

# The Legal Profession and Conflicts: Ain't No Mountain High Enough?

By C. Evan Stewart

On the eve of the Civil War, William Henry Seward (one of the 19th century's greatest statesmen), proclaimed that the issue of slavery represented "an irrepressible conflict between opposing and enduring forces." In the legal profession, conflicts of interest may (or may not) be "irrepressible," but they are often the bane of lawyers' existence, specifically for lawyers who practice in large, national or international firms. Notwithstanding that fact (or perhaps because of it), one of the leading professors in the field of professional responsibility and legal ethics has observed that big firm lawyers "are some of the biggest risk-takers that I run into" when it comes to conflicts issues.<sup>1</sup>

As Don Corleone once asked: "How did things ever get this far?" This article will attempt to answer that (and related) question(s).

## Two Leading Cases

To put the current conflicts environment in proper context, two recent, leading cases are a helpful guide. The first involves the Pennie & Edmonds law firm.

### 1. Pennie & Edmonds

In 1980, Pennie & Edmonds (P & E)—a leading intellectual property firm—began representing Pfizer; and in 1992, P & E also started representing Searle. Both Pfizer and Searle were in the forefront of developing a new type of drug: Cox-2 inhibitors (an anti-inflammatory drug); Pfizer and Searle entered into cooperative marketing agreements with respect to a specific Cox-2 drug called Celecoxib (P & E knew of this cooperative arrangement at least as of 1998).

In 1995, P & E began representing the University of Rochester (Rochester) for purposes of prosecuting a patent application for Cox-2 inhibitors before the Patent and Trademark Office (PTO). In March 1998, as P & E was proceeding with its Rochester patent prosecution, the firm circulated an internal conflicts memo which stated that Searle was retaining P & E specifically for Cox-2 patent matters. None of the Rochester partners at P & E responded to that memo; those same Rochester partners knew that Rochester (assuming the PTO granted the patent) intended to sue, or license, potential infringers, including Pfizer (and further knew that Rochester wanted P & E to represent Rochester for those purposes).

In April 2000, as P & E was advising Rochester on prospective litigation strategies, the PTO issued Rochester

a patent for Cox-2; Rochester then brought an infringement action against Pfizer. Not surprisingly, Pfizer and Searle then sued Pennie & Edmonds.

The issue before New York Supreme Court Justice Charles Ramos was whether P & E violated DR 5-105 by representing two different patent clients in connection with related (but not necessarily identical) applications pending before the PTO, with knowledge that it was likely that one client would sue, or attempt to license the other.<sup>2</sup> P & E defended itself on the ground that there was no conflict until "actual adversity" existed between two (or more) clients; it took this position (in the main) because by the time Rochester actually sued Pfizer, P & E was no longer Rochester's counsel.

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Justice Ramos rejected P & E's defense, found that the firm's conduct ran afoul of the "appearance of impropriety" standard, ruled that there had been a violation of DR 5-105(C) by the firm's failure to disclose the multiple representations and failure to obtain client consent to said representations, and reported P & E to the New York disciplinary authorities.<sup>3</sup> One practical impact of the litigation: The law firm of Pennie & Edmonds is no more.<sup>4</sup>

### 2. Duane Morris

Duane Morris is a 600-plus-lawyer firm with 18 offices spanning the globe. The ethical problem facing that firm came into being when Duane Morris found itself on various sides of a medical conglomerate, the McKesson Corporation.

Initially, Duane Morris was hired to represent two McKesson subsidiaries, McKesson Automation Inc. (MAI) and McKesson Medication Management Inc. (MMM), in a bankruptcy proceeding in Pennsylvania. The April 27, 2006 engagement letter prepared by Duane Morris' Harrisburg, Pennsylvania, office and presented to MAI and MMM sought to protect the firm with respect to potential future conflicts. The relevant "advance waiver" language was as follows:

Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representation of parties with interests adverse to McKesson and waives any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson.

We agree, however, that McKesson's consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson's material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson.

