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Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces

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LEGAL journals and commentary are replete with discussions of traditional conflicts of interest, i.e., the representation of a client by an attorney or law firm when that attorney or firm also represents or has represented a second client whose interests are materially or directly adverse to those of the first client. Despite a pervasive—some might even say obsessive—focus on the ethical prohibition against representation of opposing parties, there has been little or no discussion of a certain aspect of the conflicts problem: the treatment of positional conflicts. Positional conflicts—sometimes known as business conflicts—may occur when a lawyer or law firm’s presentation of a legal argument on behalf of one client is directly contrary to, or has a detrimental impact on, the position advanced on behalf of a second client in a different case or matter. Few law review articles have been written on the subject. It receives scant attention in the ABA Model Rules of Professional Conduct (the “Model Rules”), and the few ethical decisions issued on the topic are brief and, for the most part, unilluminating. There are virtually no reported decisions disqualifying an attorney or law firm on the basis of positional conflicts. Most major law firms, having established detailed policies and procedures to identify traditional conflicts, have no written policy and no formal procedure for defining or dealing with positional conflicts.¹

Despite the neglect of this issue in the legal literature and in practice, the definition and treatment of positional conflicts is a vitally important concern in one context: the availability of pro bono resources to handle major litigation, transactional, and policy matters. Public interest legal groups—including civil rights and women’s rights organizations, the ACLU, environmental groups, and others—have traditionally relied upon the pro bono assistance of lawyers, particularly those in major law firms, to represent or act as co-counsel with the

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organization for the complex litigation matters on their docket. In addition, since 1996, when Congress first adopted legislation that imposed severe restrictions on the legal work of any program receiving funding through the Legal Services Corporation ("LSC"),\(^2\) the demand for pro bono assistance in major matters has increased dramatically. Among other restrictions, LSC-funded programs are prohibited from participating in class action suits, challenging welfare laws and regulations, or lobbying legislative bodies (except in narrowly defined circumstances).\(^3\)

These restrictions were put in place during the same congressional term that saw the passage of major legislation that profoundly altered the rights and benefits afforded to disabled children, poor families, immigrants and asylum seekers, prisoners, and many others.\(^4\) Whether one agrees with those substantive changes or not, anyone who supports an equitable justice system will agree that those affected by the new legislation should have the opportunity to test, clarify, shape, and challenge these laws. The analogous situation in the commercial context would be to pass a major telecommunications bill, while at the same time prohibiting phone companies, cable providers, computer firms, and others from consulting and using law firms to address the issues raised by that bill. Because legal challenges to the LSC restrictions have, to date, been essentially unsuccessful, the need for expanded private sector resources to undertake restricted activities is clear. In light of the fact that much of this work involves precedent-setting cases and aggressive policy advocacy, an unexamined, overly broad concern about positional conflicts will sharply reduce the resources available to handle restricted activities. Without clarity and attention to this issue, concerns about alienating paying corporate clients—even those not grounded in law, ethics, or reality—will inevitably trump the lawyer’s obligation to undertake pro bono work, particularly in complex and controversial matters.

To address this problem, this Article examines and critiques the existing ethical rules and opinions that address positional conflicts and examines current law firm practices in identifying and dealing with potential conflicts. It then proposes a revised approach to positional conflicts as well as practical approaches that law firms can use to strike an appropriate balance between their obligations to the public and the justice system and their ethical obligations and economic interests with respect to paying clients.


I. A Closer Look at Positional Conflicts

What kinds of situations may raise the specter of impermissible positional conflicts between a commercial client and a pro bono client? The hypothetical situations described below offer a range (though hardly the entire spectrum) of situations that might be construed as potential positional conflicts. The use of hypotheticals is designed to assist the reader in understanding the nature of positional conflicts and the types of pro bono matters that a firm may decline on the basis of positional conflict. The issues raised by these hypothetical situations are addressed at a later point in this Article using the author's proposed frame of reference and procedures.

