

Antitrust Counsel Beware: Divergent Disqualification Decisions Raise Questions About Positional Conflicts

By Lee F. Berger, Panteha Abdollahi, and Andrew R. Booth

Modern antitrust litigation typically involves a web of parties: named class representatives, unnamed class members, opt-out or “direct action” plaintiffs (usually large corporations), state attorneys general, third parties (subpoena targets and amici) and defendants (also usually large corporations). Antitrust attorneys entering the fray usually are careful to address standard conflicts issues: ensuring that no directly adverse party is a client of the firm, getting waivers and establishing ethical walls when a conflict can be resolved, and helping the client to find alternative, unconflicted counsel when it cannot. But increasingly, large corporate litigants are opting out of class actions and filing their own separate direct action lawsuits, creating an additional layer of potential conflicts questions. Such opt-out cases bring to the fore the issue of whether a “positional conflict” constitutes an ethical rules violation and supports disqualification of counsel.

A positional conflict question may arise in the following situation: (1) a law firm represents Client A in an action; (2) another of the law firm’s clients (Client B) is adverse to Client A in a separate but related action, for example, in the same multidistrict litigation; and (3) the law firm does not represent Client A or Client B in the related action. Nonetheless, the positions and arguments the law firm advances on behalf of Client A may be used against Client B in the related action. If the positional conflict is determined to violate the ethical rules and warrant disqualification, it may hinder many large law firm antitrust litigation practices and clients may face limitations in their choice of counsel. Conversely, if there is no ethical violation it may provide current clients more comfort that their attorneys will not take positions in any related litigation that may disadvantage them and may enhance their (and the public’s) perception of attorney loyalty.

Antitrust counsel face a convoluted and unpredictable task in assessing whether positional conflicts may be grounds for disqualification, especially in light of differing jurisdictions’ conflict rules coupled with the absence of clear guidance from courts or ethics rules. Two recent cases address this potential positional conflict situation and highlight the ambiguities: *In re Rail Freight Fuel Surcharge Antitrust Litigation* and *Arrowpac Inc. v. Sea Star Line, LLC*.¹ The *In re Rail Freight* court found no conflict because the matters were separate, even though related. In contrast, the *Arrowpac* court found the related nature of the cases did create a conflict and disqualified the defense firm. The cases turned on their unique factual scenarios and the courts’ analyses of a variety of policy factors, thereby leading to different outcomes. But there was a similarity between the two decisions in that both courts emphasized the issue of loyalty and its interplay with positional conflicts.

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Lee Berger is Of Counsel, and **Panteha Abdollahi** and **Andrew Booth** are Associates in the Antitrust and Competition Group at Paul Hastings LLP. The authors thank **Eve Coddon**, **Donald Morrow**, **Holly House**, **Jeremy Evans**, and **Sean Unger** for assistance with this article.

¹ *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL Dkt. No. 1869, 2013 WL 4714334 (D.D.C. Sept. 3, 2013); *Arrowpac Inc. v. Sea Star Line, LLC*, Nos. 3:12-cv-1180-J-32, 3:12-cv-1181-J-32, 3:12-cv-1182-J-32, 3:12-cv-1183-J-32, 2013 WL 5460027 (M.D. Fla. Apr. 30, 2013).

The divergent conclusions reached by the courts on when a positional conflict sufficiently hinders counsels' loyalties so as to warrant disqualification create uncertainty for practitioners and clients alike. This is further exacerbated by the often multidistrict nature of antitrust proceedings and the differences in jurisdictions' conflict laws. It is essential that parties and counsel be aware of these decisions and ambiguities in making their conflicts determinations.

To help resolve the uncertainty, we believe the American Bar Association and state bar associations should consider providing additional comments on their ethical rules regarding whether the types of positional conflicts at issue in those cases violate the various rules of professional conduct, particularly in multidistrict or related antitrust proceedings. While their comments would not bind courts, they would serve as persuasive authority for judges confronting the issue as a matter of first impression. They also would provide greater guidance to practitioners and clients facing a positional conflict question. Until the bar associations promulgate that guidance or new court decisions further resolve these conflicting opinions, antitrust lawyers should be aware of these developments and consider taking measures to minimize the risk of disqualification arising from positional conflicts.