A few months later, Duane Morris' Atlanta office was hired to represent two individuals in an arbitration proceeding against a different McKesson subsidiary, McKesson Information Systems (MIS). As soon as MIS learned of opposing counsel, it wrote Duane Morris, demanding that the firm withdraw. Duane Morris refused, citing the advance waiver language of the Pennsylvania retainer letter which allowed for the firm to represent clients in cases adverse to McKesson on matters not substantially related to the businesses of MAI and MMM. Duane Morris also said that if McKesson insisted on its conflicts position, the firm would withdraw from representing MAI and MMM in Pennsylvania.

McKesson's response? It sued Duane Morris in Georgia state court, claiming that the firm's threat to withdraw in Pennsylvania's constituted "extortion," and seeking Duane Morris' disqualification from the MIS litigation. At a hearing at the end of October 2006, the Georgia court was presented with a battle of experts. For McKesson, Professor Clark Cunningham of the Georgia State College of Law testified that Duane Morris' advance waiver provisions were impermissibly broad

under Georgia's rules governing lawyers' professional conduct. Steven Krane, a partner at New York's Proskauer Rose and the current chair of the ABA's Standing Committee on Ethics and Professional Responsibility, testified "at great length" for Duane Morris, contending that Pennsylvania law applied to the MAI/MMM engagement letter, that Pennsylvania's attorney rules permitted a waiver of this kind, and that large conglomerates such as McKesson could not reasonably expect law firms to have a single engagement with one small part of the entity govern its ability to take on unrelated matters for other corporate family members.

After noting that Georgia's and Pennsylvania's advance waiver rules "are very similar," the Georgia court came down on the side of Professor Cunningham and ruled that Georgia law was applicable to the dispute at hand.<sup>5</sup> Georgia's Rule 1.7(a) reads, in pertinent part, "A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client. . . ."<sup>6</sup> To Duane Morris' contention that their conduct was not improper because the matters were unrelated, the court cited to Comment 8 of Rule 1.7, which says that a lawyer cannot act as an advocate against a client the lawyer represents in another matter, even if the other matter is wholly unrelated. As to the written consensual waiver contemplated by Rule 1.7(b), the court ruled that the MAI/MMM engagement letter was "not a knowing waiver that identifies the specific adverse clients and details of adverse representations."<sup>7</sup> In light of those determinations, Duane Morris was ruled to be disqualified in its case against MIS.<sup>8</sup>

## Advance Waivers

As the Duane Morris litigation makes evident, the issue of advance waivers can be a pretty sticky wicket.<sup>9</sup> And yet, law firms regularly use language not dissimilar to that which Duane Morris put in its McKesson retainer letter.<sup>10</sup> So what gives?

Under the revised ABA Model Rules (2002), advance waivers can in fact work—so long as the waiving client gives "informed" consent (Rule 1.7). But what is "informed" consent? According to ABA Comment 22 to Rule 1.7, in order to give such consent a waiving client must "reasonably understand [] the material risk that the waiver entails." Such an understanding may be gleaned, *inter alia*, from: (i) a (more) detailed statement of the types of future engagements that might be undertaken; (ii) a (more) detailed statement of the "reasonably foreseeable adverse consequences" of said engagements; (iii) if the "particular type of conflict" is one with which the waiving client is familiar; (iv) if the waiving client is "an experienced user of the legal services" at issue; (v) if the

waiving client is represented by the other counsel for purposes of giving consent; and (vi) if the consent is limited to prospective engagements unrelated to the current representation.<sup>11</sup>

The ABA's "revised" Rule 1.7 (and Comment 22 thereto) constituted a shift toward being more embracing of advance waivers. And just to make sure that shift was crystal clear, the ABA issued ABA Opinion 05-436 (May 11, 2005), which both withdrew ABA Opinion 93-372 (a more skeptical view of advance waivers) and endorsed "open-ended" waivers where the waiving client is sophisticated or represented by counsel.<sup>12</sup>

Perhaps the *Duane Morris* court did not get the message; it is more likely that the language of the *Duane Morris* engagement letter did not capture enough of the factors set forth in Comment 22 to Rule 1.7.<sup>13</sup> Other courts do appear to be getting the message. Thus, where the waiver has been explicit and the waiving client was sophisticated, for example, courts have shown an increased appetite for approving these provisions.<sup>14</sup>

## A "Hot Potato"

Not so long ago, the spelling of potato was a political issue.<sup>15</sup> Now, the concept of the "hot potato" has entered the lexicon of legal ethics.

