



## Positional Conflicts Revisited

The New York State Bar Association recently published an ethics opinion that found nothing wrong with two lawyers in the same firm taking opposing legal positions in front of the same judges in the same case.<sup>1</sup>


Now that I have your attention, you will remember that we looked at this issue in a previous column,<sup>2</sup> where we saw that Comment [23] to ER 1.7 (Conflicts of Interest: Current Clients)<sup>3</sup> provides that ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients unless there is a significant risk that the lawyer will materially limit her effectiveness in representing either of the clients involved. But when it comes to the same lawyer taking opposite positions for several current clients in front of the same judge in the same case, ER 1.7(a)(1) and (b)(3) make it quite clear that that situation would be considered a prohibited unwaivable conflict of interest to be generally avoided.

Looking at the facts considered by the New York Bar’s Committee on Professional Ethics in developing its opinion, an inquiry came from a law firm that had circulated a proposal asking firm lawyers to volunteer pro bono legal services supporting a legal position, not described in the opinion, for submission as *amicus curiae* to the U.S. Supreme Court. When it was determined that the lawyers who responded wanted to take differing positions on the issue involved, instead of abandoning the project the firm asked the committee if it could ethically have two mutually exclusive “teams” work on their respective positions with each group submitting its own amicus brief.

The committee immediately drew the obvious distinction between lawyers who were representing clients and those who were not. There were no “clients” being represented by either group, which the committee deemed to be a single “firm” by virtue of ER 1.10’s imputation rules.<sup>4</sup> The opinion then states that if there were actual clients behind the positions being taken by the teams, they and the firm would be prohibited from proceeding, even with the clients’ informed consent. This would be the case even if the “clients” were the lawyers on the respective teams.

Citing another New York ethics opinion to the effect that lawyers were as free as anyone else to pursue their legal remedies and did not have to hire other lawyers to do so, the opinion concludes that if the lawyers were actually appearing *pro se*

and solely in their individual capacities, they could ethically proceed to file their amicus briefs as planned.

The opinion wisely suggests that the lawyers consider disclosing to the court that they were affiliated with the same firm, or to at least disclose their firm affiliation, the awareness of which might affect the Court’s evaluation of the briefs. Just because the lawyers were appearing *pro se* without clients would not otherwise relieve them, as officers of the court, of their ethical duties of candor toward a tribunal.<sup>5</sup> 

May a lawyer take opposite positions for several current clients in front of the same judge in the same case?

Ethics Opinions and the Rules of Professional Conduct are available at [www.azbar.org/Ethics](http://www.azbar.org/Ethics)



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### endnotes

1. New York State Ethics Opinion 1174 (Oct. 15, 2019).
2. *Positional Conflicts of Interest*, ARIZ. ATT’Y (Feb. 2019) at 8.
3. Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.Ct.
4. New York has adopted the ABA’s Model Rules of Professional Conduct, and its Rule 10 is similar to Arizona’s ER 10 (Imputation of Conflicts of Interest: General Rule). These provide that a conflict affecting one lawyer in a firm affects them all, with certain exceptions.
5. See ER 3.3 (Candor Toward the Tribunal) and Comments [2] and [3] thereto, and ANNOTATED MODEL RULES OF PROF. CONDUCT (ABA Center for Professional Responsibility, 9th ed. 2019) at 371 (Statements Made in Lawyer’s “Personal Capacity”). See also *Are You Ever Not a Lawyer?* ARIZ. ATT’Y (July/August 2019) at 6.