1. Luban, Menkel & Meadow, a 200-attorney law firm in Washington, D.C., has a traditional corporate practice. Although its labor and employment department is not as large as its litigation or corporate departments, the firm does represent corporate clients in employment litigation cases and, using its lobbyists, has, on behalf of those clients, sought changes in the law that limited the ability of discharged employees to sue their former employers. A major civil rights legal organization has asked the firm to serve as pro bono counsel in an action brought to secure a ruling that a recent bill, strengthening the process for bringing discrimination employment suits, should be enforced retroactively. The head of the firm’s labor department vehemently opposes taking on the matter, arguing that because the firm, on behalf of one of its clients, lobbied unsuccessfully to insert an explicit provision into this legislation that enforcement be prospective only, representing the other side of the issue would present an impermissible positional conflict for the firm. Is this position accurate?

2. The same firm has been contacted by the D.C. Federal District Court, through the court’s pro bono program, to represent an individual pro se litigant, an African-American woman who has filed a Title VII race discrimination case in the court. Her employer is not a client of the firm. The labor department head, once again, has opposed taking on the case. He argues that a firm that represents large, corporate employers simply cannot ethically advocate the interests of an employee. Does this situation pose an impermissible positional conflict?

3. Rhode & Galanter, a large law firm in San Francisco with a national practice, has been asked by the Sierra Club to file an appeal with state and federal environmental agencies to block the construction of a dam in Maine that will flood and destroy a unique eco-environment in the northeastern part of that state. Although the firm has not handled any wetlands or water rights cases for its corporate clients, it does have a small environmental practice and has hopes of expanding its environmental work. Currently, the firm represents a number of corporations in matters involving emissions standards and Superfund clean-ups. May the firm ethically represent the Sierra Club? Could it decline that representation on ethical grounds?
4. San Francisco's Rhode & Galanter also has a major transactional practice. As part of the firm's commitment to pro bono service, it is actively seeking to involve its non-litigators in pro bono work. One of the first transactional pro bono projects undertaken by the firm is serving as general counsel to a community development organization in a low-income neighborhood seeking to strengthen its community by bringing in locally-based businesses and creating job opportunities. Several months after Rhode agreed to represent the organization, the group asks the Rhode & Galanter team to help negotiate an agreement with a major supermarket chain that is opening the neighborhood's first large market. The community organization's leadership wants the agreement to include a commitment that at least half of the construction crew and supermarket hires will come from the local community and that a portion of the land to be purchased will be set aside for a children's playground, with the costs of construction to be borne by the company. After meeting with the community group, one of the business lawyers reminded her colleagues that the firm, in negotiating to site a plant on behalf of another client, a manufacturing company in another city, had advocated successfully that similar "tie-in" agreements were unwise. Having opposed tie-in provisions previously, can the firm ethically advocate for such provisions for its current pro bono client?

5. Houseman & Green, a large firm in Minneapolis with branch offices in several cities, including Washington, D.C., is known as a high-powered lobbying firm. The Welfare Law Center, fearing that the move in several states to privatize processing of claims for financial assistance under the Temporary Assistance for Needy Families (TANF) program will result in a higher denial rate for applicants, has asked the firm to assist the Center on a pro bono basis in lobbying for federal legislation mandating greater oversight by state agencies of private companies that process claims for benefits. The legislation would include penalties if those private companies act in a "lawless" manner in arbitrarily denying claims, to be paid into a fund to cover child-care costs for recipients. Like many D.C. law firms, Houseman & Green's Washington office has a busy government contracts practice, representing manufacturers that provide equipment and materials to federal agencies, particularly the military. On occasion, the firm's lobbying group has been involved with that practice, seeking to soften provisions in federal government contracts that mandate payment of penalties by manufacturers for cost overruns, delays, or equipment failure. The same lobbyists would undoubtedly be working on the legislation identified by the Welfare Law Center. Should the firm take on this new pro bono assignment?
II. EXISTING ETHICS PROVISIONS, OPINIONS, AND ANALYSES OF POSITIONAL CONFLICTS