The "hot potato" rule stands for the salutary proposition that a lawyer may not drop one client in favor of another client, "especially if it is in order to keep happy a far more lucrative client."<sup>16</sup> Despite the broad prohibition of that rule, the legal profession has been quick (and creative) in finding ways around it.

For example, there is a growing line of cases that allows a lawyer to ethically drop one client in favor of another, if the "dropped" client can be characterized as an "accommodation" client. In the securities litigation arising out of problems at the Rite Aid Corporation,<sup>17</sup> outside counsel to the corporation and the CEO determined after an internal investigation that it could no longer defend the interests of both clients and told the company that the CEO (by now terminated) needed his own lawyer. The court, on the CEO's motion to disqualify his former firm, deemed the CEO to be an accommodation client who had impliedly consented to the outside counsel's primary allegiance to the company.<sup>18</sup>

There is another line of cases, strongly encouraged by bar groups, where courts have applied a flexible approach to "thrust upon" situations.<sup>19</sup> Essentially, the view is that the "hot potato" rule should not kick in where it is not the lawyer who seeks to drop a client to pursue a better client, but rather where the lawyer gets the conflict "thrust upon" her (for example, by a corporate merger). Factors to be used in applying this flexible approach include:

- The prejudice the withdrawal or continued representation would cause the parties (including whether continuing representation of one party would give it an unfair advantage to the detriment of the other party [this is the most important factor]);
- What caused the conflict to occur;
- Whether the conflict was created or is being used to effect an advantage; and
- The costs and convenience to the party required to retain new counsel.

Perhaps the most interesting take on the "hot potato" rule has come from the Northern District of Ohio in *Pioneer-Standard Electronics Inc. v. Cap Gemini America Inc.*<sup>20</sup> There, the New York-based firm of Shearman & Sterling was representing Pioneer on a pending European Commission matter when Cap Gemini retained the firm to defend it against Pioneer in an Ohio federal action. Shearman sought a waiver from Pioneer, but Pioneer refused that request. Shearman then told Pioneer it was dropping the company as a client.

When Pioneer moved to disqualify Shearman as Cap Gemini's counsel in Ohio on the ground that the law firm's professional judgment was likely to be "adversely affected" by the multiple representations, Shearman's defense was that there was no such problem since it had dropped Pioneer as a client before appearing in the Ohio litigation. The court rejected Shearman's position as being in violation of the "hot potato" rule—i.e., it could not drop Pioneer as a client. At the same time, the court also ruled that there was no reason why Shearman could not represent *both* Cap Gemini in Ohio (against Pioneer) *and* Pioneer in Europe "with equal vigor" and without violating client confidences to the detriment of the other.<sup>21</sup>

## Corporate Affiliates and Subsidiaries

One area where the *Duane Morris* court might have focused its attention (but did not) was on whether corporate affiliates and subsidiaries may be considered as different entities for conflicts purposes. According to ABA Opinion 95-390 (January 25, 1995), a lawyer representing a corporate client "is not by that fact alone necessarily barred from representation that is adverse to a corporate affiliate of that client in an unrelated matter." Put another way (and according to 95-390), said lawyer for the corporate client may, under many/most circumstances, sue the client's wholly owned subsidiary without obtaining the client's informed consent.

Well, what is wrong with that? First off, as the vociferous dissents to 95-390 pointed out (the ABA committee split 6-4), this approach has a few flaws: (i) it seems directly at odds with traditional notions of client loyalty;

(ii) it exalts corporate form and structure over corporate substance and reality; (iii) it makes it hard to understand the distinction between direct and indirect economic harm to the corporation; and (iv) it seems to be a trap for non-Fortune 500 companies (i.e., those who just assume lawyer loyalty and are without sufficient resources to hire scores of in-house lawyers to protect against such circumstances).<sup>22</sup> Even more important is the fact that any corporate lawyer proceeding in the fashion envisioned by the 95-390 majority (i.e., suing a subsidiary without, at a minimum, consulting and getting consent from the parent company) would likely be fired by the company's general counsel as soon as she discovered the perfidious act of the outside lawyer.<sup>23</sup>

Courts traditionally have not embraced the view or rationale of 95-390's majority.<sup>24</sup> But increasingly courts are starting to experiment in this area, especially if a subsidiary can be shown to be independent of another corporate entity, so that the transmittal of client confidences and other information would not be presumed.<sup>25</sup> Suffice it to say that predicting how this niche of the conflicts market will play out would be problematic, at best.

