

**ISSUE AND POSITIONAL CONFLICTS:
CAN MEDIA LAWYERS BE OPEN-MINDED ABOUT CLOSURE?**

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Lawyers accustomed to contending on behalf of their media clients that the appropriate antidote to noxious speech is more speech were startled last fall by the news that Time Inc. and Sports Illustrated had asked a federal judge to scuttle the settlement of a libel action brought against them by former Alabama football coach Mike Price, to dismiss the action itself, and to award them damages on the ground that Price and his lawyer had breached a confidentiality agreement by publicly characterizing the settlement as a “great victory” that had “vindicated [Price’s] name.”² (More power to Time and its attorneys, of course, if they could turn a settlement into a summary judgment, and the defense of a defamation suit into a paying proposition.) Even more surprising, at least for lawyers committed to the notion that secret court proceedings “are anathema to a free society,”³ was the revelation that Time had persuaded the judge to seal all documents filed in connection with the dismissal motion (including, presumably, the settlement agreement that Time had asked the court to enforce). That twist – in addition to suggesting the disadvantages of First Amendment absolutism – brings to mind prickly questions about the extent to which a single lawyer or law firm can make opposite arguments in separate cases. Joni Mitchell sang that she had looked at clouds from both sides now, but could she have litigated them simultaneously?

Although many law firms that regularly represent media clients avoid the most obvious conflicts by shying away from the prosecution of defamation actions, the problem often arises in other contexts. Suppose that your local daily retains you to challenge the imposition of a gag order, or the sealing of a court file, or the closure of a courtroom. Suppose that at the same time, in a different case that has attracted media attention, you or your partners are asked by another

client (the manufacturer of a supposedly dangerous product, a nursing home alleged to have neglected its residents, the defendant in a notorious criminal case) to advocate the same sorts of impediments to newsgathering. Can you or your firm serve both masters?

Authorities on legal ethics refer to this problem as one involving an “issue” or “positional” conflict, and they identify several important factors for the lawyer to consider. Their starting point is Model Rule 1.7, which – in the absence of proper consent – forbids a lawyer from representing a client “if the representation involves a concurrent conflict of interest.”⁴ Because they appear to agree that representations of the sort described above are not “directly adverse,”⁵ commentators focus on the portion of the rule that declares a concurrent conflict of interest to exist 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.”⁶ They commonly point to the risk that the lawyer’s successful representation of one client will adversely affect her representation of the other – or the risk that, to avoid such an outcome, the lawyer will “pull her punches,” to one client’s advantage and the other’s detriment.

For example, if both cases are being argued in the same court, will the impact of the lawyer’s advocacy be diluted in the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer’s effectiveness – and, if so, can the lawyer (or firm) avoid favoring one client over the other in the “race” to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?⁷

Accordingly, only if the lawyer and the law firm “reasonably believe[] that the[y] will be able to provide competent and diligent representation to each affected client” – and only if the clients give their informed consent – can the representations proceed simultaneously.⁸

As a comment to Model Rule 1.7 explains:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. 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. A conflict of interest exists, however, 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. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer.⁹

“If there is significant risk of material limitation,” the comment concludes, “then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”¹⁰

So where does the balancing of these indeterminate “factors” leave us? First, the authorities unanimously express reservations about efforts by a lawyer or law firm to take inconsistent positions in cases pending before the same tribunal – or, to put the matter more broadly, “in the same jurisdiction.”¹¹ Thus, at a minimum, a law firm should avoid advancing directly contradictory arguments in cases awaiting decision by the same appellate court. That kind of conflict is probably unconsentable; the law firm cannot “reasonably believe[] that [it] will be able to provide competent and diligent representation to each affected client.”¹² But putting arguments on a collision course before the same appellate court isn't the only sort of conflict against which the rules caution us.

After all, the impact of an appellate court decision on the second case would be the same even if the second case were still before the trial court in that particular jurisdiction. Moreover, even if both cases were in the trial court, but assigned to different judges,

the decision in the first-decided case would, in all likelihood, carry at least some precedential or persuasive weight in the second case. And if both cases should happen to end up before the same judge, the situation would be even worse.¹³

On the other hand, even within the same state and at the same level of the judicial hierarchy, cases pending in counties that are geographically remote – or before judges who wouldn't be caught dead following each other's decisions – may present less cause for concern.

The question “whether the issue is substantive or procedural”¹⁴ echoes the opinion of the ABA Committee on Ethics and Responsibility that “procedural, discovery and evidentiary issues ... almost invariably turn on their particular facts, and it is therefore rare that such issues will give rise to [a positional] conflict problem.”¹⁵ Armed with this rationale, a law firm might be tempted to dismiss the entire problem described above on the ground that a request for file-sealing or court closure “almost invariably turn[s] on [its] particular facts.” But our media clients are unlikely to view such matters so benignly. They may well believe that every court-ordered denial of access, regardless whether it results in a published opinion, accomplishes an incremental incursion on our freedom of information; that every successful closure bid makes the next request easier for the next judge in the next case to contemplate. Deploying for one client an argument to which another client is categorically hostile presents a classic positional-conflict problem. Far more illuminating than whether the issue can be pigeonholed as “substantive” or “procedural” is “the significance of the issue to the immediate and long-term interests of the clients involved and the clients’ reasonable expectations in retaining the lawyer.”¹⁶ As Hazard and Hodes declare: “Whenever a positional conflict concerns an issue about which one or more of the clients feels strongly, it is unlikely that the lawyer will be able to successfully represent those parties, or that she will be able to obtain the necessary waivers or consents.”¹⁷