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Conflict of Interest Rules and Disqualification

There are a variety of sources of conflict-of-interest rules, which differ from state to state and also between state and federal courts within the same state.² Generally, a state's conflict-of-interest rules govern cases in a federal court in that state, including when the federal court presides over multidistrict litigation with cases originating around the country.³

But state rules are not the sole authority governing conflicts of interest in federal court, and federal courts may look to ABA model rules and ethical canons—in addition to the applicable state law—in deciding whether a conflict exists.⁴ Assessing conflicts becomes, necessarily, an unpredictable exercise that varies based on the court and the jurisdiction, a problem exacerbated by the multijurisdictional practices prevailing in antitrust class actions. Furthermore, once courts conclude that a conflict exists and move to considering disqualification, they often assess an array of factors, including the prejudicial impact of granting or denying disqualification, any tactical reasons prompting the motion, and public policy considerations.⁵

Rail Freight Finds No Conflict and Denies Disqualification

In *In re Rail Freight Fuel Surcharge Antitrust Litigation (Rail Freight)*,⁶ District Judge Paul L. Friedman found that counsel should not be disqualified for an alleged positional conflict of interest. At issue in *Rail Freight* was Latham & Watkins LLP's representation of two parties on opposite sides of related litigations. Latham represented Union Pacific Railroad Company in dozens of matters.⁷ Latham

² See, e.g., *In re American Airlines, Inc.*, 972 F.2d 605, 609–10 (5th Cir. 1992).

³ See, e.g., *In re Cnty. of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000).

⁴ *In re American Airlines*, 972 F.2d at 610.

⁵ RONALD E. MALLEN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 17:15 (ed. 2011); *Kevlik v. Goldstein*, 724 F.2d 844, 848 (1st Cir. 1984); *Copantitla v. Fiskardo Estiatorio, Inc.*, 788 F. Supp. 2d 253, 281 (S.D.N.Y. 2011). Some courts, in certain situations, apply a per se rule of disqualification. See, e.g., *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978).

⁶ *In re Rail Freight*, 2013 WL 4714334.

⁷ *Id.* at *1.

also represented Oxbow Carbon & Minerals LLC in transactional matters, though none related to Oxbow's relationship with Union Pacific or its rail freight needs.⁸

In 2007, direct purchasers of rail freight services launched class actions alleging a price-fixing conspiracy by the four largest rail freight carriers, including Union Pacific.⁹ These class actions were centralized in the *Rail Freight* multidistrict litigation. Oxbow later filed a separate action against Union Pacific, making the same price-fixing allegations (the *Oxbow* case).¹⁰ Latham served as Union Pacific's counsel in the *Rail Freight* class cases but not in the *Oxbow* case.¹¹ When Latham refused Oxbow's request to withdraw as counsel for Union Pacific in the class cases, Oxbow fired Latham in other matters and filed a motion to disqualify Latham from representing Union Pacific in the class cases, even though Oxbow was not a named party to the class cases.¹²

Oxbow argued that Latham's representation of Union Pacific in the class cases violated Rule 1.7(b) of the D.C. Rules of Professional Conduct. Rule 1.7(b)(1), which provides:

[A] lawyer shall not represent a client with respect to a matter if: (1) That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.¹³

Oxbow contended that the class cases and the *Oxbow* case are the "same matter" and thus Latham's representation of Union Pacific in the class cases would be directly adverse to Oxbow in the *Oxbow* case: Latham might make motions for Union Pacific in the class cases that, if successful, Union Pacific would use as precedent against Oxbow in the *Oxbow* case, and Union Pacific would use work product that Latham developed for Union Pacific in the class cases against Oxbow in the *Oxbow* case.¹⁴

