

LET'S CHAT ABOUT CONFLICTS OF INTEREST

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INTRODUCTION

Conflicts of interest present some of the most common, difficult, and dangerous problems confronting lawyers. The problems are common because conflicts of interest must be assessed with every new client. The problems are difficult because the ethics rules are complex and confusing. The problems are dangerous because the post-Enron/post-Financial Collapse public is very aware of self-dealing by lawyers, politicians, and others.

People understand loyalty. They also understand when a lawyer has been disloyal. Few accusations will inflame a jury more than the charge that a defendant-lawyer has betrayed his or her client. The charge plays into the public mythology that lawyers are dishonest and avaricious. While the mythology may be just that, when there is credible evidence in a legal malpractice trial that the defendant lawyer was disloyal to the client, the charge will resonate with the jury.

POLICY CONSIDERATIONS BEHIND THE CONFLICT OF INTEREST RULES

The rules regulating lawyers' conflicts of interest arise out of a number of competing policy concerns. The first, and most important, policy concern is the belief that a client has a right to a lawyer who will be loyal to the client and in whom the client can trust.¹ The conflict of interest rules seek to promote trust between the client and the lawyer. Loyalty and trust are ends in themselves.²

A client benefits from the ability to trust his or her lawyer because the client can be assured that the lawyer will provide legal advice untainted by the claims or interests of another, and that the lawyer will be the client's advocate and protector. The client also benefits because the client can feel free to confide in the lawyer, know that the lawyer will keep those communications confidential, and know that the lawyer will provide legal advice based upon all of the facts, rather than on incomplete facts.

A lawyer also benefits from a client's trust. The lawyer benefits because trust creates an environment in which the client will confide in the lawyer and share all of the pertinent facts. A client's candor and full disclosure permit the lawyer to properly

evaluate the facts, to provide the best possible legal advice to the client and, ultimately, to protect the client.

The second policy concern behind the conflict of interest rules is closely related to the first. That policy concern is the interest in enhancing effective legal representation.³ Conflicts of interest undermine a lawyer's independence and professional judgment.⁴ If a lawyer's professional judgment is influenced by personal, financial, or professional concerns that compete with the client's, the lawyer may, consciously or unconsciously, fail to provide the client with accurate or complete legal advice. Indeed, the lawyer's ability to provide effective representation depends upon a client's trust. If a client does not fully trust the lawyer because of concerns about the lawyer's loyalty, the client may not disclose all necessary information to the lawyer and, thus, may indirectly prevent the lawyer from providing accurate and complete legal advice.

The third policy concern is that a lawyer be a client's protector and vigorous advocate. A conflict of interest may deter a lawyer from representing a client with the appropriate vigor.⁵ When a lawyer is tugged by competing loyalties, the lawyer may be tempted to "pull her punches" for a client. The lawyer may not disclose to the client all options, may fail to sue all of the appropriate parties, may fail to assert all of the appropriate claims or defenses, or may fail to make all of the arguments that the lawyer should make under the circumstances.

In short, conflicts of interest undermine a client's *expectation* of effective legal representation and undermine a lawyer's *ability to provide* effective legal representation.⁶

WHAT IS A CONFLICT OF INTEREST?

Not all differences among clients rise to the level of prohibited conflicts of interest. Some clients may dislike each other. Generally, a lawyer is not prohibited from concurrently representing clients merely because they are antagonistic to each other.⁷ Clients may compete in the marketplace and, thus, have conflicting economic interests. Should their competition prohibit a lawyer from representing marketplace competitors? Should a company be precluded from hiring a lawyer with special expertise merely because a competitor retained the lawyer first? In certain practice areas, such as entertainment or sports law, clients may wish to hire a lawyer precisely *because* of the lawyer's other clients and contacts within the industry. Do the usual conflict of interest rules apply to lawyers in such practice areas?

Should a lawyer in a small town refuse to shop at a local store simply because the merchant is a client? A lawyer may have a significant difference of opinion with clients regarding matters of community-wide concern. Should a lawyer's vocal participation in a community issue prevent him or her from representing a client with whom the lawyer disagrees on a public issue?

