

CONTENTS

Preface *xix*

Part I Introductory Materials **1**

CHAPTER 1 Fundamental Principles **3**

§1.1 Introduction	3
§1.2 Conflicts of Interest as Defined by Ethics Codes	7
§1.3 Conflicts of Interest Statutes	9
§1.4 The Purpose of Conflicts Rules	10
§1.5 The Force and Effect of Conflicts Rules	12
§1.6 Kinds of Conflicts	14
§1.7 Dual Role Conflicts	18
§1.8 Advocate-Witness “Conflicts”	22
§1.9 Imputed Conflicts	25

CHAPTER 2 The Origins and Evolution of Conflicts Rules **29**

§2.1 Introduction	29
§2.2 Conflict Provisions in the Original ABA Canons	30
§2.3 Conflicts Provisions in the Model Code	33
§2.4 The Advent of the Model Rules	42
§2.5 California’s Conflicts of Interest Rules	45

CHAPTER 3 The Duties that Underlie the Conflicts Rules **55**

§3.1 Introduction	55
§3.2 The Duty of Loyalty to Current Clients	57

Contents

§3.3	The Duty of Confidentiality to Current Clients	61
§3.4	The Duty of Loyalty to Former Clients	62
§3.5	The Duty of Confidentiality to Former Clients	65
§3.6	The Nature of Counsel’s Ongoing Loyalty Duty	68
Part II Concurrent Conflicts of Interest		71
CHAPTER 4 Concurrent Conflicts Generally		73
§4.1	Introduction	73
§4.2	Origins of the Concurrent Conflicts Rule	75
§4.3	Model Rule 1.7	77
§4.4	The “Direct Adversity” Requirement	84
§4.5	Other Concurrent Conflicts Rules	87
§4.6	Reasons for the Rule	92
§4.7	Conflicts Involving “Competitor” Clients	94
CHAPTER 5 Joint Representation Generally		95
§5.1	Introduction	95
§5.2	Permissible Joint Representation	98
§5.3	Potential and Actual Conflicts	103
§5.4	The Nature of the Joint Representation	106
§5.5	Joint Representation of “Competitor” Clients	112
CHAPTER 6 Conflicts Involving Favored Clients		113
§6.1	Introduction	113
§6.2	Favored Clients Generally	114
§6.3	Municipalities and Municipal Employees	117
§6.4	Joint Representation of Insurers and Insureds	123
§6.5	Insurance Defense Counsel Conflicts	127
§6.6	The Nature of the Conflict	131
§6.7	The Right to Select Independent Counsel	136

Contents

CHAPTER 7 Conflicts Involving Unrelated Matters 139

§7.1	Introduction	139
§7.2	Direct Adversity in Unrelated Matters	141
§7.3	Service as an Adverse Client’s Expert Witness	145
§7.4	Financial Adversity	146
§7.5	Representation of Economic Competitors	147
§7.6	“Finite Pie” Conflicts	152
§7.7	Issue Conflicts	156

Part III Conflicts Involving Former Clients 159

CHAPTER 8 Conflicts Involving Former Clients Generally 161

§8.1	Introduction	161
§8.2	Evolution of the Former Client Conflicts Rule	164
§8.3	The Current Version of Model Rule 1.9	167
§8.4	Former Client Conflicts in Other Jurisdictions	171
§8.5	Rationale for the Former Client Conflicts Rule	173
§8.6	The Ethical Duty and Privilege Distinguished	178
§8.7	Substantial Relationship Generally	181
§8.8	Consequences of a Rule Violation	186

CHAPTER 9 Substantial Relationship in Federal Court 189

§9.1	Introduction	189
§9.2	The Second Circuit Approach	192
§9.3	The Third Circuit Approach	198
§9.4	The Fifth Circuit Approach	202
§9.5	Substantial Relationship in the Sixth Circuit	204
§9.6	The Seventh Circuit Approach	206
§9.7	The Ninth Circuit Approach	210
§9.8	The Tenth Circuit Approach	213
§9.9	The Eleventh Circuit Approach	214

CHAPTER 10 Substantial Relationship in State Court	215
§10.1 Introduction	215
§10.2 The California Approach	216
§10.3 The “Modified” Substantial Relationship Test	221
§10.4 Substantial Relationship in Florida	224
§10.5 The New Jersey Approach	225
§10.6 Substantial Relationship in New York	228
§10.7 Substantial Relationship in Texas	230
§10.8 Substantial Relationship in Other States	231
Part IV Personal Interest Conflicts	239
CHAPTER 11 Personal Interest Conflicts Generally	241
§11.1 Introduction	241
§11.2 Permissible Personal Interests	245
§11.3 Applicable Ethical Rules	247
§11.4 Model Rules 1.8(b) and (e)	248
§11.5 Model Rules 1.8(f) and (g)	253
§11.6 Other Prongs of Rule 1.8	259
§11.7 Personal Interest Conflicts in California	262
§11.8 Curing Personal Interest Conflicts	263
CHAPTER 12 Pecuniary Interest Conflicts	265
§12.1 Introduction	265
§12.2 The Business Transaction Rule	267
§12.3 Borrowing from Clients and Equity Billing	274
§12.4 California Rule of Professional Conduct 3-300	276
§12.5 Attorneys’ Liens	278
§12.6 Gifts from Clients	280
§12.7 Acquisition of Literary or Media Rights	283
§12.8 Agreements Regarding Malpractice Claims	284
§12.9 Acquiring a Proprietary Interest in Litigation	286