The court rejected Oxbow's argument, and found no conflict existed. In so doing, the *Rail Freight* court relied on *Sumitomo Corp. v. J.P. Morgan & Co.*¹⁵ In *Sumitomo*, Paul Weiss represented plaintiff Sumitomo against J.P. Morgan in one case but declined to represent Sumitomo in a separate but related case against Chase Manhattan Bank because Chase was Paul Weiss's client.¹⁶ At Chase's request, the court consolidated the two cases filed by Sumitomo for pretrial purposes.¹⁷

⁸ *Id.*

⁹ *Id.* at *1–2.

¹⁰ *Id.* at *2.

¹¹ *Id.* at *3. Union Pacific had asked Latham to defend it in the *Oxbow* case, but Latham declined, stating it "did not want to be adverse to a valued client." *Id.*

¹² *Id.* at *4.

¹³ Paragraph (c) of Rule 1.7 provides that conflicts can be waived if all potentially affected clients provide informed consent.

¹⁴ *In re Rail Freight*, 2013 WL 4714334, at *8; Oxbow Reply to Opp. to Mot. to Disqualify, MDL 1869, Dkt. 642.

¹⁵ Nos. 99 Civ. 8780, 99 Civ. 4004, 2000 WL 145747, at *4 (S.D.N.Y. Feb. 8, 2000).

¹⁶ *Sumitomo*, 2000 WL 145747, at *1–2. During its investigation of the matter for Sumitomo, Paul Weiss discovered that several of its current clients, including Chase, were among Sumitomo's potential adversaries. Paul Weiss immediately informed Sumitomo that it could not evaluate potential claims against those clients (including Chase) or otherwise represent Sumitomo in connection with any future litigation against those clients. *Id.* at *1. Sumitomo asked Paul Weiss to seek a waiver from Chase permitting Paul Weiss to evaluate potential claims against Chase. Pursuant to this request, Paul Weiss sought a waiver from Chase and, when that request was denied, Paul Weiss advised Sumitomo to retain other counsel for any claims against Chase. *Id.* at *1–2.

¹⁷ *Id.* at *1, *5.

Chase then moved to disqualify Paul Weiss because Paul Weiss's representation of Sumitomo against J.P. Morgan "would adversely affect Chase."¹⁸

Applying the Second Circuit's rules that "disqualification is appropriate only if there is a significant risk that an attorney's conduct will taint the trial" and "that a lawyer owes a duty of undivided loyalty to his client that precludes him from doing anything adverse to a client's interests," the *Sumitomo* court found the per se rule against simultaneous representation inapplicable.¹⁹ The court reasoned that Paul Weiss did not represent one client in litigation against another current client, nor would Paul Weiss try to establish Chase's wrongdoing or seek a judgment against its current client. The fact that Paul Weiss could potentially advance positions that "if adopted, would prejudice an argument that Chase was advancing in a separate case" did not create direct adversity.²⁰ The court rejected the notion that consolidation of the two cases would alter this conclusion: "no conflict arises because consolidation does not merge separate lawsuits into a single action and does not make parties in one suit parties in another."²¹

The court further explained there was no danger that Paul Weiss's representation of Sumitomo would adversely impact its representation of Chase in completely unrelated matters or impugn the court's confidence in the vigor of client representation.²² As the court stated:

[W]e are not dealing with an individual client who has placed his trust in an individual lawyer for a substantial period of time. Chase is a huge financial institution and Paul Weiss is but one of many law firms with which it does business. Moreover, the amount of business is not substantial given the size of the two institutions.²³

The court's finding of a lack of positional conflict sufficient to warrant disqualification was thus driven, at least in part, by its analysis of client loyalty considerations.

