

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 AUGUST TERM, 2009

4 (Argued: December 3, 2009 Decided: August 18, 2010)

5 Docket No. 09-2790-cv

6 - - - - -  
7 GSI COMMERCE SOLUTIONS, INC.,

8 Petitioner-Appellant,

9 v.

10 BABYCENTER, L.L.C.,

11 Respondent-Appellee.

12 - - - - -  
13 B e f o r e: WINTER, RAGGI, and LIVINGSTON, Circuit Judges.

14 Appeal from a judgment of the United States District Court  
15 for the Southern District of New York (Jed S. Rakoff, Judge)  
16 granting a motion to disqualify petitioner's counsel. We affirm.  
17 Counsel currently represents respondent's parent company, and  
18 respondent and the parent company are so closely related that  
19 they are essentially one client for disqualification purposes.  
20 Counsel has thus engaged in concurrent representation, which it  
21 may not do without the parent company's consent. Counsel had not  
22 obtained such consent. We therefore affirm.

1 REBECCA D. WARD (James T. Smith &  
2 Leonard D. Steinman, Blank Rome,  
3 LLP, Philadelphia, Pennsylvania;  
4 Raymond L. Fitzgerald, Butler,  
5 Fitzgerald, Fiveson & McCarthy,  
6 P.C., New York, New York on the  
7 brief), Blank Rome, LLP,  
8 Philadelphia, Pennsylvania, for  
9 Petitioner-Appellant.

10  
11 JOHN D. WINTER (Claude S. Platton  
12 on the brief) Patterson Belknap  
13 Webb & Tyler, LLP, New York, New  
14 York, for Respondent-Appellee.

15 WINTER, Circuit Judge:

16 GSI Commerce Solutions, Inc. ("GSI") appeals from Judge  
17 Rakoff's order granting a motion by BabyCenter, LLC  
18 ("BabyCenter"), a wholly-owned subsidiary of Johnson & Johnson,  
19 Inc. ("J&J"), to disqualify Blank Rome, LLP, as GSI's counsel.  
20 The court concluded that the doctrine forbidding concurrent  
21 representation without consent applies because the relationship  
22 between BabyCenter and J&J, which Blank Rome represents in other  
23 matters, is so close that the two are essentially one client for  
24 disqualification purposes. The district court therefore  
25 disqualified Blank Rome from representing GSI in the instant  
26 matter because the law firm had not obtained consent from J&J.

27 We affirm.

28 BACKGROUND

29 a) Attorney-Client Relationship between Johnson & Johnson and  
30 Blank Rome

1 J&J entered into an Engagement Agreement with Blank Rome in  
2 2004. The agreement, contained in a letter to J&J ("2004  
3 Letter"), describes the scope of Blank Rome's representation as  
4 limited to compliance matters involving J&J and J&J affiliates  
5 "in connection with the European Union . . . Data Protection  
6 Directive and potential certification to the U.S. Safe Harbor."  
7 The bulk of the agreement concerns two provisions purporting to  
8 waive certain conflicts of interest. The first provision  
9 addresses Blank Rome's concurrent representation of Kimberly-  
10 Clark in a specific patent matter "adverse to [J&J's] corporate  
11 affiliate, McNeil PPC, Inc." Specifically, it sets out the Rules  
12 of Professional Conduct applicable to attorneys representing an  
13 enterprise with diverse operations and concludes that Blank Rome  
14 is free to continue to represent Kimberly-Clark in that matter so  
15 long as J&J agrees to waive the conflict.

