

# Climate Change and Positional Conflicts of Interest

by Christopher L. Colclasure, Denise W. Kennedy, and Stephen G. Masciocchi

*Positional conflicts of interest may arise when a lawyer asserts a legal or factual position that is adverse to a client in an unrelated matter. Lawyers should be especially alert to positional conflicts in novel areas of law, such as climate change.*

Legal issues arising from concerns about climate change are forcing a realignment of interests on all sides of the climate change debate. For example, electric generating units that historically have taken similar positions on air quality might pursue different carbon rules, depending on the type of fuel they use and whether their baseline carbon emissions are high or low. Environmental advocacy groups that are traditional allies may take differing positions on natural gas development and hydraulic fracturing, depending on whether their primary focus is on greenhouse gas (GHG) emissions or the protection of aquifers. Such realignments may pose “positional conflicts”—also known as “issue conflicts”—under Rule 1.7(a)(2) of the Colorado Rules of Professional Conduct (Colorado Rules or Rules). Positional conflicts have the potential to ensnare those who practice in the field of climate change.

## Defining Positional Conflict

A positional conflict is a concurrent conflict of interest that arises when a lawyer’s representation of one client might be materially limited by a position the lawyer is advocating on behalf of another client in an unrelated matter or by some other factor. Positional conflicts are indirect.<sup>1</sup> They are governed by Colorado Rule 1.7(a)(2), which states:

[A] concurrent conflict of interest exists if . . . 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<sup>2</sup> or a third person or by a personal interest of the lawyer.<sup>3</sup>

Positional conflicts risk making the lawyer less credible to judges when the lawyer is making contradictory arguments in simultane-

ous cases.<sup>4</sup> They might also compromise the attorney’s loyalty or ability to exercise independent judgment on a client’s behalf, or even foreclose the lawyer from pursuing otherwise available alternatives.<sup>5</sup>

Positional conflicts are most easily understood in the litigation context, where winning one case might create a legal precedent that is adverse to a position the lawyer or the lawyer’s firm is advocating in an unrelated case. This risk is recognized in American Bar Association (ABA) Formal Opinion 93-377,<sup>6</sup> as well as in Comment [24] to Colorado Rule 1.7.<sup>7</sup>

Positional conflicts are not limited to litigation. As the District of Columbia (DC) Bar Association has noted, they may arise whenever a lawyer simultaneously takes positions on behalf of multiple clients regarding the same types of legal matters and “such representation creates a substantial risk that representation of one client will adversely affect the representation of the other.”<sup>8</sup>

Positional conflicts usually involve contradictory positions on a question of law, but they also can be based on adverse positions regarding disputed events or facts.<sup>9</sup> For example, in *Fiandaca v. Cunningham*,<sup>10</sup> plaintiffs’ counsel represented a class of female inmates who sought better prison conditions. Counsel separately represented mentally disabled residents of a state treatment facility in a lawsuit over conditions at the facility. The prison defendants offered to establish a new prison building on the grounds of the treatment facility. Plaintiffs’ counsel rejected that settlement offer because the new prison building would displace a number of treatment facility residents and would violate judicial orders previously entered in the treatment facility litigation.<sup>11</sup> The First Circuit held that this “combination of clients and circumstances placed [plaintiffs’ counsel] in the untenable position of being simultaneously



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obligated to represent vigorously the interests of two conflicting clients," in violation of New Hampshire's version of Rule 1.7.<sup>12</sup> This positional conflict resulted in counsel's disqualification from the inmates' case.<sup>13</sup>

## Positional Conflicts in Litigation

Positional conflicts most often arise in the context of litigation; however, they may occur in any field of practice, including lobbying, administrative law, transactional work, or a combination of these activities. *Williams v. Delaware*<sup>14</sup> provides a clear example of a litigation conflict. A lawyer represented two clients in separate capital murder cases, and both death sentences were appealed to the Delaware Supreme Court. In the first appeal, the lawyer argued that the trial court erred when it failed to place "great weight" on the jury's recommendation against imposing the death penalty. In the second case, the jury recommended the death penalty and the trial court concluded it was required to place "great weight" on the recommendation. It was foreseeable that the second defendant would argue on appeal that the trial court should not have placed great weight on the jury's recommendation. This created a positional conflict. The lawyer's argument in the first appeal, which was still pending, materially limited his ability to advocate for the opposite position in the second. The Delaware Supreme Court granted the lawyer's motion to withdraw in the second case.<sup>15</sup>

## Standing and the Political Question Doctrine

Climate change litigation has the potential to involve positional conflicts. One example involves questions of Article III standing and the political question doctrine. Plaintiffs in five federal cases alleged that GHG emissions contribute to climate change, thereby creating a nuisance under federal common law.<sup>16</sup> Recently, in *American Electric Power v. Connecticut*, the U. S. Supreme Court held that the Clean Air Act preempts such claims of federal common law nuisance,<sup>17</sup> but it left unresolved the questions of what is required to establish standing in climate change litigation and whether climate change lawsuits grounded in federal common law present nonjusticiable political questions.<sup>18</sup>

Standing and the political question doctrine have been significant issues in the nuisance cases.<sup>19</sup> These issues remain in dispute in one nuisance case, *Village of Kivalina v. ExxonMobil*,<sup>20</sup> which is pending before the Ninth Circuit. These issues are likely to resurface in other common law climate change lawsuits, such as public trust cases.