Following *Sumitomo's* holding, the *Rail Freight* court noted that while "Latham's defense of [Union Pacific] in the [class cases] may involve the development of arguments or the taking of positions that ultimately establish negative precedent for Oxbow in" the *Oxbow* case, they are nevertheless distinct matters for purposes of Rule 1.7(b)(1). It also found no evidence that Oxbow had shared confidential information with Latham that Latham could use in its representation of Union Pacific, and therefore, Latham's representation of Union Pacific in the class cases provided "no reason to doubt Latham's loyalty to either [Union Pacific] or Oxbow in the matters in which Latham represents those clients."²⁴ Because the class cases and the *Oxbow* case were separate, and there was no reason to believe that Latham had breached the ethical rules regarding loyalty or confidentiality, the *Rail Freight* court refused to disqualify Latham. Additionally, and consistent with virtually all courts that have considered this issue, the court rejected Oxbow's argument that Latham could not represent Union Pacific in the class cases because Oxbow was an unnamed class member, as unnamed class members are not "parties" for conflicts purposes.²⁵

¹⁸ *Id.* at *2.

¹⁹ *Id.* at *3–4.

²⁰ *Id.* at *4.

²¹ *Id.* at *5.

²² *Id.* at *4.

²³ *Id.*

²⁴ *In re Rail Freight*, 2013 WL 4714334, at *10.

²⁵ *Id.* at *9–12 (collecting cases); see Model Rules of Prof'l Conduct R. 1.7(a)(1) cmt. 25.

The *Arrowpac* Court Concludes Conflicts Justify Disqualification

In contrast to *Rail Freight*, Magistrate Judge James R. Klindt in *Arrowpac Inc. v. Sea Star Line, LLC* disqualified counsel based on a positional conflict existing in separate but related actions.²⁶ The court focused on the practical implications that would arise from allowing simultaneous representation of clients with adverse positional interests, relying heavily on the purpose of the disqualification rules in safeguarding loyalty as a feature of the attorney-client relationship.

In October 2012, after opting out of a class action, Nestlé USA, Inc. and YRC Worldwide filed a price-fixing suit against Sea Star Line, LLC, alleging a price-fixing conspiracy related to the prices of ocean transportation shipping services. Nestlé and YRC filed that action, known as *Arrowpac*, simultaneously with three other direct-action plaintiffs' antitrust cases against Sea Star in the Middle District of Florida.²⁷

Sea Star selected Baker & Hostetler LLP to represent it in the three non-*Arrowpac* cases. Baker did not represent Sea Star in *Arrowpac* because Baker simultaneously represented Nestlé and YRC in unrelated environmental and labor law matters, and Nestlé and YRC did not grant Baker a conflict waiver.²⁸ On January 25, 2013, Nestlé and YRC, although not plaintiffs in the non-*Arrowpac* cases, filed motions to disqualify Baker from representing Sea Star in any of the four pending antitrust suits.²⁹

Nestlé and YRC argued that Baker's representation of Sea Star in the non-*Arrowpac* cases violated Florida Rule of Professional Conduct 4-1.7, which states, in pertinent part: "[A] lawyer shall not represent a client if . . . the representation of 1 client will be directly adverse to another client."³⁰ According to Nestlé and YRC, Baker could not defend Sea Star in the non-*Arrowpac* cases "without taking positions that are directly and materially adverse to Nestlé and YRC."³¹ Sea Star countered that disqualification was not warranted because Baker did not appear in the *Arrowpac* case—the only case in which Nestlé and YRC were parties—and thus there could be no direct adversity. Rather, at most, there was a positional conflict, which Sea Star contended would not create a conflict under the ethical rules. Sea Star also asserted it would be prejudiced

²⁶ *Arrowpac*, 2013 WL 5460027.

²⁷ U.S. District Court, Middle District of Florida, Case Nos. 3:12-cv-1180-J-32JBT, 3:12-cv-1181-J-32JBT, 3:12-cv-1182-J-32JRK, 3:12-cv-1183-J-32MCR. The cases all were assigned to Judge Timothy Corrigan. Case No. 1180 (Dkt. 43), Case No. 1181 (Dkt. 12), Case No. 1182 (Dkt. 5), Case No. 1183 (Dkt. 13).