16 The second provision in the 2004 Letter to J&J seeks a  
17 prospective waiver of all conflicts arising out of Blank Rome's  
18 representation of Kimberly-Clark in patent matters adverse to J&J  
19 and affiliates. The prospective waiver provision provides:

20 We believe that if, in the future, our  
21 firm were requested by Kimberly-Clark to  
22 represent it in patent matters related to  
23 Johnson & Johnson or its affiliates or  
24 subsidiaries, our representation of Johnson &  
25 Johnson in the Data Protection Matters and in  
26 other unrelated matters and our present and  
27 future representation of Kimberly-Clark would

1 not adversely affect our relationship with  
2 either client. . . .  
3

4 Specifically, this letter seeks  
5 confirmation that, should our representation  
6 of Kimberly-Clark in connection with patent-  
7 related proceedings involve Johnson &  
8 Johnson, or any other entity related to  
9 Johnson & Johnson, Johnson & Johnson  
10 consents, and will not object, to our  
11 continuing representation of Kimberly-Clark  
12 in connection with these proceedings . . . .  
13

14 A final part of the 2004 Letter summarizes the terms of the two  
15 waivers and directly asks J&J to acknowledge that "you are aware  
16 of the conflict of interests that results from our representation  
17 of Kimberly-Clark and Johnson & Johnson but that notwithstanding  
18 that conflict . . . you consent to our representation of Johnson  
19 & Johnson and our simultaneous continued representation of  
20 Kimberly-Clark." Blank Rome also attached a standard Addendum,  
21 which provides in relevant part:  
22

23 Unless otherwise agreed to in writing or  
24 we specifically undertake such additional  
25 representation at your request, we represent  
26 only the client named in the engagement  
27 letter and not its affiliates, subsidiaries,  
28 partners, joint venturers, employees,  
29 directors, officers, shareholders, members,  
30 owners, agencies, departments or divisions.  
31 If our engagement is limited to a specific  
32 matter or transaction, and we are not engaged  
33 to represent you in other matters, our  
34 attorney-client relationship will terminate  
35 upon the completion of our services with  
36 respect to such matter or transaction whether  
37 or not we send you a letter to confirm the  
38 termination of our representation.  
39

1           In 2005, Blank Rome sent another letter to J&J ("2005  
2 Letter") seeking to amend the terms of the Engagement Agreement.  
3 The 2005 Letter first explains that Blank Rome had increased its  
4 representation of generic drug manufacturers in patent-related  
5 matters. It specifically notes that the firm's representation of  
6 these new clients could lead to conflicts with its existing  
7 clients, such as J&J, that are known as branded drug  
8 manufactures. The 2005 Letter then states: "The Addendum to our  
9 current engagement letter stipulates that we represent only  
10 [J&J], and not its affiliates, subsidiaries, partners, divisions  
11 and joint venturers." However, the Letter goes on to request the  
12 following waiver from J&J:

13                       Specifically, this letter seeks  
14 confirmation that, should our representation  
15 of generic drug manufacturers in connection  
16 with patent-related proceedings involve  
17 Johnson & Johnson, or any other entity  
18 related to Johnson & Johnson, Johnson &  
19 Johnson consents, and will not object, to our  
20 continuing representation of the generic drug  
21 manufacturers in connection with these  
22 proceedings, and should we determine that our  
23 withdrawal as counsel is necessary for us  
24 under the Rules of Professional Conduct to  
25 continue to represent the generic drug  
26 manufacturers, Johnson & Johnson consents,  
27 and will not object, to our firm's withdrawal  
28 at such time.  
29

30 A final part of the 2005 Letter specifically asks J&J to  
31 acknowledge: "you [J&J] provide your prospective consent to our  
32 [Blank Rome's] representation of generic drug manufacturers in

1 patent-related proceedings involving Johnson & Johnson and its  
2 affiliates and subsidiaries.”

3 Pursuant to this Engagement Agreement, Blank Rome advised  
4 J&J on a variety of privacy matters, much of which was related to  
5 J&J affiliates. In particular, Jennifer Daniels, a partner at  
6 Blank Rome, provided affiliates with privacy-related services,  
7 including the preparation of policies and procedures, guidance  
8 documents, and training materials. In 2006, Ms. Daniels  
9 represented BabyCenter in a privacy-related matter. Blank Rome  
10 did not, however, advise J&J with regard to the E-Commerce  
11 Services Agreement (“E-Commerce Agreement”) between BabyCenter  
12 and GSI, which is the subject of the current litigation. It also  
13 appears that Blank Rome received no confidential information  
14 relevant to that agreement during its representation of J&J or,  
15 separately, BabyCenter.