One environmental group has filed several public trust lawsuits against the federal government, Colorado, California, New Jersey, and other states. In each lawsuit, the group alleges that the sovereign has a common law fiduciary duty to protect the atmosphere from the effects of anthropogenic GHG emissions.<sup>21</sup> The complaint against Colorado seeks a declaratory judgment that "the State Defendants must significantly reduce Colorado's greenhouse gas emissions based upon the best available science."<sup>22</sup> The complaint against the federal defendants is more specific. It seeks an injunction requiring the United States, among other things, to reduce its GHG emissions by 6% per year beginning in 2013, and to provide financial and technical assistance to developing countries to support their emissions reductions.<sup>23</sup>

Among the public trust cases filed to date, the potential for positional conflicts appears to be greatest for lawyers representing Cali-

fornia and New Jersey. Both states were plaintiffs in *American Electric Power*, where they convinced the Second Circuit that they had standing and that the nuisance claims did not present a nonjusticiable political question. It is unclear whether California and New Jersey will respond to the Supreme Court's rejection of the federal nuisance claim by re-filing their nuisance claims in state court. It might be logical for them, as defendants in the public trust cases, to seek dismissal on standing and political question grounds;<sup>24</sup> doing so might raise a positional conflict.

Litigation positional conflicts occur in relatively narrow circumstances. Comment [24] to Rule 1.7 affords substantial leeway to argue contradictory legal positions "in different tribunals at different times on behalf of different clients." The key question, as discussed below, is whether the representation of either client would be materially limited by the lawyer's representation of the other.

## Trial and Appellate Courts

Positional conflicts may arise in trial or appellate courts. A comment to the superseded 1983 version of ABA Model Rule 1.7 advised that "it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court."<sup>25</sup> The court in *Williams v. Delaware*, though, refused to recognize the distinction between trial and appellate courts.<sup>26</sup> In Opinion 93-377, the ABA Ethics Committee noted that the "rationale of [the Model Rule comment] is not clear" and likewise repudiated the distinction.<sup>27</sup> The comments to the current versions of ABA Model Rule 1.7 and Colorado Rule 1.7 no longer make this distinction.

Trial courts thus do not provide a safe harbor for positional conflicts. The outcome of one trial may well be persuasive in another.<sup>28</sup> Clients are no less likely to question their attorney's loyalty at the trial level than on appeal. Trial judges and appellate judges are equally likely to question the credibility of an attorney who argues both sides of an issue. There is a risk that the same witnesses may testify or submit expert reports in factually related cases.<sup>29</sup> Also, as was the circumstance in *Williams*, the two trial decisions might well be appealed to the same court.

The climate change arena presents a heightened risk of positional conflicts at the trial level. An attorney taking contradictory positions on standing and the political question doctrine in common law climate change cases probably could not avoid a positional conflict by appearing solely at the trial court level. Few such cases have been filed, the issues are novel, and the media coverage has been intense. The parties in each case likely would file a notice of supplemental authority whenever another court rules on the issue. The scarcity of on-point case law nearly ensures that a trial judge will take note of the outcome of similar cases. All of these factors heighten the potential for the lawyer's representation of one client to be materially limited by the representation of another.

Positional conflicts also can arise across multiple jurisdictions, although the risks are greater when two cases are in the same jurisdiction.<sup>30</sup> As explained by the ABA Ethics Committee, if the two matters will not be litigated in the same jurisdiction, the lawyer should nevertheless attempt to determine fairly and objectively whether the effectiveness of her representation of either client may be materially limited.<sup>31</sup>

The ABA Opinion identifies several factors to consider when evaluating whether cases in different jurisdictions might pose a

conflict. Lawyers should ask whether (1) "the outcome of one case is likely to have a significant impact on another"; (2) the lawyer might "soft-pedal or de-emphasize certain arguments" to avoid impacting the other case; and (3) the lawyer might "alter any arguments to reconcile her position in the two cases."<sup>32</sup>

Accordingly, if a lawyer were to take opposing positions on standing and the political question doctrine, the fact that the nuisance and public trust cases were filed in several jurisdictions would provide little comfort. The justiciability of climate change lawsuits is important, as demonstrated by media coverage, as well as the Supreme Court's recent decision in *American Electric Power*. The outcome of any one of these cases likely would affect the others because the claims are novel. There would be a real risk of soft-pedaling arguments to avoid impacting another case. For instance, if a lawyer developed a creative and persuasive argument in favor of justiciability, he or she might be reluctant to make that argument if the lawyer knew it would be used against him or her in another case.

### Positional Conflicts in Lobbying and Administrative Law

Positional conflicts may arise outside litigation, such as when lawyers lobby or seek an administrative agency decision.<sup>33</sup> Conflicts also may arise in hybrid settings.

Professor John Dzienkowski from the University of Texas School of Law describes a lobbying positional conflict that faced Kirkland & Ellis LLP in 1976.<sup>34</sup> The firm filed an antitrust action on behalf of Westinghouse Electric Corporation alleging that numerous entities in the uranium industry had engaged in anti-competitive practices. The American Petroleum Institute (API) separately hired the firm to lobby against proposed legislation that was designed to encourage competition by forcing oil companies to be divested of their uranium holdings. As Dzienkowski noted, "If the court in the antitrust case had adopted the findings in Kirkland's report to the API, then the client, Westinghouse, would have lost its lawsuit." This case study is significant not only because it involved a hybrid lobbying litigation positional conflict, but also because the conflict included legal issues (whether oil companies had violated existing laws) and factual issues (whether existing practices were anticompetitive).<sup>35</sup>

The American Clean Energy and Security Act of 2009, also known as the Waxman-Markey Bill,<sup>36</sup> illustrates how an attorney's role as a lobbyist could create a positional conflict in the climate change context. The Waxman-Markey Bill proposed a cap-and-trade program that would have capped the amount of GHGs emitted nationwide and required emitters to obtain allowances for their emissions, either by receiving free allowances from the government or by purchasing them from other parties. Alternatively, facilities could purchase offset credits from sources of emissions that were not subject to the cap but that nonetheless reduced their GHG emissions. Had Waxman-Markey become law, the allocation of free allowances would have had substantial financial impacts on facilities that emit GHGs.