These are difficult, but real-life, questions. Thus, there must be some objective and reasonable standards for analyzing conflicts of interest and for determining when a conflict of interest disqualifies a lawyer from a representation.

THE STANDARD FOR DETERMINING WHETHER A CONFLICT OF INTEREST EXISTS – GENERALLY

The *Restatement (Third) of the Law Governing Lawyers* states that a conflict of interest arises when:

. . . there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.⁸

The key words and phrases here are “interests,” “substantial risk,” and “materially and adversely affected.” Thus, conflict-of-interest analysis involves considering (1) what interest is at stake; (2) what is a “substantial risk”; and (3) what does “materially and adversely affected” mean under the circumstances.

The *Restatement* identifies four questions to ask when evaluating a conflict of interest standard. Those questions are:

- 1) What kind of effect is prohibited?
- 2) How significant must that effect be?
- 3) What probability must there be that the effect will occur? and
- 4) From whose perspective are conflicts of interest to be determined?⁹

WHAT EFFECT ARE THE CONFLICT OF INTEREST RULES ATTEMPTING TO PREVENT?

The first question is, in essence, what evils are the conflict of interest rules attempting to prevent? Do the conflict of interest rules preclude a lawyer from representing clients with differing interests regardless of whether the differences are of consequence, or are the rules attempting to prevent an actual harm?

The ethics rules have evolved to recognize that almost all clients and lawyers have “differing interests” to some degree. The “differing interests” standard used by early versions of the ABA Model Code of Professional Responsibility was eventually discarded as overbroad and unworkable.¹⁰ The current ABA Model Rules of Professional Conduct and the case law have settled on a standard of an “adverse effect” on a lawyer’s representation of a client. Thus, differences between the interests of clients do not rise to the level of a prohibited conflict of interest unless the differing interests adversely affect the lawyer’s representation of a client.

The Comment to the *Restatement* states that “[u]nless there is a risk that the lawyer’s representation would be affected ‘adversely,’ there is no conflict of interest.”¹¹ Note that the standard does not consider an adverse effect *on the client* as determinative of whether there was a prohibited conflict of interest. Rather, the standard addresses an adverse effect *on the lawyer’s representation of the client*. The conflict of interest rules do not examine the *result* of the representation, but the *quality* of the representation, regardless of the result.¹²

Why this distinction? The distinction acknowledges that certain things are unknowable. A lawyer might have an egregious conflict of interest, and yet achieve a result satisfactory to all clients. But, while the clients may be satisfied with the outcome despite the lawyer’s conflict, generally the clients cannot know what the outcome would have been without the lawyer’s conflict. Thus, the standard objectively examines the incentives and pressures on a lawyer, before and during the representation, likely to affect the quality of the lawyer’s representation, regardless of the result.¹³

The conflict of interest rules do not seek a blanket prohibition of a lawyer representing concurrent clients whose interests conflict in some minor or immaterial way. Rather, the rules bar a lawyer’s conflict of interest when it matters: when the conflict would adversely affect the lawyer’s representation of any client.

HOW SIGNIFICANT MUST THE ADVERSE EFFECT BE?

A prohibited conflict of interest must matter. This means, generally, that the conflicting interests must be “material” to the representation.¹⁴ “Materiality” is determined by examining the obligations assumed by the lawyer, either by the nature of the representation or by agreement with the client.¹⁵

An otherwise immaterial conflict may be material if, for example, a client tells the lawyer that he or she considers the conflict a serious matter.¹⁶ In other words, even if a client is unreasonable and the conflicting interests are insignificant, the conflict *might* be material merely because the client thinks it material. Whether the client is right or wrong is beside the point. Rather, what is important is the overriding goal of the conflict of interest rules: that is, to foster a client’s trust and confidence in the lawyer and the lawyer’s loyalty to the client.

WHAT IS THE PROBABILITY OF AN ADVERSE EFFECT?