16 b) J&J’s Relationship with BabyCenter

17 BabyCenter is a wholly-owned subsidiary of J&J that operates  
18 as an online media company. BabyCenter hosts a variety of  
19 websites in the United States and abroad that focus on pregnancy  
20 and early childhood development. Until January 2009, BabyCenter  
21 also hosted an online retail store offering baby-care and related  
22 products.

23 BabyCenter relies on J&J for a variety of business services,  
24 including accounting, audit, cash management, employee benefits,

1 finance, human resources, information technology, insurance,  
2 payroll, and travel services and systems. It also substantially  
3 relies on J&J's legal department either to provide legal services  
4 or to secure outside counsel. Stuart Wilks, a member of the J&J  
5 legal department, serves as "Board Attorney" to BabyCenter.  
6 J&J's legal department participated in the negotiation of the E-  
7 Commerce Agreement between BabyCenter and GSI. J&J lawyers have  
8 also been involved from the beginning in the dispute between  
9 BabyCenter and GSI. Indeed, J&J's legal department has dealt  
10 directly with Blank Rome in attempting to resolve the present  
11 dispute.

12 Finally, it appears that J&J exercises some management  
13 control over BabyCenter's business decisions, although the extent  
14 of this control is not clear from the record. BabyCenter is a  
15 limited liability company. Its sole member is BC Acquisition  
16 group, which is itself a wholly-owned subsidiary of J&J. J&J  
17 structures affiliates into groups of companies. BabyCenter  
18 belongs to the Consumer Healthcare Group and its operations are  
19 supervised by the Consumer Healthcare Group Operating Committee,  
20 which is composed mainly of J&J employees.

21 c) BabyCenter & GSI Commerce Solutions

22 BabyCenter and GSI entered into the aforementioned E-  
23 Commerce Agreement in August 2006, pursuant to which GSI agreed  
24 to run the day-to-day operations of BabyCenter's online store in

1 return for a percentage of sales revenue. Section 10.10 of the  
2 E-Commerce Agreement provides that, if a dispute should arise,  
3 the parties will first attempt to resolve it through mediation.  
4 Should mediation fail, the agreement provides that the parties  
5 will proceed to arbitration.

6 When BabyCenter closed its online store in 2009, GSI accused  
7 it of wrongfully terminating the E-Commerce Agreement.  
8 Specifically, it argued that the five-year term of service in the  
9 agreement had not expired at the time the store closed. James  
10 Smith, a Blank Rome partner, notified BabyCenter on December 1,  
11 2008 of GSI's demand for mediation on its claim. Daniels, the  
12 Blank Rome partner who had worked with J&J and affiliates on  
13 privacy matters, contacted J&J's legal department the same day to  
14 inform J&J of the dispute. In January 2009, the parties  
15 attempted mediation. Blank Rome partners Smith and Rebecca Ward  
16 appeared on behalf of GSI. Members of the J&J legal department,  
17 as well as John Winter (no relation to the author of this  
18 opinion) from the firm Patterson Belknap Webb & Tyler LLP,  
19 appeared on behalf of BabyCenter at mediation.

20 Mediation efforts proved unsuccessful. On February 27,  
21 2009, Winter informed GSI that BabyCenter would not continue to  
22 arbitration so long as Blank Rome represented GSI. On the same  
23 day, J&J informed Blank Rome of its opposition to Blank Rome's  
24 representation of GSI.



1 d) The District Court Proceedings

2 On April 6, 2009, in light of BabyCenter's failure to  
3 arbitrate, GSI filed a motion in the Southern District to compel  
4 arbitration. BabyCenter responded with a cross-motion to  
5 disqualify Blank Rome as counsel, arguing that its representation  
6 of GSI presented a concurrent conflict to which J&J had not given  
7 its consent.

