FUNDAMENTAL PRINCIPLES
WHAT IS A CONFLICT OF INTEREST?

US approach

EU/UK approach
The American Bar Association's Model Rules for Professional Conduct
Rule 1.7 Conflict of Interest

(a) 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; 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the he/she will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.
3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2 A lawyer must cease to act for both clients when a conflict of interest arises between those clients, and also whenever there is a risk of a breach of confidence or where his independence may be impaired.

3.2.3 A lawyer must also refrain from acting for a new client if there is a risk of a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.
THE IMPUTATION RULE

**Code of Conduct for Lawyers in the European Union, Rule 3.2.4:**
Where lawyers are practicing in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

**American Bar Association Model Rule 1.10:**
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.
# AVOIDING CONFLICTS OF INTEREST?

<table>
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<th>Can the conflict be waived by the client?</th>
<th>The US approach</th>
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<td>The UK and continental European approach</td>
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| What is “informed consent”? | Requires communication of “information adequate for the person to make an informed decision... [including] material risks of the proposed course of conduct and reasonably available alternatives.” |

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<th>Does an “ethical screen” cure a conflict?</th>
<th>Ethical screens, sometimes called “Chinese walls” or “firewalls” do not “cure” a conflict in the US</th>
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<td>They do resolve concerns about disclosure of confidential information</td>
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"The lawyer who would sue his own client, asserting in justification the lack of ‘substantial relationship’ between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed."

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976)
CLIENT DEMANDS ON CONFLICTS:

What are we seeing in the market?

- exclusivity requests
- bans on representations of competitors
- treating affiliates as clients
- positional conflicts
THE CORPORATE AFFILIATE PROBLEM

"...representation adverse to a client's affiliate can, in certain circumstances, conflict with the lawyer's duty of loyalty owed to a client.... “

GSI Commerce Sols., Inc. v. BabyCenter, L.L.C., 618 F.3d 204 (2d Cir. 2010)

How do you determine who your client is for conflict purposes?
> The UK approach
> The US approach
THRUST UPON CONFLICTS

What are they?
> Conflicts occasioned through no fault of the lawyer which result in the lawyer facing an unanticipated conflict.
> Classic examples occur in merger scenarios

How can they be resolved?
> Notice to both clients
> Withdrawal from the one who does not consent
> Inverse of the “hot potato” rule
## CONSEQUENCES OF MISSED CONFLICTS

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<td>Reputational harm</td>
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<td>Malpractice claims</td>
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Company A and Company B are both current clients of Lawyer Q. Lawyer Q is asked by Company A to represent it in negotiating an equipment purchase agreement with Company B. A and B both want the transaction to close. B has separate counsel in the matter.

**Question:** Can Lawyer Q represent A in negotiating the agreement with B?

- A: As long as Q’s representation of B is unrelated to the purchase agreement, Q can represent A in the proposed matter.
- B: As long as Q does not hold confidential information of B relevant to the purchase agreement, Q can represent A in the proposed matter.
- C: As long as B consents, Q can represent A in the matter.
- D: Both A and B must consent.
SCENARIO 1

Polling Question #1

Rule 1.7. The result would be different in most jurisdictions outside of the United States

Both A and B must consent.
Company C and Company D are in the same industry. Many years ago, Lawyer Q represented Company D in an employment dispute with D’s CEO. The case was settled and Lawyer Q and Company D have no on-going relationship. Company C now approaches Lawyer Q to represent it in a breach of warranty action against Company D. 

**Question:** Can Q undertake the matter for Company C?

- **A** No, unless D consents.
- **B** No, unless both C and D consent.
- **C** No, but Q’s partner can undertake the work as long as Q is screened from the matter.
- **D** Yes, the matters are not substantially related.
SCENARIO 2

Polling Question #2

D
Yes, the matters are not substantially related.

Rule 1.9.
Scenario 3

Lawyer Q works in his firm’s NY office. He currently represents Bank E in a loan to Company F. Lawyer X, Lawyer Q’s partner in the LA office, is asked by Company F to advise it in relation to a real estate transaction with Company G.