## Conclusion

In his seminal article in 1975 on lawyers and their role in the adversarial system, Simon Rifkind passionately expressed his faith in that system, and in the lawyer's singular duty of client loyalty—to represent clients' interests as zealously as legally permissible.<sup>26</sup> To the extent conflicts of interest played a role in Judge Rifkind's article, it was to take strenuous issue with the notion that lawyers might have divided loyalties between clients and non-clients (and/or the general public).

The legal profession thirty-two years later seems a very different place in many respects. The organized bar's imaginative, multi-headed attempts to circumvent or evade existing conflicts of interest rules (as set forth above) appear to be motivated primarily by the economic needs and pressures of an increasingly competitive business. Where this ride will end, who knows. Until then, as Bette Davis once emoted: "Fasten your seat belts, it is going to be a bumpy night!"

## Endnotes

1. Karen Donovan, *When Big Law Firms Trip Over Their Own Clients*, N.Y. TIMES, October 3, 2004, at B5.
2. *The Lawyer's Code of Prof'l Responsibility*, DR 5-105 (hereinafter "Code"); MODEL RULES OF PROF'L CONDUCT R. 1.7.
3. Justice Ramos' decision, rendered on July 14, 2004, seems actually quite restrained, finding only the "appearance of impropriety" and a violation of DR 5-105(C). Given the clear and predictable adversity of P & E's multiple clients, DR 5-105(A) ("A lawyer shall decline proffered employment . . . if it would be likely to involve the lawyer in representing differing interests. . .") would appear to have been the more appropriate ethical rule.
4. A similar, if even more "egregious" case, recently involved Wilson Elser Moskowitz Edelman & Dicker. See *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, No. 602229/99, 2007 WL 2142299 (New York Sup. Ct. March 29, 2007). There, the court granted partial summary judgment for liability insurer Ulico, which sued its former law firm for breach of fiduciary duty by participating in a scheme to transfer Ulico's policy holders to another insurer client of the firm's. Citing DR 5-105, the court ruled that the case involved "conduct by an attorney which fostered the business interests and advanced the competitive position of certain clients not over a former client but over a client which the attorney was still representing." *Id.* at \*6. As a result, the court (i) ordered the law firm to disgorge to Ulico \$3.4 million in fees paid by Ulico, and (ii) allowed Ulico to proceed to trial on other damage claims totaling more than \$100 million. *Id.* at \*15.
5. The court looked to Georgia's Rule 8.5, by which, *inter alia*, the law of the jurisdiction in which the lawyer's conduct took place governs. Query whether Duane Morris made the right tactical decision in choosing a New York based lawyer (regardless of expertise) to face off in a Georgia state court against a local Georgia professor on this issue.
6. GA RULES OF PROF'L CONDUCT R. 1.7(a).
7. The court's cited authority for its ultimate holding was *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998) and *Snapping Shoals Electric Membership Corp. v. RLI Insurance Corp.*, No. 1:05 CV 1714-GET, 2006 WL 1877078 (N.D. Ga. 2006).
8. Interestingly, on March 6, 2007, the trial judge lifted the bar on Duane Morris representing parties adverse to MIS because its representation of MIA and MMM in the bankruptcy proceeding had ended in a proper manner at the conclusion of that proceeding. As such, Rule 1.9, instead of Rule 1.7, was the now-applicable ethics rule; the court, emphasizing the right of clients to choose counsel, then allowed Duane Morris to re-institute its representation. See ABA & BNA, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 132-33 (2007).
9. *Compare Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 558 F.2d 221 (7th Cir. 1978) with *Interstate Prop. v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982); *Unified Sewage Agency of Washington County v. Jelco Co.*, 646 F. 2d 1339 (9th Cir. 1981).
10. See Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000).
11. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22. ALI'S RESTATEMENT is generally in accord with the Model Rule, although it does say that advance waivers are subject to "special scrutiny." The bar in the District of Columbia has long been favorably disposed toward advance waivers. See D.C. Legal Ethics Comm., Op. 309 (Sept. 20, 2001). See also N.Y.C., Op. 2006-1 (Feb. 17, 2006).
12. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-436. Op. 93-372 warned that "no lawyer can rely with ethical certainty on prospective waiver. . ."
13. See also *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796 (N.D. Cal. 2004).
14. See *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp 2d 1100 (N.D. Cal. 2003); *General Cigar Holdings v. Altadis*, 144 F. Supp. 2d 1334 (S.D. Fla. 2001); *St. Barnabas Hosp. v. New York City Health & Hosp. Corp.*, 7 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dep't 2004). Even with this shift, many lawyers experienced in this area continue to be uncertain how uniformly supportive courts will be to advance waivers. See ABA & BNA, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, APRIL SPEAKERS AND AUDIENCE DEBATE