²⁸ *Arrowpac*, 2013 WL 5460027, at *2, *5–6. The opt-out plaintiffs originally had filed suit against Sea Star in South Carolina. *Id.* at *3. Sea Star, with some assistance from Baker, filed two motions to dismiss while the cases were pending in South Carolina. *Id.* at *4–5. Before a decision was rendered, on October 29, 2012, the plaintiffs voluntarily dismissed their claims and re-filed their actions in Florida. *Id.* at *6. In their briefing related to disqualification, Nestlé and YRC highlighted that Baker's involvement in the motions to dismiss showed a lack of loyalty to its existing clients. Mot. to Disqualify Baker & Hostetler, LLP as Counsel for Sea Star Line, LLC, Case No. 12-1180, Dkt. 71. Sea Star disputed this characterization. Opp. to Mot. to Disqualify Baker & Hostetler, LLP as Counsel for Sea Star Line, LLC, Case No. 12-1180, Dkt. 81. But it was undisputed that Baker did some research related to the dismissal motions. *Arrowpac*, 2013 WL 5460027, at *5.

²⁹ Motion to Disqualify Baker & Hostetler, LLP as Counsel for Sea Star Line, LLC, Case No. 12-1180, Dkt. 71.

³⁰ *Arrowpac*, 2013 WL 5460027, at *2, *8. Florida's Rule 4-1.7 is modeled after the ABA Model Rules of Professional Conduct 1.7(a). *See* Model Rules of Prof'l Conduct R. 1.7(a)(1). Florida maintains an exception to the rule against simultaneous representation if the lawyer reasonably believes he/she can provide competent and diligent representation, the representation is not prohibited by law, the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal, and each client gives informed written consent. Fla. R. Prof. C. 4-1.7(b).

³¹ Motion to Disqualify Baker & Hostetler, LLP as Counsel for Sea Star Line, LLC, Case No. 12-1180, Dkt. 71, at 6.

without the right to choose its counsel, who had defended Sea Star in its antitrust litigations for over 20 years and had special knowledge of the ocean transport litigation.³²

The *Arrowpac* court granted the motion for disqualification “[g]iven the unique facts present- ed” and the litigation’s history.³³ Like the *Rail Freight* court, the *Arrowpac* court considered *Sumitomo*, but here the court distinguished *Sumitomo*, despite acknowledging the case’s “factu- al similarities.”³⁴ Instead, the court interpreted Rule 4-1.7 as encompassing “any representation directly adverse to the interests of a current client.”³⁵ It reasoned that Sea Star’s next move in the cases would be to file a joint motion to dismiss, and “the arguments formulated and advanced by Baker’s lawyers [in the non-*Arrowpac* cases] could result in the dismissal of the case brought by Nestlé and YRC.”³⁶ Accordingly, the practical effect of this would be adversity that is “direct and it is material,” as Rule 4-1.7 prohibits.³⁷ The court further reasoned that even if separate motions to dismiss were filed in the four cases, Baker (or Sea Star’s general counsel) inevitably would share research and analysis with Sea Star’s counsel in *Arrowpac*, thereby acting against Nestlé’s and YRC’s interests.³⁸ The conflicts complications that would arise in the course of combined dis- covery also concerned the court.³⁹

Applying a different standard than the *Sumitomo* court used,⁴⁰ the *Arrowpac* court ruled dis- qualification warranted based on the purposes of Florida’s disqualification rules: protecting client confidences and “to safeguard loyalty as a feature of the attorney-client relationship.”⁴¹ While not- ing it was satisfied there was no risk of Baker’s improperly using client confidences in the litiga- tion, the court concluded “Baker’s loyalty to Nestlé and YRC[] would be seriously questioned if Baker were allowed to proceed as proposed.”⁴² Similarly, the court doubted Baker’s ability to vig- orously represent Sea Star in the case while maintaining all client loyalties. The court found the prejudice of disqualification to Sea Star “minimal” given that the cases were in their infancy and “Sea Star has other counsel who are well familiar with the [ocean transport] litigation.”⁴³