Contents

CHAPTER 13 Relationship Conflicts	291
§13.1 Introduction	291
§13.2 Representation of Family Members	292
§13.3 Sexual Relationships with Clients	293
§13.4 Sexual Relationships with Relatives of Clients	295
§13.5 Relationships with Judges	297
§13.6 Relationships with Opposing Counsel	298
<u>Part V Attorney-Client Relationships</u>	<u>301</u>
CHAPTER 14 Attorney-Client Relationships Generally	303
§14.1 Introduction	303
§14.2 Client Identification	305
§14.3 The Nature of the Relationship	308
§14.4 Implied Attorney-Client Relationships	312
§14.5 The Belief of the Putative Client	319
§14.6 Fee Payments and Retainer Agreements	323
CHAPTER 15 Prospective Clients	327
§15.1 Introduction	327
§15.2 Applicable Ethical Rules	331
§15.3 Adoption of the Prospective Client Rule	336
§15.4 Prospective Clients in California	338
§15.5 Rationale for the Rule	340
§15.6 Applying the Rule	342
CHAPTER 16 Relationships with Entities	347
§16.1 The Entity Rule	347
§16.2 Exceptions to the Entity Rule	351
§16.3 Closely-Held Corporations	353
§16.4 Partnerships	355
§16.5 Associations	358

	Contents
§16.6 Unions	360
§16.7 Joint Ventures	362
 CHAPTER 17 Vicarious Attorney-Client Relationships	 363
§17.1 Introduction	363
§17.2 Relationship with an Entity Client’s Affiliate	365
§17.3 Assignment of the Attorney-Client Relationship	373
§17.4 Successors in Interest to Defunct Entities	374
§17.5 Mergers and Acquisitions	376
§17.6 Relationships between Attorneys and Inventors	379
 <u>Part VI Consequences of Conflicted Representation</u>	 <u>381</u>
 CHAPTER 18 Disciplinary Consequences	 383
§18.1 Introduction	383
§18.2 The Development of Disciplinary Standards	388
§18.3 Sanctions for Conflicts of Interest Generally	390
§18.4 Admonition	392
§18.5 Reprimand	394
§18.6 Suspension	396
§18.7 Disbarment	399
§18.8 Probation	401
§18.9 Other Possible Sanctions	402
 CHAPTER 19 Actions Designed to Preclude Representation	 403
§19.1 Introduction	403
§19.2 Motions to Disqualify Counsel	405
§19.3 Injunction Actions Generally	407
§19.4 Preclusion of Representation in Arbitrations	410
§19.5 Opposition to Pro Hac Vice Status	413
§19.6 Opposition to Appointed Counsel	419

Contents

CHAPTER 20 Other Non-Disciplinary Consequences 421

§20.1	Introduction	421
§20.2	Fee Claims	422
§20.3	Actions for Damages	427
§20.4	Ineffective Representation Claims	432
§20.5	Consequences for Clients	436

Part VII Detecting, Avoiding, and Curing Conflicts 437

CHAPTER 21 Detecting Conflicts 439

§21.1	Introduction	439
§21.2	The Duty to Detect and Disclose Conflicts	441
§21.3	Systems for Identifying Conflicts	443
§21.4	“Conflicts Checks”	445
§21.5	The Ongoing Duty to Check for Conflicts	449
§21.6	The Failure to Detect Conflicts	451
§21.7	Other Conflicts Detection Measures	455

CHAPTER 22 Avoiding Conflicts 457

§22.1	Introduction	457
§22.2	Declination of Representation	458
§22.3	Withdrawal from Representation	461
§22.4	Other Means of Avoiding Conflicts	464
§22.5	Qualification or Declaratory Relief	465

CHAPTER 23 Curing Conflicts 469

§23.1	Introduction	469
§23.2	Informed Consent Generally	470
§23.3	Screening Generally	473
§23.4	Withdrawal from Representing a Joint Client	474
§23.5	The “Hot Potato” Doctrine	476
§23.6	The “Thrust Upon” Exception	479

