.

### C. Waivers

1. Written.
2. Advanced.
3. Conflict v. disqualification.

- D. Privileges
  - 1. Joint represented clients.
  - 2. To non-clients.

- E. Example Discussion

### III. ADDITIONAL MATERIALS

- A. Case Law and Ethics Rules Discussion

- 1. Joint client relationships: *Unnamed Attorney v. Kentucky Bar Ass'n*, 186 S.W.3d 741 (Ky. 2006).
- 2. Representation of organizations and individual constituents: *J & B Energy, Inc. v. Caldwell*, 2014 Ky. App. Unpub. LEXIS 647, 2014 WL 3973966 (Ky. App. Aug. 15, 2014).
- 3. Duties to prospective clients.
- 4. Guidance on adversity: *Vaughn v. Zoppoth Law Firm*, 2014 Ky. App. Unpub. Lexis 824, 2014 WL 5315103 (Ky. App. Oct. 17, 2014)
- 5. Kentucky Supreme Court disqualification precedent: *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015)

- B. Rules

- 1. [Rule 8.5.](#)
- 2. [Rule 1.7.](#)
- 3. [Rule 1.8.](#)
- 4. [Rule 1.9.](#)
- 5. [Rule 1.10.](#)
- 6. [Rule 1.13.](#)
- 7. [Rule 1.18.](#)

- C. Templates

- 1. Joint Representation Letter.
- 2. Standard Conflicts Letter with Ethical Waiver.
- 3. Non-Engagement Letter.
- 4. Detailed Non-Engagement Letter.



#### IV. CASE LAW AND ETHICS RULES DISCUSSION

##### A. Formation of an Attorney-Client Relationship

The test for formation of attorney-client relationships in Kentucky is the subjective reasonable belief of the client. If the would-be client shares information with the attorney in confidence for the purpose of seeking legal advice, and the attorney does nothing to disavow the formation of the relationship, it is likely that the attorney and the client have an attorney-client relationship. Second, when representing more than one client in the same matter, the attorney is required to get the informed consent of each of the jointly represented clients, confirmed in writing, to the sharing of confidential information among the jointly represented clients, the lack of attorney-client privilege as among the jointly represented clients, and the inability of the attorney to provide legal advice or representation on behalf of one of the clients adverse to others of the jointly represented clients. See Rule 1.7, Comments 29-32 and *Unnamed Attorney v. Kentucky Bar Ass'n*, 186 S.W.3d 741 (Ky. 2006). Third, if the attorney is representing an organization, the constituents of that organization are not *necessarily* also a client; however, when dealing with the organization's constituents, it is important for the attorney to clarify for those constituents the identity of the client. See Rule 1.13(a) and (f). Indeed, Rule 1.13(g) recognizes that a lawyer representing an organization may also represent any of its constituents, so long as the attorney complies with Rule 1.7 with respect to joint representations.

##### B. Representation of Organizations and Individual Constituents

The case of *J&B Energy, Inc. v. Caldwell*, 2014 Ky. App. Unpub. LEXIS 647, 2014 WL 3973966 (Ky. App. Aug. 15, 2014), presents a somewhat confusing tale of alleged legal malpractice and breach of fiduciary duty. The underlying circumstances involve a joint venture to remove coal from slurry in strip mining sites, wash the coal, and sell it to electrical generation plants. One joint venturer (J&B) had the equipment for the project and the other joint venturer (Proz) had business contacts to make the project happen. At the initial meeting, Proz's representative, Brown, was accompanied by attorney Caldwell, who asserted that he told everyone at the meeting that he was representing Proz. Caldwell subsequently also undertook to represent PBP Energy, LLC, the joint venture itself, to get it formed and to work on the private placement. Caldwell further asserted that, after those activities were concluded, he stopped representing PBP and, instead, attorney Payne began representing PBP. Caldwell and Payne later became law partners.

PBP's operating agreement, drafted by Payne, was entered into by J&B, Proz, and a company controlled by Caldwell. J&B was concerned about the arrangement but was given an ultimatum by Caldwell to "sign or no deal." In addition, Caldwell did not disclose to J&B that Caldwell had loaned substantial sums of money to Brown, which (according to J&B) effectively gave Caldwell power over Brown. Caldwell and Proz later voted to remove J&B as co-manager of PBP.

J&B ultimately sued Payne, Caldwell and their law firm for breach of fiduciary duty, failure to disclose conflicts of interest, legal malpractice, and gross negligence/intentional or willful misconduct. The trial court granted the lawyer and law firm defendants' motion for summary judgment on the legal malpractice and breach of fiduciary duty claims because the trial court found a lack of an attorney-client relationship between J&B and the defendants.