Although the Waxman-Markey Bill did not become law, other limits on GHG emissions have taken effect. For example, the Regional Greenhouse Gas Initiative (RGGI) is a cap-and-trade program established by ten northeastern and mid-Atlantic states.<sup>37</sup> RGGI allows the use of emission offset credits, subject to various

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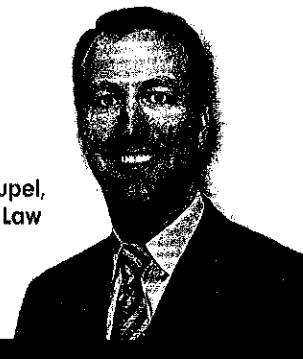
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restrictions. Offset credits must be certified as “real, additional, verifiable, enforceable, and permanent” emissions reductions before being sold.<sup>38</sup>

**Practice pointer.** A positional conflict involving a cap-and-trade bill might take the following form. During the legislative debate on Waxman–Markey or a similar bill, a lawyer representing a cement kiln trade association might seek a high number of free allowances by arguing that cement kilns could not feasibly reduce their GHG emissions. The lawyer might simultaneously seek certification of RGGI offset credits for an emissions-reduction project to be undertaken by a cement kiln outside the RGGI states. To certify the emission–offset credits, the lawyer would have to demonstrate that the emissions reductions would be real, additional, verifiable, enforceable, and permanent. Establishing these criteria for the individual cement kiln likely would be contrary to the lobbying position that the industry requires a high number of free allowances.

### Positional Conflicts Involving Service on Boards or Legislatures

Some attorneys represent clients while simultaneously serving as a member of an administrative board or commission, or as a legislator. Positional conflicts can arise from these separate roles.

The Colorado Bar Association Ethics Committee has opined that it is “improper for an attorney who serves as a member of a Board to represent clients in matters over which the Board has jurisdiction.”<sup>39</sup> Additionally, “in most instances,” it is improper for another lawyer in the board member’s firm to accept employment for clients in a quasi-judicial matter over which the board has jurisdiction.<sup>40</sup> Thus, an attorney may be prevented from serving on a board because his or her firm might represent clients in matters regulated by the board. This could impact attorneys who serve on boards that regulate land use, energy development projects, or other activities related to climate change.

The State Bar of Michigan’s Standing Committee on Professional Ethics concluded that a lawyer–legislator’s duty to the public is a responsibility to a “third person” for purposes of Michigan Rule 1.7.<sup>41</sup> Such a lawyer would face an indirect conflict if his or her responsibilities to a third person—the public—materially limited his or her representation of a client. If a material limitation existed, and if that limitation adversely affected the representation, the lawyer would have to decline or terminate the representation of the client.<sup>42</sup>

The Michigan committee, however, concluded that there is no blanket rule against a lawyer–legislator representing clients whose interests might be affected by legislation. Instead, “[t]he interests of each person to whom the lawyer owes a duty must be balanced on a case-by-case basis.”<sup>43</sup> For example, voting to raise statewide tax rates would not normally create a conflict of interest, because the higher tax rates would not limit the lawyer’s ability to represent clients. However, the result would be different if the lawyer represented a client on a specific tax matter that would be affected by the proposed legislation.<sup>44</sup>

The Vermont Bar Association Professional Responsibility Committee adopted a similar rationale in finding that a lawyer’s service on a quasi-judicial board that promulgates rules and hears administrative appeals could create positional conflicts.<sup>45</sup> The Vermont Committee found that an attorney was allowed to partici-

pate in promulgating, revising, or repealing a rule unless the “particular rule [would] have a substantial impact on the firm’s clients or its practice.”<sup>46</sup>

### Positional Conflicts in Transactional Matters

Positional conflicts can arise in a purely transactional setting, or between litigation and transactional matters. For example, Dzienkowski recounts the occasion when the law firm of Skadden, Arps, Slate, Meagher & Flom LLP (Skadden) repeatedly took the position that so-called “poison pill” arrangements were improper.<sup>47</sup> The firm then began drafting such arrangements and recommending that its transactional clients adopt them to become less attractive takeover targets. The next year, Skadden and its co-counsel argued in an unrelated lawsuit that a poison pill burdened interstate commerce and violated the U.S. Constitution—a position adverse to its transactional clients.<sup>48</sup> Skadden denied that any conflict existed, but the concerns about a conflict of interest garnered media coverage in the *Wall Street Journal*.<sup>49</sup>

### Identifying Positional Conflicts in Climate Change Matters

The existence of a positional conflict depends on whether there is a “significant risk” that the representation of a client will be “materially limited.”<sup>50</sup> The focus is on

the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.<sup>51</sup>

### The Likelihood of Differing Interests

Perhaps recognizing that “it is difficult to make predictions, especially about the future,”<sup>52</sup> Colorado Rule 1.7(a)(2) and Comment [24] ask whether there is a significant risk that the representation will be materially limited. The DC Bar Ethics Committee similarly opined that the existence of a conflict “turns upon the likelihood” that the putative conflict would adversely affect the representation.<sup>53</sup> The “mere possibility” that the outcome of one case will affect another does not trigger a conflict, but a conflict exists if “an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other.”<sup>54</sup>

Weighing the risk that clients’ interests will diverge may be more difficult in the field of climate change than in more established areas of law where the issues are familiar and cases tend to follow well-worn paths. Climate change has placed traditional allies on opposite sides of some issues and brought traditional adversaries together on others.

For example, the national Sierra Club, the Environmental Defense Fund, and the Natural Resources Defense Council endorse the expanded use of natural gas as a so-called bridge fuel, because burning natural gas generates less carbon dioxide than burning coal. Using natural gas as a bridge fuel means more of it must be produced, which requires increased drilling and the use of hydraulic fracturing.<sup>55</sup> Hydraulic fracturing increases gas (or oil) recovery from wells and enables the industry to operate in places where it previously was not possible or economical, such as the Marcellus shale formation in New York and Pennsylvania.<sup>56</sup>

Hydraulic fracturing is controversial because it requires substantial amounts of water and because the fracturing fluid contains low concentrations of heretofore proprietary chemicals. The Sierra Club's New York State chapter and other environmental organizations oppose the expansion of natural gas drilling and the use of hydraulic fracturing.<sup>57</sup> Hydraulic fracturing has thus created a split between traditionally aligned organizations, including the Sierra Club and some of its own chapters.