Unfortunately, the ethical standards currently available to analyze potential positional conflicts are quite limited and unhelpful. The Model Rules and existing ethics opinions offer little useful guidance. The two Model Rules provisions that explicitly address potential conflicts of interest in the public interest context, Rules 6.3 (Membership in Legal Services Organization) and 6.4 (Law Reform Activities Affecting Client Interests), are very narrow, dealing almost entirely with the role of private lawyers as officers or directors of legal services and law reform organizations, rather than in their capacity as advocates for clients of these organizations. Because Rule 6.4 addresses the question of positional conflicts, though not in the advocacy context, it does provide some indirect guidance. The rule states that “[a] lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer.” When the law reform activity undertaken by the organization with which the lawyer is associated would benefit that lawyer’s client, the rule requires disclosure of that fact, to prevent the lawyer from using the organization to advance individual client interests. Rule 6.4 makes no mention of a situation in which the law-reform activity would be detrimental to the interests of a client of a lawyer-director, an implicit acceptance of the fact that lawyers may ethically support two conflicting positions. The Model Rules’ discussion of law-reform activities lacks the positive exhortation included in its predecessor, the Model Code of Professional Responsibility (the “Code”). The Code suggested that lawyers should seek reform “without regard to the general interests or desires of clients or former clients.”

Only the comment to Model Rule 1.7, the general rule governing conflicts of interest in simultaneous representations, specifically addresses the issue of positional conflicts. Paragraph nine of the comment states: “A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected.” Having articulated that positional conflicts are generally permissible, the comment goes on to describe only one very narrow example of a situation in which the impact of advocating two antagonistic positions may create an impermissible conflict. It states that “it is ordinarily not improper to assert such positions in cases pending in different trial

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6. Id. Rule 6.4.
7. See id.
9. Id.
courts, but it may be improper to do so in cases pending at the same time in an appellate court."11 Under the approach of the Model Rules, therefore, it would seem that in virtually all instances (except for those few situations analogous to the head-to-head advocacy of conflicting, precedent-setting positions in a single appellate court) arguing opposing positions does not create conflicts or ethical concerns. In situations involving a subsequent representation, the Model Rules take the position that mere positional conflicts are almost never inappropriate or unethical. The comment to Model Rule 1.9, which deals with conflicts of interest involving former clients, notes that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."12

Moving beyond the Model Rules, there are several ethics opinions, including an ABA formal ethics opinion and several state opinions, that address the question of positional conflicts in somewhat greater depth.13 ABA Formal Opinion 93-377, for example, contains a somewhat more expansive and analytical treatment of when positional conflicts may become inappropriate absent disclosure and client consent.14 The opinion outlines a two-pronged test for identifying problematic positional conflicts when a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different pending matter. The first aspect is whether the two cases are being litigated in the same jurisdiction (expanding the Model Rules' single appellate court test15 to include trial courts).16 The second factor is whether "there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client."17 If both of these factors are present, the lawyer should not take on the second client without full disclosure and consent. Even if the two matters will not be litigated in the same jurisdiction, the lawyer or firm must still determine, as a threshold question, whether the effectiveness of either client will be materially limited by the lawyer's representation of the

11. Id.
12. Id. Rule 1.9 cmt.
15. See supra note 11 and accompanying text.
17. Id.
other. The formal opinion cites several factors that may help in making this determination: (1) whether the issue is of such importance that its determination is likely to affect the outcome of at least one of the cases; (2) whether a determination of the issue in one case is likely to have a significant impact on its determination in the other; and (3) whether the lawyer, in representing both clients may be inclined to soft-pedal or alter certain arguments to avoid impacting the other case. Although the opinion certainly offers more specific guidance than the Model Rules, the factors outlined in the opinion call for speculation and do not offer concrete suggestions concerning attorney conduct.