On appeal, Caldwell and Payne argued that

neither made any direct communication or contact with J&B that would indicate or give the impression that they intended to enter into an attorney-client relationship with J&B. Caldwell and Payne argued that the facts of this case are controlled by Kentucky's Organizational Client Rule, SCR 3.130(1.13) and that pursuant to that rule, Appellants simply did not have an attorney-client relationship with Payne, Caldwell, or Caldwell & Payne, P.A., which would support a claim of legal malpractice.

*Id.* at \*25-26.

The Kentucky Court of Appeals disagreed, reversing in part the trial court's decision, and found that there was a genuine issue of material fact with respect to the existence of an attorney-client relationship. The Court recognized that "[w]hether an attorney-client relationship exists is inherently a factual issue" and that "the attorney-client relationship is contractual in nature and may be either an express contractual relationship, or a relationship implied by the conduct of the parties." *Id.* at \*27. The Court also rejected defendants' argument that Rule 1.13 means that an attorney representing an organization does not represent the individual constituents. The Court, however, noted that Rule 1.13(g) and Comment 12 to Rule 1.13 state that a lawyer *can* also represent the organization's constituents and that, per Comment 12, "when the lawyer reasonably should know that the owners have an expectation of dual representation, the lawyer should advise the owners and the representatives of the organization, preferably in writing, the identity of the lawyer's client and the ramifications of a client conflict." In this regard, the Court noted:

Upon review of the record, we believe that a genuine issue of material fact exists with respect to the issues that surround the attorney-client relationship between Caldwell, Payne, and the Appellants in this matter. While Caldwell alleges that he only participated in the formation of PBP, this Court finds that the record raises questions and issues of material fact as to the extent of his representation of the parties in other matters at other times. More specifically, and among other evidence of record, we note testimony from Brown that Caldwell was to provide legal services to both J & B and Proz, as well as Brown's testimony that

Caldwell was invited to represent both Proz and J & B in negotiating and drafting agreements with Peabody Coal company. Further, Caldwell himself testified that he continued to represent PBP after it was formed. Thus, we believe there is at least some issue of genuine material fact as to the nature of the relationship between Caldwell, Payne, Caldwell & Payne, P.A., and J&B in this matter.

*Id.* at \*26-27. Had Caldwell and Payne been clearer as to who they did and did not represent; had they clarified that issue with the parties; and had they remained consistent with their declared representations and non-representations, they may have had a stronger argument of non-representation.

### C. Duties to Prospective Clients

Rule 1.18 addresses an attorney's duties to a "prospective client," which Rule 1.18(a) defines as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Under Rule 1.18, an attorney (and possibly his/her law firm as well) can be disqualified from the same or a substantially related matter if the lawyer received from the prospective client information that could be significantly harmful to the prospective client. See Rule 1.18(c); see also Rule 1.18(d) regarding the opportunity to screen the lawyer "tainted" with the prospective client's confidential information to prevent the disqualifying conflict from being imputed to the entire firm.

In what is likely the first reported case on Rule 1.18 since Kentucky's adoption of it in 2009, the United States Bankruptcy Court for the Western District of Kentucky refused to disqualify counsel based on a Rule 1.18 analysis. In the case of *Irvin v. Faller (In re: Faller)*, 2014 Bankr. LEXIS 2949, 2014 WL 3385364 (Bankr. W.D. Ky. Jul. 9, 2014), the defendant moved to disqualify plaintiff's counsel based on the defendant-debtor having previously met with plaintiff's counsel in 2007 and then again in 2012. Defendant claimed that he had "discussed 'the exact specifics regarding the issues that I have in the complaint that he has now filed in this action.'" *Id.* at \*3. However, importantly, after the 2007 meeting and the 2012 meeting, the attorney had smartly sent defendant a "Non-Engagement of the Law Firm" letter, in which the attorney indicated that the law firm could not represent the defendant, the firm was not going to investigate the defendant's case, and the firm was not expressing any opinions on the merits.

Based on these "Non-Engagement" letters and an analysis of Rule 1.18, the Bankruptcy Court refused to disqualify counsel, reasoning:

The Court does not find that Mr. Bachert's law firm's representation of the Plaintiffs in this case violates SCR 3.130(1.18). The Defendant failed to establish that he revealed anything to Mr. Codell in his initial meetings that would be "significantly harmful" to his defense of this

adversary proceeding. This adversary proceeding is based on state court jury verdicts awarding compensatory and punitive damages to the Plaintiffs and against Defendant. This action seeks to have these debts of the Defendant declared nondischargeable under the bankruptcy code. There is no evidence that these matters were discussed by Defendant with Mr. Codell or Mr. Bachert.

No client relationship was established and even if the Defendant meets the requirements of a "prospective client" under the rule, there was no violation of the rule by the meetings with Mr. Codell. Mr. Codell was the only lawyer who had anything other than a "chance meeting" with the Defendant. There is no evidence that any confidential information or any other information that could be significantly harmful to the Defendant's case was exchanged in the brief meeting with Mr. Codell about the trust. In fact, the record of Mr. Codell's letters disproves this. Further, Mr. Codell is no longer associated with the law firm representing the Plaintiffs. The Court accepts Mr. Bachert's testimony as an officer of the Court that he had no substantive consultation with the Defendant, nor is there any evidence to support Defendant's claims to the contrary.