Counsel Should Tread Carefully

The inconsistency between *Arrowpac* on the one hand, and *Rail Freight* and *Sumitomo* on the other, creates concern for antitrust litigants and their counsel. The complexity arises here due to differing interpretations of how far an attorney’s duty of loyalty goes, an almost metaphysical question that is influenced both by a particular judge’s and practitioner’s philosophy on the nature

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³² Opp. to Mot. to Disqualify Baker & Hostetler, LLP as Counsel for Sea Star Line, LLC, Case No. 12-1180, Dkt. 81, at 7–19.

³³ *Arrowpac*, 2013 WL 5460027, *2.

³⁴ Compare *Arrowpac*, 2013 WL 5460027, at *8, with *In re Rail Freight*, 2013 WL 4714334, at *7–8. The *Arrowpac* court believed the proce- dural scenario in *Sumitomo* differed, in that the *Sumitomo* court made its decision without a “rich [case] history” and absent a “future pic- ture of the practical implications” of allowing Paul Weiss to represent *Sumitomo*. *Arrowpac*, 2013 WL 5460027, at *9–10.

³⁵ *Id.* at *10.

³⁶ *Id.* Despite relying on this analysis for disqualification, the court nonetheless asserted it was not basing its disqualification order on the ground that Baker was “simply taking antagonistic legal positions.” *Id.* at *10 n.17.

³⁷ *Id.* at *10.

³⁸ *Id.* at *11.

³⁹ *Id.*

⁴⁰ *Id.* at *12 n.19.

⁴¹ *Id.* at *12.

⁴² *Id.*

⁴³ *Id.*

of the attorney-client relationship and the specific facts of any case. Although we do not take a position on which court's interpretation of the duty of loyalty may be correct under the specific facts of each case, we believe the uncertainty creates a minefield for antitrust attorneys engaged in complex antitrust litigation. As one court noted, "Modern litigation . . . often involves multinational companies and multinational law firms among whom conflicts occasionally arise due to the broad reach of their respective businesses."⁴⁴

Thus, some attorneys, especially those at large law firms with multiple offices and practice areas, may find a positional conflict rule under *Arrowpac* difficult to manage: even if an attorney clears conflicts at the outset of an antitrust litigation, opt-out plaintiffs filing separate but related suits years later could create a positional conflict that could then potentially disqualify counsel from the original lawsuit. From the perspective of the client whose counsel is disqualified, the positional conflict reduces its choice in counsel, as many large firms representing plaintiffs and defendants alike would face the risk of having a separate client file a related case in the multiyear path that many antitrust cases follow. Parties may also face significant prejudice from the inherent delay incurred in securing new counsel; and the longer the delay, the higher the prejudice. Adoption of the *Rail Freight* ruling, however, may lead to clients questioning their counsel's loyalties in light of their willingness to take on adverse positions. The *Arrowpac* approach may enhance a current client's confidence in its attorney's loyalty, as it will have security that its attorney will not take adverse positions in any matters.

Clarity from the ABA and State Bar Associations Would Be Helpful

Given the inconsistent precedent on positional conflicts, as well as the lack of guidance given by legislatures and the courts, the ABA and state bar associations should supply further clarity.⁴⁵ As courts have recognized, conflict-of-interest rules developed in the context of traditional, single attorney-client relationships—not large firm-client relationships in complex class actions (including antitrust matters).⁴⁶ In particular, practitioners and their clients would benefit from further clarification of how the existing rules apply to antitrust class actions, which almost invariably include a combination of class plaintiffs and opt-out plaintiffs and a large number of defendants—all of which are typically corporate entities—and any given law firm will likely represent (in *some* fashion) entities on both the plaintiff and defense sides.