Two state ethics opinions illustrate the range of approaches taken to date regarding the positional conflicts issue. California Ethics Opinion 1989-108 (based not on the Model Rules but on that state’s rules of professional conduct) finds that even under a worst-case scenario, positional conflicts do not constitute an impermissible conflict of interest. In the scenario presented in the opinion—a situation in which the legal issue involved in two unrelated cases was identical and both cases were pending in federal court and had been assigned to the same judge—the opinion found that the conflict of interest rules should be limited to traditional identity of party situations. The opinion found that “if the attorney chooses not to disclose the two representations [in a positional conflict situation] the attorney does not violate his or her duty of loyalty to the client.” It further suggested, however, that while disclosure is not required, “the prudent attorney would be well-advised to disclose ‘issues conflicts’ where the attorney has reason to believe clients might be harmed by the continued undisclosed dual representation.” In a candid aside, the opinion noted that “[t]his Committee is unable to provide a definitive test as to when disclosure should be made.”

In contrast to the California opinion, under which a positional conflict would virtually never rise to a violation of the ethics rules, District of Columbia Ethics Opinion 265 took a far more stringent approach to positional conflicts than the Model Rules or the ABA Formal Opinion. The D.C. opinion concluded:

When a lawyer is asked to represent an entity that takes positions on matters of law in a subject area in which the lawyer practices regularly on behalf of other clients, the lawyer may not, without the informed consent of all affected parties, accept simultaneous representation of both clients where such representation creates a sub-

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19. Id.
20. Id.
21. Id.
stantial risk that representation of one client will adversely affect the representation of the other.\textsuperscript{23}

In providing this guidance, the opinion relied on District of Columbia Rule 1.7, a stricter version of the Model Rules statement on conflicts of interest.\textsuperscript{24} The opinion did suggest, however, that the problem of positional conflicts may be attenuated, in the instance of representation by a firm, if more than one lawyer in the firm is involved.\textsuperscript{25}

Despite some divergence of approach between the Model Rules and the ethics opinions cited, the authorities reviewed above are in clear agreement on several propositions. First, positional conflicts are simply not a factor except in simultaneous representation situations. Second, there must be a strong likelihood of harm to one client. Third, there is no bright line that identifies impermissible positional conflicts; rather, lawyers are told, in effect, that they will know it when they see it.

Although the literature on positional conflicts is limited, there are several commentators who have added important insights on this topic. According to John Dzienkowski, in an effort to provide more concrete guidance to practitioners, Professors Hazard and Hodes have identified four factors that can influence the severity of a positional conflict.\textsuperscript{26} These factors are: (1) a central position in one case that the client in the other matter feels strongly about;\textsuperscript{27} (2) when one client litigates the issue frequently (the so-called repeat player situation) and thus has a long-term interest in how the issue is decided;\textsuperscript{28} (3) the existence of special knowledge or confidential information;\textsuperscript{29} and (4) whether the matter involves a pure issue of law or whether factual arguments can affect the outcome.\textsuperscript{30} These factors certainly offer a more easily applied analysis of the countervailing interests that a posi-

\textsuperscript{23} Id.
\textsuperscript{24} See id. The Committee believed that the same result would be reached under ABA Model Rule 1.7—a dubious proposition. See id. Compare District of Columbia Rules of Professional Conduct Rule 1.7 (1996) (setting forth a relatively restrictive conflicts rule), with Model Rules of Professional Conduct Rule 1.7 (1998) (setting forth a more permissive conflicts rule).
\textsuperscript{25} See id.
\textsuperscript{26} See John S. Dzienkowski, Positional Conflicts of Interest, 71 Tex. L. Rev. 457, 479 (1993).
\textsuperscript{27} See id. (citing Geoffrey C. Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.7:105 (2d ed. 1990)).
\textsuperscript{28} See id. (citing Geoffrey C. Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.7:106 (2d ed. 1990)).
\textsuperscript{29} See id. (citing Geoffrey C. Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.7:105 (2d ed. 1990)).
\textsuperscript{30} See id. (citing Geoffrey C. Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § 1.7:106 (2d ed. 1990)).
tional conflict situation may affect. Unlike Hazard and Hodes, however, who contend that a fact-based matter is more likely to pose an impermissible conflict (factor 4), I agree with Dzienkowski who asserts that cases involving mixed questions of fact and law are less likely to create a problem than pure issues of law.31