*Id.* at \*5-6. From a practice tip standpoint, the effectiveness of the attorney's "Non-Engagement" or "I'm Not Your Lawyer" letter to dispel the notion that the attorney was representing the prospective client is particularly noteworthy.

D. Additional Guidance on Adversity

The issue of joint representations arose in the case of *Vaughn v. Zoppoth Law Firm*, 2014 Ky. App. Unpub. LEXIS 824, 2014 WL 5315103 (Ky. App. Oct. 17, 2014), in a somewhat unusual way. *Vaughn* was a breach of contract and unjust enrichment action brought by a law firm against Vaughn, its client. The law firm had jointly represented Vaughn and other investors (the Renfros) with whom Vaughn had an indemnity agreement against Countrywide Home Loans, Inc. When the law firm agreed to represent both Vaughn and the Renfros, the attorney cautioned the two clients that their potential different objectives with the lawsuit could create a conflict and that, if Countrywide prevailed, the Renfros could exercise the indemnity provision against Vaughn. Resolution of the dispute with Countrywide was uncertain and, to reduce legal fees, Vaughn and the Renfros agreed to the joint representation. However, as the litigation proceeded and after the law firm had exhausted the initial retainer, Vaughn stopped paying the law firm. The law firm sued Vaughn and the jury awarded the law firm over \$10,000.

Vaughn appealed the decision, arguing in part that the law firm's joint representation of him and the Renfros was a conflict that nullified the

representation agreement. In affirming the decision, the Kentucky Court of Appeals disagreed with Vaughn's nullification argument. Analyzing the situation under Rule 1.7, the Court stated:

Vaughn and the Renfros were not adverse parties. The operating agreement of Cobia included an indemnity clause which *could* have created a conflict of interest if Renfro had ultimately been found liable to Countrywide. However, when Vaughn and Renfro retained the services of Zoppoth, the outcome of the litigation was wholly unknown. At the time, both were adverse to Countrywide, and they asserted the same claims in the amended complaint.

It is undisputed that Zoppoth did not obtain written consent to the joint representation. However, Zoppoth presented testimony at trial that he had discussed the possibility of a future conflict with Renfro and Vaughn. Nonetheless, they had agreed to proceed with the joint representation. Furthermore, Vaughn does not offer any legal authority for the proposition that representation which creates a **potential** conflict of interest inherently nullifies a contract. On point, Comment 8 to SCR 3.130(1.7) provides that: "[t]he **mere possibility** of subsequent harm does not itself require disclosure and consent." (Emphasis added.) This observation suggests that Zoppoth acted above and beyond his ethical obligation when he counseled Vaughn and Renfro about the potential for future conflict. Therefore, Vaughn [sic] met his burden, and we cannot conclude that the evidence warranted a directed verdict.

*Vaughn*, 2014 Ky. App. Unpub. LEXIS 824 at \*7-8.

As a practice tip, it would have been better for attorney Zoppoth to get the written consent to the joint representation from the clients. For one, Rule 1.7(b)(4) requires that a client's consent to waive a conflict be an informed one and be confirmed in writing. For another, confirming the informed consent in writing would have eliminated any uncertainty that the risks and advantages of the joint representation were discussed with both Vaughn and the Renfros. As it was, Zoppoth was able to testify to the discussions that took place to show the disclosures he made to Vaughn and the Renfros about the implications of a joint representation before they agreed to it.

#### E. Supreme Court Precedent on Disqualifications

The relatively recent Kentucky Supreme Court decision in *Marcum v. Scorsone*, 457 S.W.3d 710 (Ky. 2015), is an abrupt change in how attorney disqualification motions involving alleged conflicts will be decided in Kentucky state courts going forward. With the *Marcum* decision, gone are the days of the more unpredictable "appearance of impropriety"

standard. Instead, the Kentucky Supreme Court has mandated that attorney disqualifications must be based on the finding of an actual conflict of interest under the Kentucky Rules of Professional Conduct and that the trial court must conduct an evidentiary hearing in order to make such findings.

In *Marcum*, the Kentucky Supreme Court established a new fact-based, Rules-based "actual conflict" standard for deciding attorney disqualification motions. The Court held that before an attorney is disqualified, the complaining former or current client must show that an actual conflict exists, declaring:

Before a lawyer is disqualified based on a relationship with a former client or existing clients, the complaining party should be required to show an actual conflict, not just a vague and possibly deceiving appearance of impropriety. And that conflict should be established with facts, not just vague assertions of discomfort with the representation.