Question: Can Lawyer X undertake the matter for Company F?

A. Yes, the matters are unrelated and different lawyers in different offices are serving the clients.

B. Yes, provided Q and X are screened from one another’s matters.

C. No, unless E and F consent to the concurrent representation.

D. No, unless E and F consent and a screen is implemented.
No, unless E and F consent to the concurrent representation.

Rules 1.7 and 1.10. Company F and Bank E would be current clients. A screen may be a condition of the client’s consent but it is not required under US rules.
Lawyer Q represents Company G on corporate matters and a few years ago handled an employment discrimination case for Company G. Lawyer Q is approached by Company F to commence proceedings against Company H arising out of a failed real estate transaction. Company H is not a client of Lawyer Q, but it is a majority owned subsidiary of his client Company G. Company G and Company H are in different business lines and have different addresses. There are no overlapping officers or directors, but they share accounting and IT systems, use the same branding and there is one central OGC that acts for the entire group. Company H accounts for more than half of the group’s revenue.

**Question**: Can Lawyer Q take on the matter without conflict waivers?

**A** No, G and H share legal counsel, systems and branding. H should be treated as Q’s client for conflicts purposes.

**B** Yes, G and H carry on separate businesses and do not have overlapping management. H should not be treated as Q’s client for conflicts purposes.

**C** Yes, G and H are separate legal entities. The fact they are in the same corporate group is not relevant.

**D** No, Lawyer Q has disqualifying confidential information about Company G’s litigation strategy.
SCENARIO 4

Polling Question #4

No, G and H share legal counsel, systems and branding. H should be treated as Q’s client for conflicts purposes.

See N.Y. City 2007-03 (2007); GSI Commerce Sols., Inc. v. BabyCenter, L.L.C., 618 F.3d 204 (2d Cir. 2010) and Gartner, Inc. v. HCC Specialty Underwriters, Inc. et al (S.D.N.Y. 2022)
Lawyer Q currently represents Company A in two litigation matters. Lawyer Q’s engagement letter incorporates Company A’s Outside Counsel Guidelines. They state that the OCG “govern the law firm’s relationship with Company A and its affiliates”. The OCG also state that firms that bill over $1m per year “cannot represent any party adverse to the Company A corporate family without a waiver”. Lawyer Q’s firm bills Company A well under this amount. Lawyer Q’s partner, Lawyer M, wants to represent Company B in a copyright dispute against Company C, an affiliate of Company A. Company A and Company C share the same legal and accounting departments.

**Question**: Can Lawyer M take on the matter without a conflict waiver?

- **A**: No, the OCG prohibit this.
- **B**: No, Company C should be considered a client for conflicts purposes under the Baby Center test.
- **C**: Yes, the OCG do not prohibit this.
- **D**: Both A and B.
SCENARIO 5

Polling Question #5

Both A and B.

See Dr. Falk Pharma Gmbh v. GeneriCo, LLC, 916 F.3d 975 (Fed. Cir. 2019)
SCENARIO 6

Law firm Q agrees to “second” an associate full time to Bank A for 6 months. Bank A pays the firm a flat fee and firm Q continues to pay the associate’s salary. She retains her “class rank” and benefits. Law firm Q intended to remove her access to the firm’s computer systems, but they forget to do this. The associate’s web profile continues to show her as a Law firm Q lawyer.

Law firm Q wants to take on a new client, Company B. Bank A is suing Company B in an unrelated matter. The associate is not working on the case.

**Question**: Does Law firm Q have a problem?

A. No, the associate is not working on the matter.
B. No, Bank A’s conflicts are not imputed to the law firm.
C. Yes, Bank A’s conflicts are imputed to the firm because of the secondment.
D. Yes, Bank A’s conflicts are imputed to the firm because the associate was paid by the firm.
SCENARIO 6

C

Yes, Bank A’s conflicts are imputed to the firm because of the secondment.

