

18th Judicial Conference of the United States Court of International Trade



**PROFESSOR CYNTHIA GODSOE
BROOKLYN LAW SCHOOL
DECEMBER 1, 2014**

Conflicts of Interest



MRPC 1.7 (a). . . A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
- (2) 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.

Waiver for Joint Representation



MRPC 1.7(b) A lawyer can continue representation despite a conflict where:

- (1) The lawyer **reasonably believes** she can provide competent and diligent representation to each client;
- (2) The representation is not prohibited by law;
- (3) It does not involve a claim by one client against another represented by the lawyer in the same litigation or another litigation; and
- (4) Each client gives **informed consent in writing**.

****Some conflicts are still unwaivable.**

Informed Consent & Limited Representation



MRPC 1.7 Cmt. [18]: A waiver for joint representation must be knowing as to the specific (potential) conflict(s) at issue. “[E]ach affected client [must] be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. . . .When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.”

MRPC 1.2 (c): “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Lawyers for Entities: The Basic Rules



MRPC 1.13(a): A lawyer employed or retained by an organization represents **the organization** acting through its ... constituents.

MRPC 1.7 Cmt. [34]: A lawyer who represents a corporation or other organization **does not**, by virtue of that representation, **necessarily represent any constituent** or affiliated organization.

MRPC 1.13(g): A lawyer representing an organization **may** also represent any of its ... constituents, subject to the [conflict] provisions of Rule 1.7.

MRPC 1.13(f): In dealing with an organization's ... 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.

Warnings to an Entity's Constituents



Tell the constituent about the potential conflict, that you cannot represent her, and that she may wish to obtain individual representation. Tell her that your conversations with her are not privileged.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Practice Tips



- Clearly identify the client or clients in a retainer or engagement letter. Avoid “accidental” clients through warnings to non-represented parties and consistent conduct.
- Before representing multiple clients in the same matter, interview them separately. Don’t downplay the possible consequences of joint representation, tempting as it may be!
- Have jointly represented clients waive specific conflicts in writing. Also, have them agree to joint confidentiality and privilege to minimize future conflicts.
- Determine at the outset what will happen if the joint representation ends.