*Marcum*, 457 S.W.3d at 718. A party's right to counsel of his choice is too important to the public's perception of the legal system. An actual conflict must be shown to exist before the courts will interfere with that right. In that regard, the Kentucky Supreme Court also mandated that the trial court must hold an evidentiary hearing to determine whether an actual conflict exists and must state on the record the specific nature of the conflict. Thus, after *Marcum v. Scorsone*, Kentucky state trial courts entertaining such motions must now conduct evidentiary hearings and must make findings as to whether there is an actual conflict of interest based on the Kentucky Rules of Professional Conduct. The burden of establishing an actual conflict will rest with the complaining party. What showing that complaining party is expected to make, however, is yet to be seen. Commentary 3 to Rule 1.9 states, in part:

A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

In other words, the commentary to Rule 1.9 suggests that, in attempting to meet his burden of establishing an actual conflict, the complaining former client should not be required to divulge the very information he claims could be used against him by his former attorney. At the same time, the *Marcum* decision's condemnation of vague assertions of a conflict by a complaining party and its recognition of the importance of protecting, whenever possible, a party's right to personal choice of counsel will require the complaining party to make more specific and

logical connections between the prior representation and the present matter than had previously been required.

## V. TEMPLATES

### A. Joint Representation Waiver Letter

LETTERHEAD

DATE

ADDRESS

Re: Joint Representation and Conflicts Waiver Letter

Dear \_\_\_\_\_:

This letter shall serve to confirm the engagement of \_\_\_\_\_ LLP to represent XYZ and Pretty Brands, Inc. ("Pretty") in the above referenced Action. As part of our representation, each of you has consented to permitting our firm to act as counsel to both of you at the same time, and also consented to the fact that the representation would change in the event that a conflict should arise.

In order for our firm to represent each of you jointly, it is necessary that each client consent to the multiple representation after communication to you of information reasonably sufficient to permit you to decide whether to grant such consent. This letter will present such information to you.

Joint Representation Agreement and Waiver. As we discussed, each of you could choose to be represented by separate counsel in this matter. You have advised us that there are considerations of cost, as well as strategic advantages for each of you in joint representation. You have also advised us that you have agreed on all material issues concerning this matter.

During the course of our representation, a conflict might arise that would preclude you from having the same counsel. From the information that has been presented to us thus far, it appears that no issues have arisen over you having common counsel. We also understand that XYZ has agreed to indemnify Pretty in connection with any liability Interline may incur for damages related to the product at issue in the above-referenced Action. However, you are aware that the possibility exists that you may have divergent interests in the future (e.g. due to a substantial discrepancy in testimony, or differences related to settlement). We are obligated to advise you of the possibility that such conflicts may arise.

You agree that in the event a conflict of interest arises, we may withdraw from the representation of one or more of you as necessary to resolve the conflict. In such event, you agree that we may continue to represent the other, even if, as a result of such withdrawal, we may take

positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.

Shared Information. As we discussed, one of the necessary consequences of joint representation of multiple clients by a single lawyer or law firm is the sharing of confidential information concerning the subject matter of the joint representation. You acknowledge and agree that communications between the firm and any or all of you relating to this matter will be treated as confidential and will not be disclosed outside your group without your informed consent or as otherwise permitted by the applicable rules of professional conduct or other law. You also acknowledge and agree that whatever relevant or material communications or information that we receive concerning this matter, including communications from any one of you, will be shared with each of you as we consider appropriate. You further acknowledge and agree that in the event a dispute arises between or among one or more of you, and you are no longer represented by us in this matter, as the result of a conflict of interest or other cause, we may nevertheless use any confidential information we have concerning this matter adversely to you or to the advantage of those we continue to represent in any subsequent negotiation or proceeding relating to this matter.

Withdrawal by Client. Any of you may withdraw from the joint representation at any time for any reason, upon written notice to the firm and the other party to this agreement. You acknowledge and agree, however, that: (1) you will remain responsible for your share of the firm's fees and expenses incurred to and including the date on which notice is received by the firm; (2) you will be responsible for retaining and paying for separate legal representation; and (3) we may continue to represent the others in the group consistent with the other provisions of this letter, even if we may take positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.

Finally, this confirms that you have been advised and have had the opportunity to consult with a disinterested outside attorney of your choice about the terms and conditions of this agreement.

If this letter does not accurately confirm your understanding of the terms of our representation, please indicate the same to me immediately. Assuming it does accurately reflect your understanding, please so indicate by signing your copy of this letter and returning it to me as soon as possible.

If you have any questions, please do not hesitate to contact me.



Very truly yours,

HAVE SEEN AND CONSENT:

\_\_\_\_\_ Corp. \_\_\_\_\_  
 Date

By: \_\_\_\_\_

By: \_\_\_\_\_  
 Date

B. Standard Waiver Letter with Ethical Screen

LETTERHEAD  
DATE  
ADDRESS

Re: Waiver of Conflicts and Ethical Screen

Dear \_\_\_\_\_:

Thank you for allowing me to continue representation of this matter through my new firm, \_\_\_\_\_. This letter will confirm our discussion regarding your engagement of the Firm and will describe the basis upon which we will provide legal services to you.