Dzienkowski, in his seminal article on positional conflicts, made another important contribution to the practical analysis and identification of issues conflicts.32 He noted that potential conflicts can arise not only in the context of litigation, but also in transactional work and in the lobbying arena.33

III. POSITIONAL CONFLICTS: WHAT IS AT STAKE

Positional conflicts, if broadly defined, can have a deleterious effect on the availability of precisely the type of pro bono assistance that is in critically short supply. Therefore, it is essential to analyze what values and interests are at stake in constructing a workable approach to positional conflicts.

The strongest arguments in favor of determining that positional conflicts, under certain circumstances, are impermissible in the absence of full disclosure and client consent are the two obligations toward clients that are at the foundation of all conflicts concerns: the duty of loyalty and the duty of confidentiality. In a positional conflict situation, where the problem may arise because of identity of issue rather than identity of client, maintaining client confidentiality is far less of a concern. While there may be circumstances in which the lawyer's familiarity with the client's practices may come into play,34 in most cases involving positional conflicts it is unlikely that detailed confidential information will either help or hurt the lawyer in effectively asserting a contrary position.

The duty of loyalty continues to be a factor in positional conflict situations, although it is less of a factor than in traditional conflicts of interest. No client can reasonably expect that the client's lawyer will always refrain from arguing, in an unrelated case or in negotiating a contract in an unrelated matter, a position that is at odds with that advocated by the lawyer on behalf of the client. Two of the factors alluded to by Hazard and Hodes—the centrality of the issue for the client and the likelihood that the position is one that the client will need to advance repeatedly35—along with an examination of the precedential value of the attorney's advocacy, can identify the relatively unusual situation in which the client is so closely identified with a par-

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31. See Dzienkowski, supra note 26, at 479 n.104.
32. See id. at 457-540.
33. See id. at 483-84.
34. See note 29 and accompanying text.
35. See notes 27-28 and accompanying text.
particular position that the lawyer's advocacy of a contrary position in an unrelated matter would create ethical problems.

Beyond the lawyer's obligations to clients, broader policy and societal issues may support the determination that a particular positional conflict is impermissible. Concerns about loss of credibility may arise, for example, if the lawyer advocates contrary positions before the same judge or in the same forum. The danger of creating conflicting precedents, where the position argued is at the heart of the matters, is another societal concern, although it could also be argued that our system of justice constantly faces conflicting determinations and resolves the issue through the appellate courts. Some commentators have cited a fear that the lawyer will soft pedal the issue in one of the matters involved. Such a concern, as well as identification of which matter or client will be impacted, is, however, a highly speculative problem that is outweighed by the practical and policy concerns that mitigate in favor of finding the positional conflict permissible.

In general, neither the interests of individual clients (except in certain limited situations) nor broader policy concerns can justify a broad application of conflicts of interest principles to the positional conflict situation. In contrast, the policy arguments against an overly broad definition of positional conflicts are very strong. Our legal system is premised on the concept that independent lawyers can and will effectively advocate a wide range of legal positions, including competing positions on behalf of different clients; indeed, lawyers do so routinely. A broad definition of impermissible positional conflicts would not only substantially alter that basic premise, but would also limit the ability of clients to secure the lawyers of their choice. It would further impose tremendous burdens and would be difficult to implement, because identification of such potential conflicts is extremely difficult. How, at the beginning of an engagement, can a lawyer be expected to identify and analyze every possible legal argument that he or she may present? Further, it is essential that lawyers participate in public interest, particularly law reform, activities. Finally, in the context of positional conflicts involving legal positions rather than directly opposing parties, the concerns about the duties of loyalty and confidentiality are far more attenuated. As a result, in the law firm context, there is far less justification for imputed disqualification in positional conflicts situations.