Such changes in the legal landscape make it harder to identify a significant risk that a lawyer's acts on behalf of one client will materially limit his or her effectiveness in representing another, because the clients' interests are not always clear. Whether such disagreements lead to positional conflicts, and whether those conflicts may be waived through proper consent, will depend on the circumstances.

### Material Limitations on a Representation

To determine whether a representation is materially limited, an attorney must examine "the effect the attorney's interest may have on the client."<sup>58</sup> The "adversity inquiry focuses on the effect the adversity has on the attorney-client relationship, not merely on the fact that adversity exists."<sup>59</sup>

Cases from other jurisdictions and secondary sources illustrate how to apply the material limitation test in practice. The First Circuit, applying a New Hampshire rule against representing a client where the representation "may be materially limited," asked whether the representation could continue "unaffected by divided loyalties" or whether it would be "adversely affected."<sup>60</sup> The Delaware Supreme Court described the test as "whether the lawyer can effectively argue both sides of the same legal question without compromising the interests of one client or the other."<sup>61</sup> The *Restatement (Third) of the Law Governing Lawyers* posits whether the client is "materially and adversely affected."<sup>62</sup> Despite minor differences in the language of these tests, their unifying question is whether the attorney's representation of a client would be adversely affected by the duties owed to another.<sup>63</sup>

### Situations Where Conflicting Representations May Continue

Both concurrent representations of clients in separate matters and joint representations of clients in the same matter may involve clients who disagree on some issues. How then may a lawyer represent more than one client in these situations? Colorado Rule 1.7 and its comments allow lawyers to manage this challenge.

### Small Differences in Interests Do Not Preclude Joint Representation

Under Comment 28 to Rule 1.7, "common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them."<sup>64</sup> *In re Best* illustrates this principle.<sup>65</sup> *Best* arose after a doctor sued a hospital to challenge a restrictive covenant in her employment contract. The doctor then became a member of the Montana Medical Association (MMA), a group that opposes restrictive covenants, in part because she hoped the MMA would share the costs of litigation. On the same day she joined the MMA, her attorney notified defense counsel that they faced a positional conflict because defense counsel represented the MMA on unrelated matters. Plain-

tiff's attorney later complained of this alleged positional conflict to the Montana Office of Disciplinary Counsel (ODC). The ODC dismissed the complaint. As described by the court, "because the Hospital's attorneys represent the association and not the individual members, the pending litigation between [the doctor] and the Hospital did not involve the MMA."<sup>66</sup>

The fact that the MMA was not part of the lawsuit did not negate the possibility of a positional conflict. Positional conflicts are indirect, and by definition, they arise between clients whose cases are separate. *Best* therefore can be read as holding that the hospital's interests and the MMA's interests generally were aligned, although they differed on restrictive covenants. Stated another way, their differing interests on this issue did not create a significant risk that the representation of either would be materially limited by defense counsel's dual role.

### Consent

Positional conflicts may be overcome if all clients consent in compliance with Rule 1.7(b).<sup>67</sup> However, some conflicts, including some indirect conflicts, are nonconsentable.<sup>68</sup> Rule 1.7(b) identifies four elements of proper consent. Consent "should not even be sought" if these elements cannot be met.<sup>69</sup>

1. The lawyer must reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. This belief must be objectively reasonable.<sup>70</sup> As defined by Rule 1.0(i),

"[r]easonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in

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question and that the circumstances are such that the belief is reasonable.

The Colorado Presiding Disciplinary Judge (PDJ) addressed the first element of consentability in *In re Rosenfeld*.<sup>71</sup> Respondent attorney defended a woman and members of her family against claims of civil conspiracy, outrageous conduct, and other misconduct. The woman was the principal actor and the family members learned of her actions after the fact. The attorney offered a defense of necessity for all defendants and argued the lack of strong evidence against the family members, but he stopped short of "pointing the finger of blame" at the woman. There was no dispute that the attorney's representation of the family members was materially limited by his representation of the woman.<sup>72</sup>

The PDJ found that the conflict had been validly waived. Despite expert testimony that a disinterested lawyer would not have allowed the waiver, the PDJ upheld the waiver under the totality of the circumstances. The trial court in the underlying case had approved the waiver, and other lawyers representing some of the family members had agreed that the respondent attorney could represent all defendants. The PDJ expressed doubt that anyone could have convinced the family members to accept separate counsel. The PDJ agreed that "choosing separate counsel for each of [the woman's] family members would have been the wiser choice," but added, "this observation is made with the benefit of hindsight."<sup>73</sup>

The Missouri Court of Appeals has identified several factors to consider in determining whether a lawyer with an indirect conflict

reasonably believes he or she will be able to provide competent and diligent representation.<sup>74</sup> The lawyer must be able to "fulfill his duties to each client of undivided loyalty, zealous advocacy, and independent judgment." In addition, each client must "be free to tell counsel his or her version of the events" without concern that the information would be detrimentally disclosed to another client or that the lawyer would be ethically prohibited from using the information.<sup>75</sup>

2. The representation must not be prohibited by law.<sup>76</sup> As noted in the comments to Rule 1.7, some states forbid a lawyer from representing more than one defendant in a capital case, and some limit the ability of a municipality or other governmental entity client to consent to a conflict of interest.<sup>77</sup>

3. The representation must 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.<sup>78</sup> This requirement is not relevant to positional conflicts. If the representation involves such direct adversity, the conflict is analyzed under Rule 1.7(a)(1).

4. Each affected client must give informed consent, confirmed in writing.<sup>79</sup>

## Strategies for Avoiding and Resolving Positional Conflicts

Lawyers and law firms have a number of available methods for identifying and resolving issue conflicts. Discussion of several primary methods follows.