8 The district court granted BabyCenter's motion to disqualify  
9 Blank Rome. GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.,  
10 644 F. Supp. 2d 333 (S.D.N.Y. 2009). Although Blank Rome's  
11 separate representation of BabyCenter allegedly ended in 2006,  
12 see id. at 336, the court concluded that BabyCenter still "must  
13 be considered a current client of Blank Rome for purposes of  
14 disqualification," id. at 337, because "BabyCenter and J&J must  
15 be considered essentially the same client for purposes of the  
16 instant litigation." Id. at 336. See also id. ("Although  
17 technically BabyCenter is a wholly owned subsidiary of J&J, as a  
18 practical matter it is part and parcel of J&J.") (citation  
19 omitted). In so ruling, the court focused on the evidence of  
20 substantial operational commonality between BabyCenter and J&J,  
21 but particularly on BabyCenter's reliance on J&J to provide legal  
22 services. See id. at 336-37. The court further found it  
23 relevant that, "since BabyCenter is a wholly owned subsidiary,  
24 its liabilities directly impact J&J's." Id. at 337.



1 Abboud, 568 F.3d 390, 397 (2d Cir. 2009). An agreement is  
2 ambiguous only if it is "capable of more than one meaning when  
3 viewed objectively by a reasonably intelligent person who has  
4 examined the context of the entire integrated agreement."  
5 Walk-In Med. Ctrs., Inc. v. Breuer Capital Corp., 818 F.2d 260,  
6 263 (2d Cir. 1987).

7 b) The Corporate Affiliate Conflict

8 In deciding whether to disqualify an attorney, a district  
9 court must balance "a client's right freely to choose his  
10 counsel" against "the need to maintain the highest standards of  
11 the profession." Hempstead Video, Inc. v. Inc. Vill. of Valley  
12 Stream, 409 F.3d 127, 132 (2d Cir. 2005). Although the American  
13 Bar Association ("ABA") and state disciplinary codes provide  
14 valuable guidance, a violation of those rules may not warrant  
15 disqualification. See id. Instead, disqualification is  
16 warranted only if "an attorney's conduct tends to taint the  
17 underlying trial." Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246  
18 (2d Cir. 1979) (internal quotation marks and citations omitted).  
19 One established ground for disqualification is concurrent  
20 representation, an attorney's simultaneous representation of one  
21 existing client in a matter adverse to another existing client.  
22 Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir.  
23 1976). Because concurrent representation is "prima facie  
24 improper," it is incumbent upon the attorney to "show, at the

1 very least, that there will be no actual or apparent conflict in  
2 loyalties or diminution in the vigor of his representation." Id.  
3 at 1387. We have noted that this is "a burden so heavy that it  
4 will rarely be met." Glueck, 653 F.2d at 749. In this respect,  
5 it will not suffice to show that the two matters upon which an  
6 attorney represents existing clients are unrelated. "The lawyer  
7 who would sue his own client, asserting in justification the lack  
8 of 'substantial relationship' between the litigation and the work  
9 he has undertaken to perform for that client, is leaning on a  
10 slender reed indeed." Cinema 5, 528 F.2d at 1386.

11 We have not previously considered whether, and under what  
12 circumstances, representation adverse to a client's corporate  
13 affiliate implicates the duty of loyalty owed to the client.  
14 However, the issue has been addressed by the ABA and also has  
15 been discussed extensively in other courts.

16 The ABA's Model Rules of Professional Conduct provide that a  
17 "lawyer who represents a corporation or other organization does  
18 not, by virtue of that representation, necessarily represent any  
19 constituent or affiliated organization, such as a parent or  
20 subsidiary." ABA Model Rule of Prof'l Conduct 1.7 cmt. 34  
21 (2006). This statement embodies what is often termed the "entity  
22 theory" of representation. See Charles W. Wolfram, Legal Ethics:  
23 Corporate-Family Conflicts, 2 J. Inst. Study Legal Ethics 295,  
24 307 (1999). However, an attorney may not accept representation

1 adverse to a client affiliate if "circumstances are such that the  
2 affiliate should also be considered a client of the lawyer  
3 . . . ." ABA Model Rule of Prof'l Conduct 1.7 cmt. 34 (2006).  
4 The ABA discussed this subject further in a 1995 Opinion Letter,  
5 concluding that "whether a lawyer represents a corporate  
6 affiliate of his client . . . depends not upon any clearcut per  
7 se rule but rather upon the particular circumstances." Am. Bar  
8 Ass'n Comm. on Prof'l. Ethics, Formal Opinion 95-390 (1995),  
9 reprinted in ABA/BNA Lawyers Manual on Prof'l. Conduct Ethics  
10 Opinions 1991-95, pp. 1001:262 (1996).