IV. Practical Realities: How Are Firms Treating Positional Conflicts in the Pro Bono Context?

Existing rules and opinions generally view most positional conflict situations as ethically permissible, but provide little practical guidance in identifying and processing such situations. In dealing with positional conflicts in practice, major law firms typically ignore the few rules and opinions in existence and handle potential positional con-
flicts on an *ad hoc* basis that rarely includes a broader analysis of the legal and ethical issues, the potential difficulties that may arise, and the interests that must be weighed and balanced in determining whether representation is ethical.

A recent law review article by Norman Spaulding does an excellent job of surveying and summarizing current law firm practice concerning the acceptance or rejection of a pro bono matter that may raise a positional conflict. Spaulding's conclusions concerning the current practices among law firms are entirely consistent with my observations of firm policies and practices, derived from years of providing technical assistance on pro bono matters to major law firms through the Law Firm Pro Bono Project. Typically, most major law firms' handling of potential positional conflicts in the pro bono context has the following characteristics:

1. Absence of Formal Policy or Procedure: Although most major law firms have clearly defined written policies and practices regarding traditional conflicts, virtually none maintain a written policy and formal procedure to assist them in identifying potential positional conflicts and in determining the appropriate resolution if such a conflict arises. As a result, firms identify and handle positional conflicts on a case-by-case basis without any clear guidelines and with little or no relation to prior actions taken.

2. Decisions Made Without Consulting Relevant Legal Authority: In most firms, determinations concerning positional conflicts are made without any reference to existing ethical rules, opinions, or commentary.

3. Overly Broad Definitions of Impermissible Positional Conflicts: As a result of the lack of legal guidance or analysis, firms often overbroadly define positional conflicts in a manner that requires them to turn down proposed pro bono engagements. Some firms simply exclude any pro bono involvement in a broadly defined category of cases and matters under the rubric of positional conflicts. For example, some law firms insist that, to avoid positional conflicts, they must refuse any pro bono matters that involve representation of an employee or any environmental matter in which the firm would represent consumers. Other firms may turn down a pro bono assignment when there is no possibility of positional conflict with a current client because of an inchoate, potential conflict that may arise in the future. One firm, for example, turned down a pro bono environmental case...

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37. The Law Firm Pro Bono Project is a program sponsored by the Pro Bono Institute in cooperation with the American Bar Association's Standing Committee on Pro Bono and Public Interest. The Project, established in 1989, provides information, advice, technical assistance, and materials to larger law firms (i.e., the 700 law firms with more than 50 attorneys) to enable those firms to improve and expand their pro bono efforts and to integrate that pro bono work into the overall culture of the firm. For more information, view the Project's web site at <http://www.probonoinst.org>.
because, though it currently handled no environmental matters, it had hopes of building an environmental practice in the future. Such determinations are clearly not warranted under any interpretation, even the most stringent, of the current law.

4. Failure to Use the Option of Disclosure and Client Consent: Even if firms narrowly and correctly identify those limited situations in which an impermissible positional conflict may arise, they typically use only one approach to deal with that conflict—refusing the pro bono engagement. The Model Rules and the commentary, however, clearly indicate that a firm has another alternative—disclosing the possibility of a positional conflict and seeking consent of both clients involved. In part because of the overly broad definition of positional conflict used by most firms, and in part because of their concern over upsetting their paying clients, there is virtually no use of the established process of disclosure and consent to resolve potential positional conflicts. As a result, law firms may well overestimate the concerns of corporate clients, thereby heightening the imbalance of power between pro bono concerns and paying matters.

For many reasons, pro bono engagements receive less favorable treatment from law firms. The fact that paying clients are more likely to be long-term clients of the firm, while many pro bono requests are episodic, works against the pro bono client. The current economic climate in which major law firms now operate—a highly competitive environment in which large corporate clients have a greater voice in all aspects of law firm practice, and in which firms are reluctant to risk alienating existing or potential clients in any way—places pro bono clients at an even greater disadvantage. These innate problems are, however, greatly and unnecessarily exacerbated by current law firm practices with respect to positional conflicts: practices that handle positional conflicts on an ad hoc basis, ignore existing legal standards, and underutilize a solution—disclosure and client consent—that could maximize pro bono resources.

