Positional Conflicts: Who Says You Can't Have It Both Ways?

By Andrew Altschul

Back before the dawn of the Internet, in a time when cutting and pasting actually involved scissors and glue, lived a breed of lawyers known as "generalists." Generalists touted their ability to handle not only any matter, but any side. Give them a case and they were prepared to argue either side *and* win.

The patron saint of generalists is arguably Senator Matthew Hale Carpenter, who earned praise when, during a two-week span in 1872, he argued opposite sides of the same legal issue before the U.S. Supreme Court on two separate matters.

But as typewriters made way for computers, and cell phones morphed into BlackBerrys, generalists found themselves brought to brink of extinction by the "specialist." Today most lawyers not only limit their practice to a particular area of law; now most also specialize in a particular side. Indeed, today, Senator Carpenter might be ethically barred from handling both cases he argued before the Supreme Court because of what is now termed an "issue" or "positional" conflict of interest.

When may a law firm argue opposite sides of an issue in two unrelated cases?

The terms "issue" and "positional" are used interchangeably to represent a conflict situation in which a lawyer, or law firm, is representing different clients on unrelated matters but arguing opposite sides of the same issue in those separate cases.

For the generalist, this is not a concern—it's what a lawyer does. For the specialists, however, this is an affront to their identity. In labor and employment law, for example, many believe you either represent the interests of employers or you represent the interests of employees. You can't have it both ways.

Or can you?

Labor and employment law is one area of specialization that has historically been defined by side. But as employment law, rather than the more inherently adversarial labor law, has grown to dominate the practice area, lawyers are increasingly representing both employers and employees. Indeed, in 1987, the first ethical opinion to address a positional conflict involved an employment lawyer arguing opposite sides of an employment law issue in two separate matters before the Ninth Circuit. Arizona Ethics Opinion No. 87-15. (The court concluded that any potential conflict was cured by consent from both parties.)

But playing both sides is not the only way this conflict can arise. Even in firms that specialize in the side they represent, there are many ways the conflict might present itself. Below are some examples:

Noncompetition agreements. Client A wants its agreement enforced, but Client B wants a competitor's, with a similarly worded noncompete, invalidated.

Statute of limitations. When defending employment law tort claims, employer-side lawyers will argue to strictly construe these statutes. General business litigators in the same firm, however, might seek to expand them. Employee lawyers could also find themselves in the same bind when dealing with counterclaims.

Arbitration agreements. A lawyer representing an executive might want to argue for enforcement of an arbitration agreement, but that same lawyer or law firm might want to argue against such agreements for lower-level or other employees.

Union as employer. Union lawyers often find themselves representing union employees on employment matters but also are called upon to provide (sometimes contrary) advice to the union in its role as an employer.

The key executive. When a CEO with whom an employer-side lawyer has had a long-standing relationship needs help with a contract for her new employer, firm internal rules of not representing employees often disappear without consideration of the positional conflict issue.

No ethical rule directly addresses positional conflicts. ABA Model Rule of Professional Conduct 1.7(a)&(b), however, limits representation of a client "if the representation of that client will be directly adverse to another client" or when representation "may be materially limited by the lawyers' responsibilities to another client or to a third person." Comment 9 of that model rule and Ethical Advisory Opinions issued by several states also discuss conflicts of this nature. What have emerged are several different conclusions: some authorities ban positional conflicts under all circumstances, some permit it under all circumstances, some permit it with written consent, and some apply multifactor tests.

But despite the wide variety of ways that position conflicts are handled throughout the country, there are a few basic principles to consider:

- Positional conflicts only relate to current clients. All authorities agree that a lawyer or firm can take alternative positions in future matters.
- No authority suggests that firms must track issues to avoid positional conflicts, and several jurisdictions recognize that this is a practical impossibility.
- Actual knowledge of a potential issue should cause the prudent lawyer to evaluate the situation, whether or not the jurisdiction finds such conflicts unethical.
- The impact of the conflict turns on a variety of factors. Most important is the likely precedential impact, if any, of the decisions in one case on the outcome of the other.
- Even if the decisions do not have any direct precedential value, lawyers should consider other negative impacts, such as the credibility of the lawyer in arguing both sides to the same judge or court, or whether the lawyer would be compelled (consciously or subconsciously) to favor one client over another.
- If a conflict or sufficient potential conflict exists, the lawyer should disclose the conflict and either seek consent to proceed (if permissible in the jurisdiction) or withdraw.

Views on positional conflicts, however, will always be intertwined with how one answers the fundamental question of what makes the best advocate. Is it ideological passion? Or broad perspective? Or maybe, just maybe, you can have it both ways. ■

Andrew Altschul (*andrew@baaslaw.com*) is a partner at Buchanan Angeli Altschul & Sullivan in Portland, Oregon, representing both business and individuals. He is employee-side chair of the Section's Ethics and Professional Responsibility Committee.