The firm will need waivers from Company B and Bank A. See N.Y. City 2007-2 (2007) on secondments.
SCENARIO 7

Lawyer Q has been asked to represent Company R in connection with a shareholder suit alleging securities fraud. Company R’s CFO has been personally named in the suit. Other employees will likely be called as witnesses. Company R would like Q to represent the Company, the CFO and the witness employees in the lawsuit.

**Question**: Can Lawyer Q do so?

A. No, the likelihood of conflicts arising is too great.

B. Yes, but all clients must agree to the law firm’s withdrawal in the event a conflict arises.

C. No, this is a non-consentable conflict.

D. Yes, but all clients must consent to the joint representation.
Yes, but all clients must consent to the joint representation.

Lawyer Q currently represents private equity firm Company A on a bid for the assets of Company X, which are being auctioned. Lawyer Q’s partner is asked to act for Company B, a competing bidder, on its bid. Only one of them can win the auction.

**Question:** Can Lawyer Q’s partner take on Company B’s matter?

- **A** No, this is a non-consentable conflict.
- **B** Yes, different lawyers will represent different bidders.
- **C** Yes, if both clients provide informed consent.
- **D** Yes, if both clients provide informed consent and the lawyers are screened from each other.
SCENARIO 8

D  Yes, if both clients provide informed consent and the lawyers are screened from each other.

See N.Y. City 2006-01 (2006)
Lawyer Q represents Company W in an antitrust suit against Company Y. Lawyer X represents Company Y in regulatory proceedings, including competition law filings. Lawyer Q’s and Lawyer X’s law firms merge. Company W consents to the concurrent representation. Company Y does not. Lawyer X’s engagement agreement with Company Y contains a general advance waiver for unrelated matters.

Question: What are Lawyer Q’s and X’s ethical obligations?

A. In the absence of informed consent from both clients, both lawyers must withdraw from their respective matters.

B. Lawyer X must withdraw but Lawyer Q may continue the representation, provided Lawyer X is screened from the matter and does not receive any fees relating to Q’s matter.

C. Lawyer Q and X must cease their affiliation.

D. Informed consent is not required but an ethical wall must be implemented.
SCENARIO 9

A In the absence of informed consent from both clients, both lawyers must withdraw from their respective matters.

See Western Sugar Coop., et al. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074 (C.D. Cal. 2015).
Lawyer Q, a lawyer licensed in Massachusetts and New York, wishes to join the New York office of Black & White LLP. Unfortunately, Q has been working for years on a litigation filed by Company O in Massachusetts directly adverse to Company W, one of Black & White’s largest clients. Lawyer Q agrees with Black & White LLP that he will not bring any work adverse to Company W to the firm and that he will be screened from all work involving Company W upon joining. Immediately following the announcement of Q’s move to Black & White, Q’s former client, Company O, files a disqualification motion against Black & White in the Massachusetts court.

**Question:** Can Black & White survive the motion?

**A** No, ethical rules of New York apply to Q’s conduct since that will be his home office, and New York does not permit ethical screening to cure conflicts in the lateral context.

**B** Yes, because although Q will be practising in NY, the applicable Rules are the Massachusetts Rules which permit ethical screens to cure a conflict.

**C** Maybe, because New York law supports not disqualifying otherwise conflicted counsel unless the lawyer continuing would result in “trial taint”.

**D** Yes, but only if Q has not shared any material confidential information concerning O with Black & White.
Yes, because although Q will be practising in NY, the applicable Rules are the Massachusetts Rules which permit ethical screens to cure a conflict.

Lawyer Q is asked by Company S to pitch for a patent infringement action it proposes to bring against Company R in New York. Company S is not a client of Lawyer Q. Company S gives Lawyer Q information about the reasons it believes Company R is infringing, its views on validity and the prior art, its settlement strategies and Company S’s financial position. Lawyer Q prepares a 40 page detailed analysis of the claim and a budget for fees. Unfortunately Company S decides to hire another law firm.