11 Many courts have reached the conclusion that the bar to  
12 concurrent representation applies if a firm's representation  
13 adverse to a client's corporate affiliate "reasonably diminishes  
14 the level of confidence and trust in counsel held by [the  
15 client]." *Certain Underwriters at Lloyd's, London v. Argonaut*  
16 *Ins. Co.*, 264 F. Supp. 2d 914, 922 (N.D. Cal. 2003) (internal  
17 quotation marks omitted); see also *Discotrade Ltd. v.*  
18 *Wyeth-Ayerst Int'l, Inc.*, 200 F. Supp. 2d 355, 358-59 (S.D.N.Y.  
19 2002); *Hartford Accident & Indem. Co. v. RJR Nabisco, Inc.*, 721  
20 F. Supp. 534, 540-41 (S.D.N.Y. 1989); John Steele, *Corporate-*  
21 *Affiliate Conflicts: A Reasonable Expectations Test*, 29 W. St.  
22 U. L. Rev. 283, 311-13 (2002). Put another way, these courts  
23 focus on the reasonableness of the client's belief that counsel  
24 cannot maintain the duty of undivided loyalty it owes a client in

1 one matter while simultaneously opposing that client's corporate  
2 affiliate in another. See, e.g., Certain Underwriters at  
3 Lloyd's, London, 264 F. Supp. 2d at 922; Discotrade Ltd., 200 F.  
4 Supp. 2d at 358-59.

5 We agree that representation adverse to a client's affiliate  
6 can, in certain circumstances, conflict with the lawyer's duty of  
7 loyalty owed to a client, a situation that we shall refer to as  
8 "a corporate affiliate conflict."

9 The factors relevant to whether a corporate affiliate  
10 conflict exists are of a general nature. Courts have generally  
11 focused on: (i) the degree of operational commonality between  
12 affiliated entities, and (ii) the extent to which one depends  
13 financially on the other. As to operational commonality, courts  
14 have considered the extent to which entities rely on a common  
15 infrastructure. See, e.g., Discotrade Ltd., 200 F. Supp. 2d at  
16 359 (corporate affiliates deemed single entity where each used  
17 the same computer network, e-mail system, travel department, and  
18 health benefit plan); Eastman Kodak Co. v. Sony Corp., Nos.  
19 04-CV-6095, 04-CV-6098, 2004 WL 2984297, at 3-4 (W.D.N.Y. Dec.  
20 27, 2004) (corporate affiliates deemed single entity based on,  
21 inter alia, integration of technology systems). Courts have also  
22 focused on the extent to which the affiliated entities rely on or  
23 otherwise share common personnel such as managers, officers, and  
24 directors. See, e.g., Certain Underwriters at Lloyd's, London,

1 264 F. Supp. 2d at 923 (substantial overlap in management);  
2 Eastman Kodak, 2004 WL 2984297, at \*4 (shared directors, officers  
3 and legal department); Discotrade Ltd., 200 F. Supp. 2d at 359  
4 (same board, directors and President). In this respect, courts  
5 have emphasized the extent to which affiliated entities share  
6 responsibility for both the provision and management of legal  
7 services. See Eastman Kodak, 2004 WL 2984297, at \*4; Certain  
8 Underwriters at Lloyd's, London, 264 F. Supp. 2d at 923-24;  
9 Discotrade Ltd., 200 F. Supp. 2d at 357; Hartford Accident and  
10 Indem. Co., 721 F. Supp. at 540; Morrison Knudsen Corp. v.  
11 Hancock, Rothert & Bunshoft, 69 Cal. App. 4th 223, 231 (Cal. App.  
12 1st Dist. 1999). This focus on shared or dependent control over  
13 legal and management issues reflects the view that neither  
14 management nor in-house legal counsel should, without their  
15 consent, have to place their trust in outside counsel in one  
16 matter while opposing the same counsel in another.