### *Incorporate Issue Conflict Screening Into Intake Process*

All firms must implement procedures to screen for direct Rule 1.7(a)(1) conflicts. Firms must ensure, for example, that when taking on new business, they do not inadvertently sue an existing client or represent a person or entity that is an opposing party in another matter. There are many software products on the market to assist firms in screening for such direct-adversity conflicts before accepting a new representation.

Screening for positional conflicts is more nuanced. Searching a database containing names of clients and adversaries will not unearth a potential issue conflict. Human judgment is essential in identifying positional conflicts and distinguishing them from more general business adversity or client relations problems.

Accordingly, firms should consider creating lists of matters that will trigger special screening procedures. If, for example, a firm is concerned about positional conflicts arising between certain types of energy industry clients, a practice group leader or screening committee should explore those potential conflicts before the firm agrees to take on matters for such clients.

Before agreeing to jointly represent multiple clients in the same climate change matter, firms should first assess the likelihood that the potential clients' interests might diverge.<sup>80</sup> Joint defense and joint prosecution agreements likewise can create positional conflicts or implied former client conflicts because lawyers assume duties of confidentiality to co-defendants or co-plaintiffs under such agreements.<sup>81</sup>

### *Request and Memorialize Conflict Waivers*

Although, as noted above, some conflicts are nonconsentable, the vast majority of conflicts can be waived by the affected clients.

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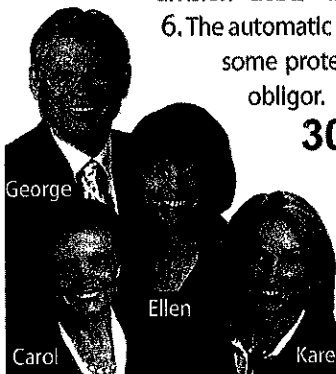
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The key element of a valid and enforceable conflict waiver is informed consent—a new concept under the 2008 version of the Colorado Rules.<sup>82</sup> Informed consent

denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.<sup>83</sup>

It therefore is insufficient to merely ask the client to waive a conflict or include boilerplate waiver language in an engagement letter. The lawyer first must provide sufficient information so that the client understands the risks and alternatives. This will require the lawyer to communicate sufficient facts about the positional conflict to the affected client(s). As noted in the comments to Rule 1.7, it may sometimes be impossible to make the disclosure necessary to obtain consent:

For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.<sup>84</sup>

When valid consent has been obtained, the consent must be confirmed in writing.<sup>85</sup> This means a “tangible or electronic record of a communication” from the lawyer to the client, but it does not require the lawyer to obtain the client’s signature on the writing.<sup>86</sup>

### Erect Confidentiality Walls When Appropriate

“Confidentiality walls” or “screening walls” can obviate imputed conflicts in some circumstances when a lawyer joins a new firm.<sup>87</sup> Screening walls also can serve as an additional measure, combined with informed consent, to address positional conflicts, particularly when the conflict involves two firm clients. A firm can agree to “wall off” a lawyer from a new matter as a condition for obtaining the client’s consent to waive a positional (or other) conflict.

Colorado Rule 1.0, Comment [9], addresses the effective use of lawyer screens. Under this comment, for a firm to erect an effective screen: (1) the screened lawyer must acknowledge the need to protect confidential information in the lawyer’s possession; and (2) other lawyers in the firm who are not working on the matter must be informed that the screening wall is in place and that they may not communicate with the screened lawyer about the matter.<sup>88</sup> Depending on the circumstances, additional measures may be necessary or appropriate, including giving written notice and instructions to the screened lawyer and to other firm lawyers and personnel, denying the screened lawyer from having access to files in the matter, and disseminating periodic reminders to the screened lawyer and all other firm personnel.<sup>89</sup>

### Draft Engagement Letters That Anticipate Issue Conflicts

Lawyers who represent multiple clients in the same matter should draft engagement letters that explain the risks of a common representation and anticipate presently unforeseen positional conflicts. This should, at a minimum, include a discussion of confidentiality, the attorney–client privilege, the possibility that the jointly represented clients might develop conflicting positions, and the likely need for the lawyer to withdraw if an unforeseen conflict cannot be reconciled.<sup>90</sup>

## Conclusion

Positional conflicts of interest are more subtle than direct conflicts and may be more difficult to spot. Fortunately, positional conflicts arise in relatively narrow circumstances, but the emerging field of climate change necessitates vigilance. By considering the possibility of positional conflicts during the client intake process and discussing any potential conflicts early in the client relationship, these conflicts can be successfully avoided or waived.