One specific area where guidance from the ABA would be helpful is the precise scope of the exclusion against representing concurrent clients with conflicts of interest under Model Rule 1.7. The rule permits concurrent representation notwithstanding a conflict if "the representation does 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."⁴⁷ This language is ambiguous: attorneys wishing to rely on the *Arrowpac* ruling could interpret Rule 1.7 to encompass consolidated or related proceedings if they are all before one tribunal, but those relying on the *Rail Freight* decision would interpret the "same litigation or proceeding" to be limited to a single action.

⁴⁴ *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453, 458 (D.N.J. 2010).

⁴⁵ The ABA has addressed positional conflict in other contexts (such as when a lawyer is taking inconsistent positions on behalf of different clients in different cases), but not in the context of representing one client in one case and having another client who is in a related case but not represented by the attorney, as discussed in this article. See Annotated Model Rules of Prof'l Conduct, "Overview of Rule 1.7(A)(2): Material-Limitation Conflicts"; ABA Formal Ethics Op. 93-377 (1993).

⁴⁶ See, e.g., *In re Rail Freight*, 2013 WL 4714334, at *9; *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 589–90 (3d Cir. 1999).

⁴⁷ Model Rules of Prof'l Conduct R. 1.7(b)(3)–(4).

Avoiding Disqualification Scenarios

Check conflicts broadly to best avoid disqualification issues/concerns. While the inconsistency between *Rail Freight* and *Arrowpac* remains, practitioners may want to consider the possibility of conflicts under both cases. A risk-adverse attorney then could consider not only conducting a conflicts check for actual conflicts, but also a broader check for positional conflicts—if practicable—when taking on an antitrust litigation. That conflicts check would thus include not only the adverse parties in the precise case in which the attorney will represent her client, but also named parties in any related litigation and any other potential opt-outs or other unnamed class members who might play a role in a related litigation in the future. If a positional conflict is identified, the risk-adverse attorney would then either seek waivers or decline representation.

This kind of conflict check may not always be practicable, though, considering that conflict-identification systems generally do not include information that would flag a positional conflict. This is another area where further guidance from the ABA and the state bar associations would be helpful.

Have a solid advance waiver in place. Conflicts of interest can sometimes be resolved through advance conflict waivers. At the time a client retains the law firm, if permissible under the applicable ethics rules, the firm could include in the retention agreement an express recognition that positional conflicts do not rise to the level of a conflict under the applicable ethics rules, and to the extent that a court would find otherwise, the client waives those conflicts. An advance conflict waiver like that may protect the attorney against a future disqualification motion based on a positional conflict. Because an attorney is unlikely to know which jurisdictions may be relevant to any future positional conflicts, attorneys may wish to err on the side of caution and include this kind of advance conflict waiver in the event that it is enforceable under the rules of the relevant jurisdiction.

Be transparent with clients. It is critical to be open and fully candid with clients and communicate potential conflicts immediately. In both *In re Rail Freight* and *Arrowpac*, defense counsel did not immediately inform the plaintiff-clients of the potential conflict, and, in both instances, the clients declined to grant waivers. Even where the attorney does not believe that a true conflict exists, it can be imperative to raise the issue to defuse any concern that the client nevertheless perceives a conflict. Trust and loyalty are driving forces behind conflict-of-interest rules, and being transparent with clients will help preserve that trust and loyalty.

Have ethical walls in place. Also related to transparency and waivers is the importance of ethical walls. In situations where a law firm represents one client that is adverse to another client in an unrelated case, an effective program for implementing ethical walls may provide both clients with confidence that there will neither be limitations in representation nor unfair advantages gained from prior representations. Ethical walls will not be sufficient to prevent a conflict under the ethics rules of some jurisdictions, but even in those jurisdictions, ethical walls can provide some additional assurance that client confidences are maintained, which may tip the balance in favor of a finding that no conflict exists.

Implementing these recommendations may assist attorneys in avoiding some of the uncertainty arising from the conflict between the *Rail Freight* and *Arrowpac* decisions. But without further guidance, the bounds of rules governing positional conflicts likely will remain uncertain into the foreseeable future. ●