17 As to financial interdependence, several courts have  
18 considered the extent to which an adverse outcome in the matter  
19 at issue would result in substantial and measurable loss to the  
20 client or its affiliate. See Hartford Accident and Indem. Co.,  
21 721 F. Supp. at 540; Wolfram, 2 J. Inst. Study Legal Ethics at  
22 357-58. Courts have also inquired into the entities' ownership  
23 structure. See Discotrade Ltd., 200 F. Supp. 2d at 358-59. Some  
24 have even suggested that an affiliate's status as a wholly-owned

1 subsidiary of the client may suffice to establish a corporate  
2 affiliate conflict. Carlyle Towers Condo. Ass'n, Inc. v.  
3 Crossland Sav., FSB, 944 F. Supp. 341, 346 (D.N.J. 1996)  
4 ("[T]here is sufficient case law which supports the proposition  
5 that, for conflict purposes, representation of a subsidiary  
6 corporation is equivalent to representation of its parent, and  
7 vice-versa . . . ."); Stratagem Dev. Corp. v. Heron Int'l N.V.,  
8 756 F. Supp. 789, 792 (S.D.N.Y. 1991) (treating the entities as  
9 one client because "the liabilities of a [wholly-owned]  
10 subsidiary corporation directly affect the bottom line of the  
11 corporate parent"). However, we agree with the ABA that  
12 affiliates should not be considered a single entity for conflicts  
13 purposes based solely on the fact that one entity is a wholly-  
14 owned subsidiary of the other, at least when the subsidiary is  
15 not otherwise operationally integrated with the parent company.  
16 See American Bar Ass'n Comm. on Prof'l. Ethics, Formal Opinion  
17 95-390 at 1001:261-62.

18       However, the record here establishes such substantial  
19 operational commonalty between BabyCenter and J&J that the  
20 district court's decision to treat the two entities as one client  
21 was easily within its ample discretion. First, Babycenter  
22 substantially relies on J&J for accounting, audit, cash  
23 management, employee benefits, finance, human resources,  
24 information technology, insurance, payroll, and travel services



1 and systems. Second, both entities rely on the same in-house  
2 legal department to handle their legal affairs. The member of  
3 J&J's in-house legal department who serves as "board lawyer" for  
4 BabyCenter helped to negotiate the E-Commerce Agreement between  
5 BabyCenter and GSI that is the subject of the present dispute.  
6 Moreover, J&J's legal department has been involved in the dispute  
7 between GSI and BabyCenter since it first arose, participating in  
8 mediation efforts and securing outside counsel for BabyCenter.  
9 Finally, BabyCenter is a wholly-owned subsidiary of J&J, and  
10 there is at least some overlap in management control.

11 When considered together, these factors show that the  
12 relationship between the two entities is exceedingly close. That  
13 showing in turn substantiates the view that Blank Rome, by  
14 representing GSI in this matter, "reasonably diminishes the level  
15 of confidence and trust in counsel held by" J&J. Certain  
16 Underwriters at Lloyd's, London, 264 F. Supp. 2d at 922 (internal  
17 quotation marks omitted).<sup>1</sup>

18 c) J&J Did Not Waive the Corporate Affiliate Conflict

---

<sup>1</sup>These factors are not clearly outweighed by those that would support a different conclusion. It is true that the dispute between GSI and BabyCenter is unrelated to the matters upon which Blank Rome represents J&J. Also, J&J and BabyCenter do not publicly present themselves as a single legal entity; in fact, the E-Commerce Agreement at issue here expressly forbids GSI from representing that J&J is one of its strategic partners. GSI also claims that the court should have given more weight to the fact that J&J is not financially dependent on BabyCenter. BabyCenter is only one of many J&J affiliates and does not account for much of J&J's revenue. But, given the extent of J&J's and BabyCenter's operational commonality, the district court did not abuse its discretion in giving these counter factors little weight.

1           GSI argues that, with the Engagement Letter, J&J and Blank  
2 Rome dispositively waived the corporate affiliate conflict.