## Notes

1. Direct conflicts are governed by Colo. RPC 1.7(a)(1).
2. Former client conflicts are analyzed under Colo. RPC 1.9. Positional conflicts involving a former client rarely will disqualify a lawyer: [A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Colo. RPC 1.9, cmt. [2]. Otherwise, after advocating a legal position, a lawyer’s freedom to argue the opposite position would be forever barred. However, a lawyer must decide whether the lawyer’s advocacy on behalf of a former client so undermines his or her credibility or effectiveness that the lawyer has a Colo. RPC 1.7(b)(2) conflict in advocating the contrary position on behalf of a current client.
3. Colo. RPC 1.7(a)(2).
4. See *Burger v. Kemp*, 483 U.S. 776, 808 (1987) (Blackmun, J., dissenting) (discussion of this concern in the direct-conflict context). See also District of Columbia (DC) Bar Op. 265, “Positional Conflicts of Interest in Simultaneous Representation” (April 17, 1996).
5. Colo. RPC 1.7, cmts. [1] and [8].
6. American Bar Association (ABA) Comm. on Ethics & Prof’l Responsibility Formal Op. 93-377, “Positional Conflicts” (Oct. 16, 1993). But see Maine Prof’l Ethics Commission Op. 155 (Jan. 15, 1997) (declining to adopt the ABA position and holding that “an ‘issue conflict,’ without more, is not a conflict of interest”).
7. A conflict of interest exists “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. . . .” Colo. RPC 1.7(b), cmt. [24].
8. DC Bar Op. 265, *supra* note 4.
9. Dzienkowski, “Positional Conflicts of Interest,” 71 *Tex. L.Rev.* 457, 466 (1993).
10. *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir. 1987).
11. *Id.* at 827.
12. *Id.* at 829.
13. *Id.* at 831. *Fiandaca* should be interpreted as posing a positional conflict rather than a direct conflict because the court relied on former New Hampshire Rule 1.7(b). *Id.* at 829-30. This rule, which was identical to the 1993 version of Colo. RPC 1.7(b), governed indirect conflicts.
14. *Williams v. Delaware*, 805 A.2d 880 (Del. 2002).
15. *Id.* at 881.
16. *Am. Elec. Power Co. v. Connecticut*, No. 10-174, 180 L.Ed.2d 435, 444, slip op. at 4 (U.S. June 20, 2011) (holding that the Clean Air Act preempts claims that greenhouse gas (GHG) emissions are a federal common law nuisance); Third Am. Compl., *Comer v. Murphy Oil U.S.A.*, Case No. 05-436, 2006 WL 1474089, (S.D.Miss. April 19, 2006), *mandamus denied*, *In re Comer*, 131 S.Ct. 902 (2011) (initially dismissed by the district court for lack of standing and on political question grounds); *California v. Gen. Motors Corp.*, No. 06-5755, 2007 U.S. Dist. LEXIS 68547 at \*2 (N.D.Cal. Sept. 17, 2007) (dismissed on political question grounds); *Vill. of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863, 868 (N.D.Cal. 2009) (dismissed for lack of standing and on political question grounds), *appeal docketed* No. 09-17490 (9th Cir. Nov. 6, 2009); *Korinsky v. EPA*, No. 05-859, 2005 U.S. Dist. LEXIS 21778 at \*1 (S.D.N.Y. Sept. 29, 2005), *aff’d* 192 Fed.Appx. 71 (2d Cir. 2006) (*pro se* case dismissed for lack of jurisdiction and lack of standing).

17. *Am. Elec. Power Co.*, *supra* note 16 at 442. The federal common law nuisance claims might cease to be preempted if Congress removes EPA's authority to regulate GHGs.

18. The district court dismissed the *Am. Elec. Power Co.* case as presenting nonjusticiable political questions. *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265, 273 (S.D.N.Y. 2005). The Second Circuit reversed and also held that all plaintiffs had standing. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 315 (2d Cir. 2009). The Supreme Court split 4-4 on these issues after Justice Sotomayor recused herself. "Four members of the Court . . . would hold that at least some plaintiffs have Article III standing . . . and, further, that no other threshold obstacle bars review." *Am. Elec. Power Co.*, *supra* note 16 at 445 ("We therefore affirm, by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed to the merits.").

19. See *supra* notes 16 and 18. The procedural history of *Comer* is notable. A panel of the Fifth Circuit reversed on the political question issue, reinstating the case. *Comer v. Murphy Oil*, 585 F.3d 855, 860 (5th Cir. 2009). After seven of the Fifth Circuit judges recused themselves, the remaining nine—the minimum required for a quorum—agreed to reconsider the case *en banc*. *Comer v. Murphy Oil*, 607 F.3d 1049, 1053 (5th Cir. 2010). Quorum was lost before rehearing when an eighth judge recused herself, but the panel's decision nonetheless was vacated and the appeal was dismissed pursuant to a circuit rule governing reconsideration *en banc*. *Id.* at 1054-55. The Supreme Court refused to grant a writ of *mandamus* reinstating the panel decision. *Comer*, *supra* note 16. The case ultimately resulted in a dismissal on political question grounds pursuant to the trial court's ruling.

20. *Vill. of Kivalina*, *supra* note 16 at 868.

21. See, e.g., First Amended Complaint at 2, *Martinez v. Colorado*, No. 11-491 (Boulder Cty. Dist. Ct. May 20, 2011), available at [www.ourchildrenstrust.org/legal-action/lawsuits](http://www.ourchildrenstrust.org/legal-action/lawsuits).

22. *Id.* at 30.

23. Complaint at 37, *Alec L. v. Jackson*, No. 11-2203 (N.D.Cal. May 4, 2011).

24. It is conceivable that a state could intervene in *Alec L.* to support the public trust claims against the United States, while simultaneously defending public trust claims filed against the state. This would heighten the risk of a positional conflict.

25. ABA Model Rule of Prof'l Conduct 1.7, cmt. [9].

26. *Williams*, *supra* note 14 at 881.

27. ABA Formal Op. 93-377, *supra* note 6. *But see* New York (NY) State Bar Ass'n Op. 826 (Sept. 12, 2008) (citing state rule allowing attorneys to take opposing positions when representing different parties in different trial courts).

28. See *Williams*, *supra* note 14 at 881. See also ABA Formal Op. 93-377, *supra* note 6.

29. *Estates Theatres, Inc. v. Columbia Pictures Indus.*, 345 F.Supp. 93, 99 n.13 (S.D.N.Y. 1972) (deposition testimony given by a plaintiff client in a civil antitrust case was detrimental to another client in a separate antitrust case). See also NY Bar Op. 826, *supra* note 27 at § 7.

30. DC Bar Op. 265, *supra* note 4 at § 2.

31. ABA Formal Op. 93-377, *supra* note 6.

32. *Id.*

33. DC Bar Op. 265, *supra* note 4; Dzienkowski, *supra* note 9 at 466-67.

34. Dzienkowski, *supra* note 9 at 466.

35. *Id.*

36. H.R. 2454, 111th Cong. (1st Sess. 2009).

37. The original ten states were Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. See [www.rggi.org/design](http://www.rggi.org/design). New Jersey Governor Chris Christie announced on May 27, 2011 that his state would withdraw.

38. Regional Greenhouse Gas Initiative Model Rule § XX-10.1 (2008). An "additional" emissions reduction is, generally speaking, one that would not occur absent the offset credit.