You have engaged us to represent the Bank in its fiduciary capacity as Trustee of the above-referenced trust regarding actions by the beneficiaries to remove the Bank as Trustee. In addition, there are certain tax matters affecting the Trust, for which we will provide counsel.

We have disclosed to you that certain attorneys of this firm have previously provided counsel to Ms. \_\_\_\_\_, a remainder beneficiary of this Trust, on matters related to her late grandfather, \_\_\_\_\_, and in advising her on her expectancies under the Trust under Will. Ms. \_\_\_\_\_ has agreed to waive any conflict of interest on the condition that an ethical screen is erected between me, the members of my team, and the attorneys who previously represented Ms. \_\_\_\_\_. In addition, \_\_\_\_\_ has also waived any conflict arising from this

firm's prior representation of Ms. \_\_\_\_\_, subject to the same ethical screen described above.

Our legal services will be billed to you based on the Firm's standard hourly rates. Those rates currently are \$\_\_\_\_\_ per hour for partners, \$\_\_\_\_\_ per hour for associates, and \$\_\_\_\_\_ per hour for paralegals. We bill our time in 1/10th hour increments. These hourly rates are reviewed and adjusted annually at the beginning of each calendar year.

Additionally, to the extent we incur other expenses for such items as special postage, express mail or deliveries, travel expenses and court costs, the actual costs for these items will be billed to you. No charges for local telephone calls, and fax paper or machine operators are billed to clients. Long distance telephone calls are billed to clients at MCI's standard undiscounted basic plan rates, which are provided by a third party vendor. We use LexisNexis for computer-assisted research, but will not undertake any research which would be billable to you without your prior approval. Postage costs for regular mailings are not charged, unless you ask us to undertake a mass mailing on your behalf. Photocopies will be charged at \$.15 per page.

Bills for our legal services, including expenses, will be sent to you on a monthly basis. Payment is due upon receipt of each invoice. You will be responsible for payment regardless of the outcome of the matter. It is understood that Dinsmore & Shohl reserves the right to withdraw from representing you upon reasonable notice, if its statements for fees and expenses are not paid in accordance with these expectations.

Please review this letter carefully. If it meets with your approval, please sign it and return it with the required retainer, if any, so that we may begin work.

Again, let me thank you for retaining us in connection with this matter. I look forward to working with you.

Very truly yours,

AGREED AND ACCEPTED:

\_\_\_\_\_  
Name

By: \_\_\_\_\_

Date: \_\_\_\_\_

C. Declined Client Letter/Avoiding Disqualification

LETTERHEAD

DATE

ADDRESS

Re: Declination of Legal Representation

Dear Mr. Doe:

This is to confirm that neither I nor this firm will represent you with respect to the \_\_\_\_\_ matter. We further confirm that we do not currently represent you in any other matter.

Because we are not representing you on any matter currently, we cannot practically monitor any changes in the law or your circumstances as they might affect the strength of the case we discussed. We must, therefore, disclaim any duty to do so.

Except for the specific information relating to \_\_\_\_\_, we do not believe that we have obtained any information from or about you or \_\_\_\_\_ that is confidential. We did no investigation of the facts you described and gave no legal advice with respect to the matter we discussed. If you disagree in any respect with those conclusions, please call me immediately so that we may resolve the point.

*[Alternative: If you wish to pursue your claim with another lawyer, you will need to act promptly. As we discussed, there may be several important deadlines involved in your claim. Based upon the information you provided to us, the first deadline may be as soon as \_\_\_\_\_. If you fail to file suit or take other appropriate action in a timely manner, you may lose permanently some, if not all, of your rights.]*

We are returning to you the papers and other information that you delivered to us for review in evaluating this matter. As we agreed, there is no charge for our examining the possibility of representing you.

We appreciate your interest in the firm.

Very truly yours,

D. Declined Client Letter/Avoiding Disqualification

LETTERHEAD

DATE

ADDRESS

Re: Declined Representation after Ethics Screen

Dear \_\_\_\_\_:

This letter follows up on your email to me at \_\_\_:\_\_\_ p.m. on \_\_\_\_\_, 2014, our approximately 25 minute phone call that evening, and my return email to you at \_\_\_:\_\_\_ p.m. that same night advising you that my firm will not be able to represent you in your dispute with \_\_\_\_\_ because my firm has a conflict. Specifically, unbeknownst to me at the time of our conversation in which I, at the outset of our call and once more during our call, requested that you provide me only the information necessary to allow me to run a conflict check, one of my law partners currently represents \_\_\_\_\_.