- POSSIBILITY OF MODEL ADVANCE WAIVER FORM 96 (February 23, 2005) (“Advance consents are uniformly being used in large law firms, even though lawyers are doubtful that they’ll hold up.” Comments of Diane Karpman).
15. During the administration of Bush 41, then Vice President Dan Quayle got into hot water when he told a school child how to spell “potatoe”!
  16. *Picker Int’l, Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff’d*, 869 F.2d 578 (6th Cir. 1989); *Santacroce v. Neff*, 134 F. Supp. 2d 366 (D.N.J. 2001); *Argue v. David Davis Enter, Inc.*, No. Civ.A. 02-9521, 2004 WL 2480836 (E.D.Pa. Nov. 4, 2004).
  17. *See In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 649 (E.D. Pa. 2001).
  18. *See also Universal City Studios, Inc. v. Reimerde*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000) (court allowed adverse representation to accommodation client, notwithstanding the affirmance of the “hot potato” rule). And while ALI’s RESTATEMENT endorses the concept of an accommodation client, not all commentators are enthusiastic. *See* Douglas R. Richmond, *Accommodation Clients*, 35 AKRON L. REV. 80 (2001) (critical of creating a new breed of client that is unnecessary, confusing, and imprudent).
  19. *See Argue v. David Davis Enter, Inc.*, No. Civ.A. 02-9521, 2004 WL 2480836 (E.D. Pa. Nov. 4, 2004).; *Univ. of Rochester v. G.D. Searle & Co.*, No. 00-CV-6161L B., 2000 WL 1922271 (W.D.N.Y. 2000); N.Y.C., Op. 2005-5 (June 2005); D.C. Legal Ethics Comm., Op. 272 (May 21, 1997). ALI’s RESTATEMENT also recognizes the “thrust upon” conflict exception to the “hot potato” rule.
  20. No. 1:01CV2185, 2002 WL 553460 (N.D. Ohio 2002).
  21. The court determined that (in Ohio, at least) there “is not a per se rule against an attorney representing clients adverse to each other.” *Id.*
  22. In one of the dissents, a devastating attack on the majority’s view used Ford Motor Company’s structure (it would be okay to sue Jaguar, a subsidiary—this would cause only an “indirect” harm; it would not be okay to sue Escort, a division—this would cause a “direct” harm) to highlight the highly dubious logic of points (ii) and (iii). ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-390.
  23. The 95-390 majority did point out that “as a matter of prudence and good practice,” it would in fact make sense to check with the client prior to taking on a representation adverse to a corporate affiliate. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-390.
  24. *See Strategen Dev. Corp. v. Heron Int’l N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1991); *Cincinnati Bell, Inc. v. Anixter Bros.*, No. C1-93-0871, 1994 WL 1877173 (S.D. Ohio 1994).
  25. *See J.P. Morgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002); *Goodlett v. Paul Revere Life Ins. Co.*, No. C97-0089, 2000 WL 34027916 (N.D. Iowa 2000). And some academic commentators have endorsed loosening up the “unduly formalistic” approach to conflicts vis-à-vis complex corporate structures. *See* Ronald D. Rotunda, *Conflict Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655 (1997); T. Morgan, *Suing Current Clients*, 1 J. INST. STUDS. LEG. ETHICS 8 (1994). *See also* MODEL RULES OF PROF’L CONDUCT R. 1.7, cmt. 34 (2004)..
  26. 30 THE RECORD 534 (1975).

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