39. Colorado Bar Association (CBA) Formal Ethics Comm. Op. 97, "Ethical Considerations Where an Attorney or the Attorney's Partner Serves on the Board of a Public Entity" (June 17, 1995), available at [www.cobar.org/index.cfm/ID/386/subID/1818/CETH/Ethics-Opinion-97-Ethical-Considerations-Where-an-Attorney-or-the-Attorney's-Partner-Serves-on-the-/](http://www.cobar.org/index.cfm/ID/386/subID/1818/CETH/Ethics-Opinion-97-Ethical-Considerations-Where-an-Attorney-or-the-Attorney's-Partner-Serves-on-the-/).

40. *Id.* The CBA Ethics Committee has opined that, "especially if the conflict is minor and the firm is large," it may be possible to resolve the conflict by walling off the lawyer and seeking client consent. *Id.*

41. Michigan Standing Comm. on Prof'l Ethics, Op. RI-331 (June 19, 2003).

42. *Id.*

43. *Id.*

44. *Id.*, citing *Restatement (Third) of the Law Governing Lawyers (Restatement)* § 135, cmt. f(i) (2000).

45. Vermont Bar Ass'n Prof'l Resp. Comm. Op. 2003-06 (undated).

46. *Id.*

47. Dzienkowski, *supra* note 9 at 468.

48. *Id.*

49. *Id.* See also Phillips, "Ethical Conflicts in the Recommendation of Poison Pills," 65 *Wash. U. L. Q.* 273 n.3 (1987).

50. Colo. RPC 1.7(a)(2).

51. Colo. RPC 1.7(a)(2), cmt. [8]. *Accord*, *In re Fisher*, 202 P.3d 1186, 1201 (Colo. 2009), quoting Colo. RPC 1.7, cmt. [8] (relying on ABA Model Rule 1.7, comment [8] in interpreting former Colo. RPC 1.7(b)).

52. Various attributed to Mark Twain, Yogi Berra, and the Danish physicist Niels Bohr.

53. DC Bar Op. No. 265, *supra* note 4 at § 2.

54. *Id.*

55. In hydraulic fracturing, water is pumped into a well at high pressures to create small fractures in the shale or rock. Sand or another "proppant" is used to prop open the fractures. Hydrocarbons flow through the fractures into the wellbore, greatly increasing production from the well.

56. See U.S. Energy Information Administration, "U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Proved Reserves 2009" (Nov. 30, 2009), available at [tinyurl.com/37h8b9s](http://tinyurl.com/37h8b9s).

57. Casselman, "Sierra Club's Pro-Gas Dilemma," *Wall St. J.* (Dec. 22, 2009), available at [online.wsj.com/article/SB126135534799299475.html](http://online.wsj.com/article/SB126135534799299475.html); Shogren, "Natural Gas as a Climate Fix Sparks Friction," *Nat'l Pub. Radio* (Feb. 23, 2010), available at [www.npr.org/templates/story/story.php?storyId=123993850](http://www.npr.org/templates/story/story.php?storyId=123993850).

58. *Fisher*, *supra* note 51.

59. *Id.* at 1206 n.6.

60. *Fiandaca*, *supra* note 10 at 830. See also ABA Formal Op. 93-377, *supra* note 6.

61. *Williams*, *supra* note 14 at 881.

62. *Restatement*, *supra* note 44 at § 135.

63. See also ABA Formal Op. 93-377, *supra* note 6 ("If the two matters are not being litigated in the same jurisdiction and there is no substantial risk that either representation will be adversely affected by the other, the lawyer may proceed with both representations"); NY Bar Op. 826, *supra* note 27 at § 3.

64. Colo. RPC 1.7, cmt. [28].

65. *In re Best*, 229 P.3d 1201 (Mont. 2010). Montana Rule 1.7 is identical to Colo. RPC 1.7.

66. *Id.* at 1202.

67. "[T]he question of consentability must be resolved as to each client." Colo. RPC 1.7, cmt. [14].

68. Colo. RPC 1.7, cmts. [14] to [17]; *Union Planters Bank v. Kendrick*, 142 S.W.3d 729, 736 (Mo. 2004). "When 'it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients,' the conflict cannot be cured by consultation and consent." *Id.* at 736, quoting Hazard, Jr. and Hodes, *The Law of Lawyering*, § 10.8 (3d ed., Aspen Publishers, 2011).

69. *Union Planters Bank*, *supra* note 68 at 736.



70. *Fognani v. Young*, 115 P.3d 1268, 1278 (Colo. 2005); Colo. RPC 1.7(b)(1).
71. *In re Rosenfeld*, 180 P.3d 448 (Colo. O.P.D.J. 2007).
72. *Id.* at 455.
73. *Id.*
74. *Horn v. Ray*, 325 S.W.3d 500, 507-08 (Mo.App. 2010). *Horn* involved a direct conflict of interest, but the court noted that its analysis would apply equally to indirect conflicts. *Id.* at 506.
75. *Id.* at 507; NY Bar Op. 826, *supra* note 27.
76. Colo. RPC 1.7(b)(2).
77. Colo. RPC 1.7, cmt. [16].
78. Colo. RPC 1.7(b)(3).
79. *People v. Maestas*, 199 P.3d 713, 717 (Colo. 2009). *See also* Colo. RPC 1.7(b)(4).
80. *See* Colo. RPC 1.7, cmts. [8] and [24].
81. *See, e.g., In re Gabapentin Patent Litig.*, 407 F.Supp.2d 607, 613-14 (D.N.J. 2005) (disqualifying lawyers from being adverse to co-defendants