V. Addressing the Hypotheticals

After reviewing the literature and the competing interests that must go into any analysis of positional conflicts, addressing the hypothetical situations outlined earlier in this Article can provide a clearer roadmap of how positional conflicts may arise and how best to deal with them.

Hypothetical 1 (Retroactive Application of a Civil Rights Law): Using the factors outlined above, this hypothetical presents a problematic positional conflict situation. The position involved in the prospective litigation is precisely the opposite of the position the firm advanced on behalf of current clients, albeit in a different forum. If the firm were to take on the pro bono litigation, the interests of its other clients, as evidenced by their focus on this issue in the legislative
context, would be seriously affected. In addition, the firm's corporate client is likely to address this issue repeatedly until it is conclusively resolved. Under the facts as outlined, the firm should probably not accept the pro bono case. Although the firm has the option of seeking consent from both parties, this is probably not a realistic option given the centrality of the issue for both parties. If the corporate client for whom the firm lobbied was no longer a client, however, there would be no impermissible positional conflict because such conflicts are virtually unknown in the subsequent representation context. In addition, there would be no positional conflict if the corporate client had not engaged the firm previously to lobby against retroactive application of this law. Although it could be argued that all corporate employers might be harmed by retroactive application, such harm is too speculative and remote to warrant turning down an important pro bono matter.

Hypothetical 2 (Representing an Individual Title VII Litigant): This hypothetical poses no ethical problem for the firm and represents an overly broad and unwarranted definition of positional conflicts. Individual employment discrimination cases under Title VII are typically fact-based applications of existing law that would not be materially adverse to any position taken by a firm client. There is no ethical constraint that would prohibit a law firm from taking on this matter.

Hypothetical 3 (Floodlands Environmental Law Suit): As in the previous hypothetical, there is no positional conflict evidenced here. The firm does not, and has never, represented a client in advocating a position directly contrary to one that the firm would advocate in the Maine dam case. Some might argue that the firm has a legitimate interest in protecting its future availability and attractiveness to corporate clients who may want the firm to oppose wetlands protections. Applicable legal authority, however, clearly states that a firm would not be barred on ethical grounds from accepting the pro bono matter if it had conducted such advocacy in the past on behalf of a former client. It is wholly baseless and speculative, therefore, to contend that the firm should turn down this matter because of an inchoate concern about potential future clients.

Hypothetical 4 (Negotiating a Contract): In this transactional hypothetical, the firm is taking a position that is adverse to one taken on behalf of another client. An examination of the other factors involved in this matter, however, demonstrates that no impermissible conflict exists. First, this is a transactional matter. As Dzienkowski pointed out, representation in this context is less likely to give rise to an impermissible conflict. Work in a private context, unlike litigation, is less likely to create clashing precedents. It is also not clear that the

38. See Dzienkowski, supra note 26, at 502-07.
“tie-in” issue is the most central matter in these contract negotiations. In addition, the contrary position in this matter was advanced by other attorneys in the firm, in a different city, and in a negotiation involving a different industry. In light of all of these factors, it is reasonable to conclude that no impermissible positional conflict exists.

Hypothetical 5 (Lobbying in Connection with Government Contracts): This hypothetical represents a closer case than any of the hypotheticals detailed above. The positions to be taken are, at first glance, directly contradictory to each other. Both the pro bono and the paying representation would take place in the same forum: Congress. Both involve lobbying, a uniquely personal type of advocacy that may implicate credibility issues more clearly than litigation or transactional work. On the other hand, the issue of penalties for private companies in the welfare context can, quite easily, be distinguished from military procurement, a highly specialized area. The consumers in the welfare context have no clout and no options if the companies are not responsive and accurate. The private companies are making their first foray into this area. Welfare reform legislation, as a matter of public policy, seeks to protect the poor from punitive and unlawful deprivation of funds and resources. While a prudent (or nervous) law firm may want to disclose a potential positional conflict to both parties and seek consent (which might well be freely given by the military contractors), this particular situation probably does not present a troubling positional conflict.