3           We agree that a law firm may ordinarily accept  
4 representation involving a corporate affiliate conflict if the  
5 client expressly consents. In the criminal context, we have said  
6 that courts should generally respect a party's decision to "waive  
7 his right to conflict-free counsel in order to retain the  
8 attorney of his choice." United States v. Schwarz, 283 F.3d 76,  
9 95 (2d Cir. 2002). That principle has even greater force in the  
10 context of private litigation where the Sixth Amendment does not  
11 apply. This view has also been embraced by courts and  
12 commentators. See American Bar Ass'n Comm. on Prof. Ethics,  
13 Formal Opinion 95-390 at 1001:262 ("The best solution to the  
14 problems that may arise by reason of clients' corporate  
15 affiliations is to have a clear understanding between lawyer and  
16 client, at the very start of the representation, as to which  
17 entity or entities in the corporate family are to be the lawyer's  
18 clients, or are to be so treated for conflicts purposes."); Ass'n  
19 of the Bar of the City of New York Comm. on Prof'l and Judicial  
20 Ethics, Formal Opinion 2007-3 ("[C]orporate-family conflicts may  
21 be averted by . . . an engagement letter . . . that delineates  
22 which affiliates, if any, of a corporate client the law firm  
23 represents . . . ."); Wolfram, 2 J. Inst. Study Legal Ethics at

1 364 (“[D]iscrete agreements between a lawyer and corporate-family  
2 client can define the relationship in such a way as to limit  
3 . . . the type of conflict obligations that the lawyer is and is  
4 not undertaking.”).<sup>2</sup>

5 However, Blank Rome failed to obtain J&J’s consent to the  
6 instant corporate affiliate conflict.<sup>3</sup> Although certain  
7 provisions of the Engagement Agreement may constitute a waiver by  
8 J&J of certain corporate affiliate conflicts, they do not waive  
9 the conflict at issue here. Specifically, the waiver is strictly  
10 limited to matters involving patent litigation and, even then,  
11 only to matters brought by either Kimberly-Clark or a generic  
12 drug manufacturer. Thus, because these provisions acknowledge  
13 Blank Rome’s continuing duty to avoid conflicts arising out of  
14 its representation of J&J and third parties, and because the  
15 instant matter does not fall into the narrow category of cases

---

<sup>2</sup>We need not exclude the possibility that some corporate affiliate conflicts pose such a threat to the integrity of the adversarial process that a court could, in its sound discretion, determine that the conflict is not waivable. But since neither party directs us to evidence suggesting that is the case, we assume that J&J’s consent to such representation would have been dispositive of the disqualification motion.

<sup>3</sup>GSI argues that BabyCenter and J&J have forfeited any right to contest Blank Rome’s representation. It focuses on the fact that J&J and BabyCenter waited several months before objecting to Blank Rome as counsel. We reject GSI’s argument because a party’s delay in raising a conflict-of-interest objection does not prohibit a court from deciding whether a conflict of interest exists. See, e.g., Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 574 (2d Cir. 1973) (“Since, as we have noted, disqualification is in the public interest, the court cannot act contrary to that interest by permitting a party’s delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility.”).

1 waived by those provisions, Blank Rome did not contract around  
2 the corporate affiliate conflict at issue here.

3 GSI argues that the waiver provisions simply do not address  
4 Blank Rome's authority to accept representation that might raise  
5 a corporate affiliate conflict. Rather, it argues, the conflicts  
6 addressed in the waivers arise only if a J&J affiliate is a Blank  
7 Rome client in its own right at the time the law firm accepts  
8 representation adverse to that affiliate. If the affiliate is  
9 not separately a Blank Rome client at that time, GSI argues, the  
10 waiver provisions imply no limitation on the firm's ability to  
11 accept the adverse representation.

12 GSI argues that the Engagement Agreement gives Blank Rome  
13 carte blanche to accept representation adverse to J&J affiliates  
14 that are not separately Blank Rome clients. This argument relies  
15 entirely on the clause that states: "Unless otherwise agreed to  
16 in writing or we specifically undertake such additional  
17 representation at your request, we represent only the client  
18 named in the engagement letter and not its affiliates,  
19 subsidiaries, partners, joint venturers, employees, directors,  
20 officers, shareholders, members, owners, agencies, departments,  
21 or divisions."