The relevant comment to Model Rule 1.7 finally directs our attention to “the temporal relationship between the matters.”¹⁸ We have been considering the situation of simultaneous and inconsistent representations. By contrast, and unsurprisingly, a law firm that has already kissed its media work good-bye is not similarly constrained: “a lawyer who recurrently handled a type of problem for a former client is not precluded from representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the former client.”¹⁹ But at least one additional situation remains to be considered. Suppose that the law firm is hired to advocate restrictions on access to court documents or proceedings for one client, while at the same time representing regular media clients in separate matters that involve no access issues whatsoever. Does the law firm face a conflict? And if it does, can the conflict be circumnavigated?

Because the law firm’s representation of the secrecy-seeking client has the potential to be “materially limited by the [firm’s] responsibilities to [other] client[s]”²⁰ – namely, by the firm’s loyalty to its regular media clients, and by its desire to avoid harming their interests or even giving them offense – ethics authorities commenting on analogous cases tend to agree that a conflict indeed exists, that the law firm must reasonably believe that it will not soft-pedal the arguments that it makes on behalf of the one-time client, and that the law firm must obtain that client’s informed consent.²¹ The harder question is whether the media clients’ consent is necessary as well. Hazard and Hodes assert that because the law firm “cannot guarantee that vigorous representation of [its] new client will not severely damage [its] representation of the [existing media clients] in future cases,” the consent of the existing clients “would certainly have to be obtained.”²² Other commentators doubt that the language of Model Rule 1.7 compels lawyers to worry about the impact of a given representation on “future cases.” But what can’t be

doubted is the effect of such an undertaking on client relations. In the interests of keeping regular clients happy, and irrespective of whether the rules of professional conduct require it, the law firm in the example given above may be well advised to give its longtime clients “veto power” over the new representation.

Avoidance of positional conflicts is complicated by the fact that most conflicts data bases are ill-designed to detect them. For that matter, many such conflicts do not arise until mid-litigation.²³ But once they emerge, they can't be ignored. When a lawyer's responsibilities to one client pose a significant risk of materially limiting his representation of another, consent or resignation is the only way out. The best defense against that awkward situation – perhaps the only defense – is thoroughgoing communication with your colleagues about what they're up to, coupled with careful attention to the needs and objectives of your own clients. If you look at clouds from both sides now, be sure to keep your head above them.

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² See, e.g., R. Robin McDonald, ‘Sports Illustrated’ Wants Out of Settlement with Football Coach, Fulton County Daily Report, Oct. 14, 2005, available at <http://www.law.com/jsp/article.jsp?id=1129194314378>.

³ *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo.), appeal dismissed, 98 F.3d 1349 (10th Cir. 1996).

⁴ Model Rules of Prof'l Conduct R. 1.7(a) (2002). And no lawyer is an island in this regard; Model Rule 1.10 imputes such a conflict to everyone associated in a firm. See Model Rules of Prof'l Conduct R. 1.10(a) (2002) (“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 Rule[] 1.7”).

⁵ Model Rules of Prof'l Conduct R. 1.7(a)(1) (2002).

⁶ Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002). Similarly, the Model Code of Professional Responsibility provides that a lawyer “shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment.” Model Code of Prof'l Responsibility DR 5-105(A) (1980). The ABA Committee on Ethics and Professional Responsibility has observed that the analysis of issue or positional conflicts “should be the same under the Model Code as under the Model Rules.” ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

⁸ Model Rules of Prof'l Conduct R. 1.7(b)(1), (4) (2002). Under the 2002 edition of the model rules, the consent must be “confirmed in writing.” Model Rules of Prof'l Conduct R. 1.7(b)(4) (2002).

⁹ Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002); accord Restatement (Third) of the Law Governing Lawyers § 128 cmt. f (2000).

¹⁰ Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

¹¹ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

¹² Model Rules of Prof'l Conduct R. 1.7(b)(1) (2002); see, e.g., Restatement (Third) of the Law Governing Lawyers § 128 cmt. f, illus. 6 (2000).

¹³ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

¹⁴ Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

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- ¹⁵ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993) (footnote 1).
- ¹⁶ Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).
- ¹⁷ 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 10.10, at 10-30 (3d ed. Supp. 2004).
- ¹⁸ Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).
- ¹⁹ Model Rules of Prof'l Conduct R. 1.9 cmt. 2 (2002).
- ²⁰ Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002).
- ²¹ See, e.g., 1 Geoffrey C. Hazard, Jr. & W. William Hodes, supra note 17, § 10.10, at 10-31.
- ²² Id. at 10-32.
- ²³ See, e.g., Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (conflict created by unexpected terms of adversary's settlement offer).