- who were implied clients under joint defense agreement, and imputing conflict to lawyers' new law firm).
82. Colo. RPC 1.7(b)(4).
83. Colo. RPC 1.0(e).
84. Colo. RPC 1.7, cmt. [19].
85. Colo. RPC 1.7(b)(4).
86. Colo. RPC 1.0(n).
87. *See, e.g.,* Colo. RPC 1.10(e) (allowing screening to avoid imputed conflicts when new lawyer did not substantially participate in the matter at the lawyer's former firm), 1.11(b) (permitting screening to avoid imputed conflicts when lawyer moves from government to private practice), 1.12 (allowing screening to avoid imputed conflicts when a judge, arbitrator, mediator, or law clerk joins a firm).
88. Colo. RPC 1.0, cmt. [9].
89. *Id.* *See generally* *Restatement*, *supra* note 44 at § 124.
90. Colo. RPC 1.7, cmts. [18] and [29] to [31]. ■

## QUESTIONS

- In which of the following areas might positional conflicts arise?
  - litigation
  - transactional
  - lobbying
  - all of the above
- Which of the following statements is incorrect?
  - Positional conflicts are indirect conflicts of interest.
  - Positional conflicts can arise only when a lawyer asserts contradictory positions on a question of law or fact.
  - In litigation, the risk of a positional conflict is heightened when two cases are pending in the same jurisdiction.
  - Confidentiality walls can be combined with informed consent to address positional conflicts.
- There have been conflicting reports as to whether the lifecycle greenhouse gas (GHG) emissions are lower for coal-fired or natural gas-fired generation of electricity. For example, see Zeller, Jr., "Studies Say Natural Gas Has Its Own Environmental Problems," *The New York Times* (April 11, 2011), available at [tinyurl.com/3oy9dzy](http://tinyurl.com/3oy9dzy). If a lawyer separately represents one client that operates U.S. coal-fired power plants and another that operates U.S. natural gas-fired power plants, and the lawyer is asserting contradictory positions on this factual issue, the lawyer most likely would face a positional conflict when:
  - separately representing each client before the EPA regarding compliance with a rule requiring facilities to report their GHG emissions
  - defending each client in unrelated lawsuits against claims that air quality permits issued to separate facilities should each contain more stringent GHG emissions limits
  - lobbying the U.S. Congress regarding a proposed climate change bill that would mandate a certain ratio of coal, gas, and other fuels in the nation's electric generation portfolio
  - petitioning the courts to vacate EPA regulations that limit GHG emissions
- Which of the following is not a factor to consider when evaluating whether the assertion of contradictory positions on a legal issue would create a conflict in litigation?
  - the strength of the lawyer's relationship with each client
  - whether the lawyer might alter his or her position in one case to avoid a conflict with the other
  - the novelty of the issues.
  - the importance of the legal issue to the cases being litigated
- Which of the following statements about conflict waivers is not correct?
  - Consentability typically is determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.
  - A conflict is consentable if the lawyer believes he or she will be able to provide competent and diligent representation for each affected client.
  - Direct conflicts may be waived, but not where one client asserts a claim against another client of the same lawyer in the same litigation.
  - A prompt e-mail to the client documenting that the client gave verbal consent during a phone call satisfies the requirement for consent to be "confirmed in writing."

*Answers on page 89.*

# Test Answers

Below are the answers to the test questions for all of the Climate Change and Clean Energy Law-related articles. The questions appear at the end of each article.

To receive nine CLE credits including one ethics credit, readers must complete the Affidavit of Accreditation and Certification on page 22 and submit it to the Colorado Supreme Court Board of Continuing Legal and Judicial Education.

Credit for reading the October 2011 articles will be granted for two years (through December 31, 2013).

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## The Regulatory Future of Clean, Reliable Energy: Increasing Distributed Generation

Page 31

by Dennis L. Arfmann, Tiffany Joye, and Eric Lashner

### ANSWERS

1. e. FERC regulates both wholesale rates and electric transmission under the Federal Power Act. It also has authority to regulate hydroelectric dams, dams, interstate natural gas transportation, and interstate oil pipeline transportation.
2. b. In Order 2006, FERC adopted small generator interconnection standards for energy resources up to 20 megawatts. The FERC's standards include Small Generator Interconnection Procedures and a Small Generator Interconnection Agreement.
3. d. Recently, FERC issued a Request for Comment Regarding Rates, Accounting and Financial Reporting for New Electric Storage Technologies; a Notice of Proposed Rulemaking relating to compensation for frequency regulation in the Regional Transmission Organizations and Independent System Operators; and an NOI relating to auxiliary services, including accounting changes for electric storage.
4. e. Coal and natural gas provided 68% of centralized electricity generation in 2009.
5. a. Coal was responsible for 1,742 million metric tons of CO<sub>2</sub> in 2009 as a result of electric power generation, which equaled approximately 80% of the total CO<sub>2</sub> emissions from electric power generation.
6. b. Increased problems and delays for interconnection are a potential technical challenge of DG because the infrastructure in place is not yet effective and efficient enough to fully support DG.
7. e. DG results in shorter distribution routes because the electricity is generated at points that are located, on average, nearer to the end consumer. Similarly, DG results in lower electric bills because energy usage and the charges associated with peak demand use from electric utilities are both reduced.
8. c. The PUC is responsible for regulating Colorado's DG law.
9. e. There are many incentives for the integration of DG, including net-metering standards, public benefit funds, feed-in tariffs, and energy storage capabilities.

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## Climate Change and Positional Conflicts of Interest

Page 43

by Chris L. Colclasure, Denise W. Kennedy, and Stephen G. Masciocchi

### ANSWERS

1. d. Positional conflicts in each of these settings are discussed in related sections of the article.
2. b. For a case where the terms of a settlement offer created a positional conflict because the proposed settlement would adversely impact an unrelated client, see *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987).
3. c. Option c poses the greatest risk that the lawyer's representation of one client would be limited by his responsibilities to the other client. A conclusion that either gas- or coal-fired generation has lower lifecycle GHG emissions could be expected to influence Congress to mandate greater use of one fuel and less of the other.
4. a. A strong client relationship might help the lawyer to obtain a waiver, but it does not prevent a conflict.
5. b. The lawyer's belief must be objectively reasonable, and the requirements of Colo. RPC 1.7(b)(2) to (4) must be met.