This letter will also confirm that during our phone call last night you did not provide me with any "disqualifying information" as defined in Rule 1.18, Rules of the Supreme Court of Kentucky. Also, this will confirm that you did not provide me with any documents related to your dispute and that I advised you that I could not represent you until after our conflict check had cleared.

Please be assured that while I learned nothing disqualifying under Rule 1.18, in an abundance of precaution, both I and my firm are taking prompt steps to erect an ethical screen, both physically and electronically, between me and the lawyer and his team in the firm that are representing \_\_\_\_\_. In short, I will have no access to any information related to his representation of \_\_\_\_\_, and he will have no access to any information you provided to me.

Also, be assured that even though none of the information you provided me is disqualifying under Rule 1.18, I have not shared any of the information you provided me with anyone, and I will not share any of the information that you provided me with anyone. In fact, the only information I shared was the very limited information necessary to run a conflict check and to determine that there was a conflict: That you asked me to represent you in a legal dispute which could be adverse to \_\_\_\_\_.

Regardless of the instant conflict, I do thank you for your consideration of me and my firm to provide you with legal representation.

Very truly yours,

**ETHICS IN TRANSACTIONAL MATTERS:  
AVOIDING CONFLICTS OF INTEREST**

Amy E. Richardson, A.J. Singleton and J. Brandon Johnson

---

**ETHICS IN TRANSACTIONAL MATTERS**

Impact of conflicts and conflict rules

- Presence of a conflict hampers lawyer's ability to defend conduct, even where conflict is unrelated to the controversy
- Some courts have ruled that conflict of interest entitles client to disgorgement of fees without need to prove damages

---

---

---

---

---

---

---

---

---

---

**ETHICS IN TRANSACTIONAL MATTERS**

- Basic Conflict Rules
- Policies and Interests in the Rules
- Key Questions in Identifying and Avoiding Conflicts
- Selected Examples and Hypotheticals

---

---

---

---

---

---

---

---

---

---

**ETHICS IN TRANSACTIONAL MATTERS**

- Which state's rules apply? Choice of applicable ethics rules governed by Rule 8.5.
- Rule 8.5 states that for non-litigation matters, apply rules of the jurisdiction where the predominant effect of the lawyer's conduct occurs.

---

---

---

---

---

---

---

---

---

---

## BASIC CONFLICT RULES

- Concurrent conflicts, *i.e.*, conflicts between current clients
- Former client conflicts
- Imputation of conflicts
- Waiver

---

---

---

---

---

---

---

---

---

---

## BASIC CONFLICT RULES: CURRENT CLIENT CONFLICTS

### Rule 1.7

- Representation of one client in a matter directly adverse to another client
- Representation of client "materially limited" by responsibilities to other clients, third parties, etc.
- Rule 1.7, Comment 8, indicates that "[t]he mere possibility of subsequent harm does not itself preclude the representation or require disclosure and consent."

---

---

---

---

---

---

---

---

---

---

## BASIC CONFLICT RULES: FORMER CLIENT CONFLICTS

### Rule 1.9

- Representation of a current client against a former client in a matter that is "substantially related" to the work done for the former client.
- Rule 1.9, Comment 1 – "After termination of a client-lawyer relationship, a lawyer has certain **continuing duties** with respect to confidentiality and **conflicts** of interest and thus may not represent another client except in conformity with this **Rule**."

---

---

---

---

---

---

---

---

---

---

**BASIC CONFLICT RULES:  
IMPUTATION OF CONFLICTS**

Rule 1.10

- With limited exceptions, your partner's conflict is your conflict.
- Also with limited exceptions, screening does not cure a conflict (screening is typically offered to induce a client to waive a conflict).
- At the same time, Kentucky's screening rule is unique: SCR 3.130 (Rule 1.10(d)).

---

---

---

---

---

---

---

---

**BASIC CONFLICT RULES:  
DUTIES TO PROSPECTIVE CLIENTS**

Rule 1.18

- What duties are owed to former "prospective" client?
- "Significantly Harmful" Disclosures by Prospective Clients?
- Be a smart attorney: send Non-Engagement Letters

---

---

---

---

---

---

---

---

**BASIC CONFLICT RULES: WAIVER**

- Some, but not all, conflicts can be waived.
- Under KY and the ABA Model Rules, waivers need to be "confirmed" in writing (Rule 1.7, Comment 20).
- Only *per se* non-waivable conflicts under Rules are litigation conflicts (Rule 1.7(b)(3)).
- Waiver of future conflicts permitted (Rule 1.7, Comment 22).

---

---

---

---

---

---

---

---

**POLICIES AND INTERESTS OF CONFLICTS OF INTEREST RULES**

- **Loyalty** – prevents any adversity, even on unrelated matters
- **Effectiveness** – having dividing interest or multiple loyalties diminishes effectiveness
- **Unfair Advantage** – knowledge about a client or client’s case while being adverse to that client gives the lawyer an advantage and compromises confidentiality
- **Giving clients the widest choice of lawyers to select from** – overbroad prohibitions means potential clients have fewer lawyers to choose from

---

---

---

---

---

---

---

---

**IDENTIFYING AND AVOIDING CONFLICTS: KEY QUESTIONS**

- Who is a client?
- How many clients do you have?
- Is a client a former client or current client?
- Is there adversity?