VI. DEVELOPING A MORE THOUGHTFUL, PRACTICAL, AND BALANCED APPROACH TO POSITIONAL CONFLICTS: SOME RECOMMENDATIONS

Both the current ethical analysis and the practical treatment of potential positional conflicts warrant improvement. The following recommendations would result in a more reasoned and reasonable approach to this important issue.

A. Amending the Model Rules

The current definition of positional conflicts in the Model Rules is too restrictive, and the issue as a whole is not dealt with thoroughly. The commentary to Rule 1.7 should be revised to include a definition (or example) of positional conflicts that is, at least, consistent with ABA Formal Opinion 93-377.39 Ideally, that comment would include a more comprehensive analysis of the competing interests and demands that must be balanced in determining whether an impermissible conflict exists in positional advocacy—one that incorporates the factors alluded to by Hazard and Hodes, Dzienkowski,40 and others.

39. See supra notes 13-17 and accompanying text.
40. See supra notes 26-30 and accompanying text.
Rule 1.7 should also cross-reference Rule 6.4. Surely, the standard for finding a positional conflict should be higher in a situation in which access to the system, not merely client choice, is at stake. In addition, Rule 6.4 should be amended to incorporate the Code’s exhortation to undertake law reform work.

B. Making Law Firm Determinations Fairer and More Accurate

1. Law firms should establish formal, written policies that define positional conflicts of interest in a balanced manner that is consistent with current ethical guidelines. These policies should be broadly disseminated within the law firm and should be used to determine whether impermissible positional conflicts exist for pro bono and paying clients alike. The policies should identify the pivotal role of law firms in law reform work as an important factor in assessing and dealing with positional conflicts.

2. In addition, since the lack of clear firm policies has resulted in some—perhaps widespread—misunderstanding of positional conflicts, the firm should educate its lawyers on the new policy and appropriate parameters.

3. Law firms should establish clear procedures—making the same procedures applicable to both paying and pro bono clients—for dealing with potential positional conflicts. These procedures should ensure that any decision about a potential conflict should be determined on a firm-wide basis, rather than giving one department or practice group the final say on the existence of a conflict.

4. Law firms should identify those areas of pro bono practice that may pose problems, in the context of positional conflicts, in light of the firm’s practice and current clients. The firm can then meet with commercial clients to explore their concerns and to identify areas of pro bono practice that would not pose a problem to those clients. Corporations and corporate legal departments are increasingly aware of the problems that result when one segment of society is denied access to the legal system, and they may be willing to support a balanced approach. The firm should also meet with legal advocacy groups to narrowly identify sensitive and inappropriate areas for pro bono referrals, as well as to identify those matters in which the firm would welcome referrals.

5. In those instances where firm policy and analysis uncover a true positional conflict problem, the firm should explore the feasibility of seeking consent to represent both parties, rather than automatically declining the pro bono matter.

6. To ensure that advocacy, including law reform work, is available to those who are unable to secure counsel for financial and other rea-

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41. See supra notes 5-11 and accompanying text.
42. See supra notes 8-9 and accompanying text.
sons, law firms, legal advocacy groups, and legal services providers should consult to assess the overall availability of assistance for law reform work in their city, state, or, in some instances, in the nation, for particular areas of the law. Working together, the firms and groups can develop a comprehensive plan that ensures that, despite any constraints faced by particular firms, sufficient resources are available to ensure that the poor and disadvantaged in the community have access to broad remedies and policy advocacy.

CONCLUSION

Current ethical standards and writings offer far too little guidance to enable lawyers to comfortably address the complexities of positional conflicts. Current law firm practice, on the other hand, too often consists of an unexamined and ad hoc approach to such conflicts that turns more on anxiety about client reactions than on a careful examination of legal, ethical, and policy considerations that admit market realities but tempers those concerns with an affirmative commitment to access to justice. This Article offers both practical guidance and legal analysis that could, if adopted, result in a balanced approach that will expand law firm participation in the major policy issues of our time without exposing the firms to ethical violations or client defections.