	Contents
§23.7 Law Firm Mergers	483
§23.8 Eliminating Conflicts	486
Part VIII Consent	489
<hr/>	
CHAPTER 24 Consent Generally	491
§24.1 Introduction	491
§24.2 Consent and Waiver Distinguished	492
§24.3 The Applicable ABA Rules	493
§24.4 Consent in California	495
§24.5 Revocation of Consent	496
§24.6 Standing Consent	498
§24.7 Implied Consent	503
§24.8 Renewed Consent	504
CHAPTER 25 Requirements in Addition to Consent	505
§25.1 Introduction	505
§25.2 The “Informed” Consent Requirement	508
§25.3 The Sophistication of the Client	512
§25.4 The “Full Disclosure” Requirement	514
§25.5 The Writing Requirement	522
§25.6 The Consultation Requirement	525
§25.7 Who the Client Must Consult	527
CHAPTER 26 Non-Consentable Conflicts	531
§26.1 Introduction	531
§26.2 The Applicable Ethical Rules	536
§26.3 Reasons Why Conflicts are Non-Consentable	542
§26.4 Lack of Capacity to Provide Informed Consent	546
§26.5 Consent by a Minor	548
§26.6 Consent by Public and Private Entities	549

Contents

Part IX Screening **551**

CHAPTER 27 Conflict Imputation and Screening **553**

§27.1	Introduction	553
§27.2	The Applicable ABA Rules	556
§27.3	Status of Screening as a Cure for Conflicts	559
§27.4	Screens in Cases Involving Prospective Clients	563
§27.5	Imputation of Conflicts to Co-Counsel	565
§27.6	Imputation of Conflicts from Non-Lawyers	569

CHAPTER 28 State Screening Rules **571**

§28.1	Introduction	571
§28.2	Arizona	572
§28.3	Colorado	574
§28.4	Connecticut	575
§28.5	Delaware	576
§28.6	Hawaii	577
§28.7	Idaho	579
§28.8	Illinois	580
§28.9	Indiana	581
§28.10	Kentucky	582
§28.11	Maryland	583
§28.12	Massachusetts	584
§28.13	Michigan	587
§28.14	Minnesota	590
§28.15	Montana	591
§28.16	Nevada	592
§28.17	New Hampshire	593
§28.18	New Jersey	594
§28.19	New Mexico	596
§28.20	North Carolina	597
§28.21	North Dakota	598
§28.22	Ohio	598
§28.23	Oregon	600
§28.24	Pennsylvania	601

Contents

§28.25	Rhode Island	604
§28.26	Tennessee	605
§28.27	Utah	607
§28.28	Washington	608
§28.29	Wisconsin	609

CHAPTER 29 Jurisdictions with no Screening Rules 611

§29.1	Introduction	612
§29.2	Alabama	612
§29.3	Alaska	614
§29.4	Arkansas	615
§29.5	California	616
§29.6	The District of Columbia	620
§29.7	Florida	620
§29.8	Georgia	622
§29.9	Iowa	623
§29.10	Kansas	625
§29.11	Louisiana	626
§29.12	Maine	627
§29.13	Mississippi	628
§29.14	Missouri	629
§29.15	Nebraska	630
§29.16	New York	631
§29.17	Oklahoma	632
§29.18	South Carolina	632
§29.19	South Dakota	634
§29.20	Texas	634
§29.21	Vermont	636
§29.22	Virginia	637
§29.23	West Virginia	638
§29.24	Wyoming	639

Contents

Part X Conflicts in Special Types of Situations 641

CHAPTER 30 Bankruptcy Proceedings 643

§30.1	Introduction	643
§30.2	Appointment of Bankruptcy Attorneys	646
§30.3	The Duty to Disclose Potential Conflicts	649
§30.4	Conflicts Arising After Initial Disclosure	655
§30.5	“Disinterestedness” and “Adverse Interest”	659
§30.6	Actual and Potential Conflicts	662
§30.7	Joint Representation Conflicts	665
§30.8	Prior Representation of the Debtor	668
§30.9	Security Interest in the Debtor’s Property	671

CHAPTER 31 Class Action Suits 673

§31.1	Introduction	673
§31.2	The Nature of Class Action Litigation	674
§31.3	Joint Representation Conflicts	676
§31.4	Conflicts Involving Absent Class Members	679
§31.5	Objections to a Proposed Settlement	682
§31.6	Pecuniary Interest Conflicts	683
§31.7	Service as Counsel and Class Representative	685
§31.8	Conflicts Safeguards	687

CHAPTER 32 Criminal Proceedings 689

§32.1	Introduction	689
§32.2	Kinds of Conflicts that Arise in Criminal Cases	692
§32.3	The Court’s Duty to Inquire about Conflicts	693
§32.4	Whether to Accept a Conflicts Waiver	697
§32.5	The Wheat Case	701
§32.6	Joint Representation Conflicts	705
§32.7	Personal Interest Conflicts	707
§32.8	Grand Jury Proceedings	709

Contents

Table of Cases
Index

711

769