---

---

---

---

---

---

---

---

**WHO IS A CLIENT?**

- Cannot analyze conflicts w/o knowing who is a client and who is not a client
- Problem of accidental or *de facto* clients

---

---

---

---

---

---

---

---



**ACCIDENTAL OR *DE FACTO* CLIENTS**

- Other participants in the transaction: advisors, brokers, lenders, etc.
- Related party and corporate family issues: e.g., partners, dominant shareholders, corporate parents, affiliates, subsidiaries, etc.? Rule 1.7, Comments 34-35
- Membership entities: e.g., trade associations, lending syndicates, partnerships

---

---

---

---

---

---

---

---

**ACCIDENTAL OR *DE FACTO* CLIENTS**

How to avoid "accidental" or "de facto" clients

- Specify client in engagement letter
- Notify potential "accidental" clients that you don't represent them
- Don't give non-clients legal advice or get confidential information from them
- Be careful with "attorney-client" communications
- Hypothetical

---

---

---

---

---

---

---

---

**IS THERE ADVERSITY?**

- Rules 1.7(a), Rule 1.7(b)(1)-(b)(3) and 1.9 all require adversity in some form. Absent adversity, there is no conflict.
- For example, there is an opinion that an attorney can represent divorcing couple, but leaves open possibility of such representation if parties have already agreed upon the terms of the divorce, did not have any minor children and had comparable employment, assets, educational background, etc.

---

---

---

---

---

---

---

---

## CURRENT CLIENT OR FORMER CLIENT?

- Conflict rules are different for current and former clients: Rule 1.7 vs. Rule 1.9
- Basic rule: repeat clients are "current" clients unless notified to the contrary
- Think about "sleeper" clients
- Ambiguity construed against the lawyer

---

---

---

---

---

---

---

---

## HANDLING MULTIPLE CLIENTS

If you have multiple clients, are they adverse?

- "Adversity" not just hostility or antagonism, includes differing interests
- "Adversity" is not static concept – it can be absent at the outset of an engagement but arises over the course of an engagement.

---

---

---

---

---

---

---

---

## HANDLING MULTIPLE CLIENTS

When are clients too adverse?

- "A lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic . . . but [*with disclosure and consent*] common representation is permissible where clients are generally aligned in interest even though there is some difference in interest among them." Rule 1.7, Comment 28.

---

---

---

---

---

---

---

---

### HANDLING MULTIPLE CLIENTS

- Clients should be advised that there will be no privilege in any dispute among them and no secrets during the engagement. Rule 1.7, Comment 30.
- Lawyer should set forth in the engagement letter reasons why lawyer believes common representation is permitted.

---

---

---

---

---

---

---

---

---

---

### HANDLING MULTIPLE CLIENTS

- Solicit and document client views on degree of adversity and common interests
- Reassess adversity over the course of the engagement
- Address "divorce" scenarios in advance

---

---

---

---

---

---

---

---

---

---

### CONFLICT WAIVERS

- Waivers should be in writing.
- Waivers require "informed consent" explanation of material risks and reasonable alternatives.
- Don't offer screens or walls if you can avoid them.
- Avoid, if possible, waivers based on consent from non-lawyers.

---

---

---

---

---

---

---

---

---

---

**ADVANCE WAIVERS**

- Don't just rely on broad "kitchen sink" advance waivers.
- If there are specific conflict scenarios that you foresee, put them in the waiver.
- Avoid labeling a waiver as an "advance waiver" if you can.

---

---

---

---

---

---

---

---

**CONFLICTS ANALYSIS VS. DISQUALIFICATION**

- Courts have repeatedly said that they need not always follow ethics rules in ruling on disqualification motion.
- *E.g., Air Products v. Airgas*, 2010 Del. Ch. Lexis 2010 ("even when a violation of the ethics rules has . . . occurred, it need not automatically result in disqualification").

---

---

---

---

---

---

---

---

**CONFLICTS ANALYSIS VS. DISQUALIFICATION**

- *Air Products v. Airgas*: court refused to disqualify Cravath, even though it had represented Airgas for eight years and was now representing Air Products in a hostile takeover attempt.
- Cravath's debt financing work for Airgas was unrelated to takeover fight.

---

---

---

---

---

---

---

---

**CONFLICTS ANALYSIS VS.  
DISQUALIFICATION**

- Cravath lawyers had little contact with senior Airgas executives.
- Cravath lawyers who worked on Airgas matters screened from Air Products representation.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 1**

- Lawyer's Firm represents Bank X on real estate (but not lending) matters; lawyer is asked to represent Borrower in a loan transaction with Bank X. Is it a conflict? Is it waivable?