Company R hires Lawyer W to defend it because they have a long standing relationship. He spends more than 1,500 hours on the matter. Lawyer W joins Lawyer Q’s firm. Before he does, Lawyer Q’s firm implements an ethical screen to ensure that Lawyer Q is screened from Lawyer W and everyone else working for Company R on the matter. Lawyer Q will not get any part of the fee from the case. Lawyer W notifies Company S that he has joined Lawyer Q’s firm the day after he joins.

Company S moves to disqualify Lawyer W and his new firm alleging breach of the Rules.

**Question:** Will Company S win?

- **A** No, the information Lawyer Q received could have been obtained in discovery so it is not significantly harmful to Company S in the matter.
- **B** No, Lawyer W may take on the representation because Lawyer Q was properly screened from the matter.
- **C** Yes, Lawyer Q did not take reasonable measures to limit the information he received to that needed to determine whether to represent Company S.
- **D** Yes, Lawyer Q did not obtain Company S’s informed consent to the possibility that his firm might represent Company R in the case.
Yes, Lawyer Q did not take responsible measures to limit the information he received to that needed to determine whether to represent Company S.

W represented T in negotiating a severance package with T's employer. T learns months later that a termination date of 30 days later would have allowed her to retain certain stock options. W's law firm partner, X, agrees to represent T in an arbitration against the former employer. The employer indicates it will seek to call W as a witness against T, so X seeks advice from her law firm GC about cross-examining W in the arbitration. W testifies in the arbitration. When T loses the arbitration, she sues W and X in New York State Supreme Court, and seeks information about X's consultation with the firm's GC on the grounds that no privilege applied because of the firm's conflict.

**Question:** Does the conflict effect a waiver of privileges?

- **A** No. In New York, the intra-firm privilege has been recognized and will be maintained.
- **B** Yes. Any privilege was waived because the consultation occurred while T remained a current client of the firm, creating a concurrent client conflict.
- **C** No. The ABA concluded that the intra-firm privilege applies to the same extent the attorney-client privilege is applicable to other consultations with a lawyer.
- **D** Maybe. It depends on whether X's consultation concerned X's strategy in representing T in the arbitration, or was solely focused on how X would navigate her ethical duties.
SCENARIO 12

Polling Question #12

Maybe. It depends on whether X’s consultation concerned X’s strategy in representing T in the arbitration, or was solely focused on how X would navigate her ethical duties.

See Stock v. Schnader Harrison Segal & Lewis LLP, 35 N.Y.S.3d 31 (1st Dep’t 2016) (recognizing the intra-firm privilege, and focusing on who was the “real client” in the consultation).
Lawyer Q has represented Company C for over a decade in negotiating routine loan transactions but, as of late, the work has slowed down. Lawyer Q’s partner would like to take on a major antitrust suit adverse to Company C. At the time of retention, the Firm sent out an engagement letter to Company C containing a generic advance waiver. It was not signed by Company C although Company C has paid its bills diligently. The engagement letter states that it confirms the client’s prior consent to the waiver and that in reliance on the foregoing, the law firm has agreed to undertake Company C’s representation.

**Question:** Can Lawyer Q’s partner rely on the advance waiver?

- **A** No, the waiver is too vague to constitute informed consent.
- **B** No, the client never countersigned the advance waiver.
- **C** It depends on the jurisdiction.
- **D** Yes, any form of consent by a sophisticated client is considered informed.
SCENARIO 13

It depends on the jurisdiction.

See *Mylan, Inc. v. Kirkland & Ellis LLP*, 15 CV 00581 (W.D. Pa. 2019) (preliminary injunction sought to prevent law firm from acting on the grounds that the waiver in question exempted adverse action in related actions); See also *Macy’s Inc. v. J.C. Penney Corp.*, 968 N.Y.S.2d 64 (N.Y. App. Div. 2013) (upholding waiver contained in an engagement agreement that the client did not countersign).
QUESTIONS?