22 We are unpersuaded. The waiver provisions unambiguously  
23 state that the contemplated conflicts arise out of Blank Rome's  
24 representation of J&J and third-parties in matters adverse to J&J

1 affiliates, and not out of some separate representation of those  
2 affiliates. The 2004 Letter states: "you [J&J] are aware of the  
3 conflict of interests that results from our representation of  
4 Kimberly-Clark and Johnson & Johnson but that notwithstanding  
5 that conflict of interest . . . you [J&J] consent to our  
6 representation of Johnson & Johnson and our simultaneous  
7 continued representation of Kimberly-Clark." (emphasis added).  
8 The 2005 Letter similarly provides: "[I]t is our belief that, if  
9 a conflict did exist, we would be permitted, subject to the  
10 consent being given via this letter, to represent Johnson &  
11 Johnson, while remaining available to represent the generic drug  
12 manufacturers in future patent-related proceedings involving  
13 Johnson & Johnson or any of its affiliates, subsidiaries or  
14 divisions." (emphasis added). The plain language of the  
15 Engagement Agreement thus contradicts GSI's argument that the  
16 waivers do not address corporate affiliate conflicts.

17 And because the waiver provisions do address corporate  
18 affiliate conflicts, GSI's construction of the Addendum also  
19 fails. If the broadly-worded, standard language of the Addendum  
20 actually waives all corporate affiliate conflicts, then there is  
21 no possible purpose served by the nonstandard waiver provisions  
22 waiving only certain corporate affiliate conflicts. Adopting  
23 GSI's construction of the Addendum as waiving all such conflicts  
24 would render the more specific and more limited waiver provisions

1 meaningless. We cannot accept such a construction. "The rules  
2 of contract construction require us to adopt an interpretation  
3 which gives meaning to every provision of the contract."  
4 Paneccasio v. Unisource Worldwide, Inc., 532 F.3d 101, 111 (2d  
5 Cir. 2008). Also, "specific language in a contract will prevail  
6 over general language where there is an inconsistency between two  
7 provisions." Id. Because GSI's construction of the broadly-  
8 worded, standard language of the Addendum would strip the  
9 remainder of the Engagement Agreement of any meaning, it violates  
10 basic canons of construction of contract law.

11 In any event, the relevant language in the Addendum states  
12 that Blank Rome represents only the named client and not unnamed  
13 "affiliates, subsidiaries, partners, joint venturers, employees,  
14 directors, officers, shareholders, members, owners, agencies,  
15 departments, or divisions." Construed as a waiver of all  
16 corporate affiliate conflicts involving the entities listed  
17 therein, this clause would raise a serious ethical problem.  
18 Specifically, Blank Rome cannot, consistent with its duty of  
19 loyalty to J&J, sue unincorporated departments or divisions of  
20 J&J. GSI conceded as much at oral argument but could not then  
21 explain why that same language grants Blank Rome authority to  
22 accept representation adverse to the other entities listed  
23 therein, such as affiliates. This troublesome aspect of GSI's  
24 construction only illustrates how hard GSI is straining to work a

1 broad waiver into language that simply is not plain enough or  
2 clear enough to support it. There is, therefore, no waiver of  
3 the present corporate affiliate conflict.<sup>4</sup>

4 d) Blank Rome Has Not Shown an Absence of an Actual or Apparent  
5 Conflict

6 Having concluded that Blank Rome's representation of GSI  
7 implicates the duty of loyalty owed to J&J, and having further  
8 concluded that Blank Rome did not contract around that duty, the  
9 question remains whether GSI can meet its heavy burden that  
10 representation of GSI should nonetheless be allowed. As to this  
11 question, we find that GSI has failed to adduce any evidence  
12 showing that such representation will not result in an "actual or  
13 apparent conflict in loyalties." Cinema 5, 528 F.2d at 1387.

14 CONCLUSION

15 For the foregoing reasons, we affirm.  
16

---

<sup>4</sup>We of course need not and do not address issues that might arise with regard to a blanket waiver, without specifying types of claims or parties, of corporate affiliate conflicts.