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 1**

- Yes, it is a conflict. In representing Borrower, the lawyer would be adverse to Bank X, also a client of the Lawyer's Firm. But the conflict is waivable. Rule 1.7(a)(1) and (b), Comment 6.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 2**

- Lawyer's Firm (but not lawyer) represents Borrower. Lawyer leaves Firm and goes to work for Bank X and is asked to handle a loan to Borrower.
- Same as above, except that lawyer before joining Bank X worked on a matter for Borrower.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 2**

- No conflict, Rule 1.9(b) allows lawyer who leaves Firm to be adverse to clients of former Firm so long as lawyer has no relevant confidential information.
- Under Rule 1.9(b), conflict if lawyer leaving Firm has relevant confidential information but lawyer can be screened by new employer. See Rule 1.10(d). Alternatively, conflict can be waived.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 3**

- Firm represents Bank X as lead bank in lending syndicate. Firm also represents Bank Y, a member of the syndicate, but not on this transaction. Bank X's and Y's interests in the deal are aligned in most but not all respects. Can firm represent Bank X in negotiations with Bank Y?

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 3**

- Conflict, if Firm is negotiating with Bank Y on behalf of Bank X. Bank Y can waive conflict or Firm can eliminate conflict with limitation on scope of representation, *i.e.*, not negotiating or advising on matters between Bank X and Bank Y.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 4**

- Firm is asked by Borrower to give an opinion on a regulatory matter with respect to a loan transaction with Bank X, which Firm represents on other matters. Firm does not otherwise participate in the transaction between Borrower and Bank X.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 4**

- Answer may depend on the nature of the opinion and issue addressed in it. Standard opinion that a corporation was validly formed and remains in existence may not give rise to conflicts. More complex opinions on more nuanced subjects may create conflicts. So long as Firm is not representing Bank X in the transaction, the conflict is waivable.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 5**

- Firm represents Lender. Borrower is obligated to pay Lender's legal fees. Borrower asks for Firm's detailed billing statement to Lender.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 5**

- A client confidentiality issue, not a conflict issue. Lawyer can only disclose client confidences with client authorization. Detailed billing statements are client confidences.

---

---

---

---

---

---

---

---

---

---

**IDENTIFYING CONFLICTS:  
EXAMPLE 6**

- Firm represents Underwriter in a securities offering. Firm also represents a subsidiary of Issuer on other matters and Issuer itself as tax/regulatory counsel on this deal. Issuer has separate transaction counsel.

---

---

---

---

---

---

---

---

---

---



**IDENTIFYING CONFLICTS:  
EXAMPLE 6**

- Conflict. In representing Underwriter, Firm is adverse to Issuer who is also a client by virtue of Firm's tax/regulatory work for Issuer and perhaps as a result of Firm's work for subsidiary of Issuer. Conflict may be waivable.

See Conflicts of Interests; Waivers, Imputation of Conflicts, NYC Eth. Op. 2001-2, 2001 WL 1870202.

---

---

---

---

---

---

---

---

---

---

**EXAMPLE 7 – PILOT UNION**

- In the airline business, each airline has its own pilots' union.
- Piedmont merged into Allegheny Airlines, forming US Airways.
- Before the merger, both airlines had their own pilots' union. The two unions eventually worked out an agreement that provided which pilots would get to fly which planes and which routes in the combined airline. The agreement needed frequent interpretations and those occurred in arbitration-type proceedings.

---

---

---

---

---

---

---

---

---

---

**EXAMPLE 7 – PILOT UNION**

- You represented the former or legacy "Piedmont" pilots' union in these disputes. These disputes continued when under the combined airline US Airways, even after that airline merged with America West.
- Today, you continue to represent the legacy Piedmont union.
- Now that American Airlines is trying to merge with US Airways, the union that represents all of the US Airways pilots has asked you to represent them in the American Airlines merger negotiations.

---

---

---

---

---

---

---

---

---

---

**EXAMPLE 7 – PILOT UNION**

- You get the written consent of the legacy Piedmont union that you represent, but the legacy Allegheny union objects.
- The issues at stake have nothing to do with the periodic disputes you handle between the legacy Piedmont pilots and the legacy Allegheny pilots, but the latter still object to your representation of them as part of the US Airways union.
- Can you take the matter and represent the combined US Airways union in the negotiations with American Airlines?

---

---

---

---

---

---

---

---

---

---

**ETHICS IN TRANSACTIONAL MATTERS**

Thank You!

**Amy E. Richardson**

Harris, Wiltshire & Grannis, LLP

**A.J. Singleton**

Stoll Keenon Ogden, PLLC

**J. Brandon Johnson**

Richardson & Richardson, P.S.C.

**BUSINESS LAW SECTION**  
of the Kentucky Bar Association

---

---

---

---

---

---

---

---

---

---



