

Ethics Potpourri

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Overview: Paper Covers More Than This Talk Will

- Implied Attorney-Client Relationships: Three recurring fact patterns.
- ² Competently Patenting in an Age of Accelerated Innovation, Increased Hostility to Patents, Lower Damages, and Less Equitable Relief.
- A Potpourri of Concluding Observations and Concerns.

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Choice of Law for Ethics

- Rules vary in text and/or interpretation, and PTO construes its reach broadly.
- On today's issues, approaches are generally consistent but some rules require informed consent to a conflict be *in writing*, not merely confirmed in writing as PTO rules do.
- In some circuits, even if district court local rules adopt state rules they do not control, and a lawyer can be disqualified even if conduct is ethical under state rules. (5th, 10th)
- Some courts take very strict view of conflicts, others deny disqualification unless the conflict "taints" a proceeding.

Big Picture: Each Client Limits a Firm's Ability to Represent Other Clients

- Generally, absent informed consent confirmed in writing, a lawyer in a firm:
 - Cannot represent a client in a matter adverse to a current client of the firm, even if unrelated;
 - Cannot represent another client adverse to former client of the firm in a substantially related matter;
 - Cannot represent another client if lawyer's obligations to anyone materially limit the lawyer's representation of that client.

The Impact on New Business of.... Having Business

- Firm can't clear conflicts (is the opponent a former client or not?) so either turns down matter or client, uncertain of whether firm will be disqualified, goes elsewhere.
- Client is angered when it sees your firm do something it believes is disloyal and goes somewhere else for existing or future work.
- Firm wants to sue a former client for fees:
 - Sends demand letter;
 - Former client points out conflict (or other alleged malpractice); and so
 - Firm foregoes collection because in many states even *an undamaged client* can sue for a serious conflict of interest: remedy is fee disgorgement!

What to do

- ☐ Identify ending event in engagement letter ("this engagement will end upon issuance of our representation of you on any application claiming priority to this application.")
- ☐ Close files.
- ☐ Send "that was great and we'd be happy to represent you again someday" emails.
- ☐ Stay current on AR (so you don't have to demand fees).
- ☐ Just say no:
 - ☐ Red flag: you're going to be their 2d, 3d, etc... lawyer.
 - ☐ Red flag: big client promises lots of work and gives you one small job.

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Title search: Ethics Potpourri for IP Practitioners (REPLAY)

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