The rules do not prohibit a lawyer from representing a client if there is virtually no chance that a conflict of interest will adversely affect the lawyer’s representation of the client.

If, for example, a lawyer can limit the scope of the representation of a new client to eliminate the conflict of interest with an existing client, the lawyer might be able to represent the new client despite the conflict; there would be no reasonable chance that the conflict would adversely affect the lawyer’s representation.¹⁷ But, even if a lawyer

seemingly eliminates the conflict, the lawyer must still consider whether, as a practical matter, he or she will be required to communicate information to one client that, despite the limited representation, will somehow adversely affect the other client at a later point. Similarly, a lawyer must consider the risk of whether the lawyer's knowledge of a client's confidential information may inadvertently benefit the new client and injure the existing client. In either case, the lawyer's possession of a client's confidential information might adversely affect a client, and the lawyer may be prohibited from undertaking the new representation despite attempts to limit the scope of representation.

The relevant factors in determining whether a conflict of interest may adversely affect a lawyer's representation of a client include (1) the duration and intimacy of the lawyer's relationship with the involved client or clients; (2) the work to be performed by the lawyer; (3) the likelihood that actual conflict will arise; and (4) the likely prejudice to the client from the conflict if it does arise.¹⁸ The question is often one of proximity and degree.¹⁹

FROM WHOSE PERSPECTIVE ARE CONFLICTS OF INTEREST TO BE DETERMINED?

The standard for determining whether a conflict exists is not the "appearance of an impropriety" standard.²⁰ That old standard is overbroad and not particularly useful.²¹ The conflict of interest analysis should consider only the facts and circumstances that the lawyer knows, or reasonably should know, at the time.²² The conflict should not be evaluated in light of information that became known only later and that could not have been reasonably anticipated. In other words, the perspective considers what did the lawyer know and when did he or she know it?²³

GENERAL PRINCIPLES OF CONFLICT OF INTEREST RULES

LOYALTY TO THE CLIENT

The touchstone behind all of the conflict of interest rules is loyalty to the client.²⁴ The Colorado Supreme Court has stated that a lawyer is required to "maintain a *paramount* duty of loyalty to the client."²⁵ Comment 1 to Rule 1.7 of the Utah Rules of Professional Conduct emphasizes this concern: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."²⁶ The Colorado Bar Association's Ethics Committee recognized many years ago that "a lawyer's prime concern should be ensuring that . . . loyalty to . . . clients is not diluted by the interest of other clients."²⁷ And, finally, the *Restatement (Third) of the Law Governing Lawyers* recognizes that the first policy concern underlying the rules prohibiting conflict of interests is loyalty to the client:

The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to

be represented by a lawyer whom the client can trust. Instilling such confidence is an objective important in itself.²⁸

While it is clear that the law seeks to promote a lawyer's loyalty to the client, what is less clear is what constitutes disloyalty to the client. The authorities seek to provide a structure for analyzing conflicts of interest and, thus, disloyalty.

The Comment to the Utah RPC 1.7 observes:

a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited because of the lawyer's other responsibilities or interests.²⁹

The Comment to the former Colorado RPC 1.7 identified several questions a lawyer should ask when analyzing the lawyer's duty of loyalty in the context of conflicts of interest:

- What is the likelihood that a conflict will develop?
- If a conflict does develop, will it materially interfere with the lawyer's independent professional judgment in considering an alternative course of action?
- Will a conflict foreclose a course of action that the lawyer should reasonably pursue on behalf of a client?
- Does the client wish to accommodate the interests involved?³⁰

There are, in essence, four general circumstances in which prohibited conflicts of interest arise: first, and most obviously, conflicts in which clients are directly adverse to each other in a transaction or litigation; second, conflicts in which the lawyer's own personal or financial interests may impair the lawyer's ability to represent the client and, thus, may adversely affect the client; third, conflicts in which clients may not be directly adverse to each other, but there is a risk that the lawyer's duty of loyalty to another client may impair the lawyer's ability to properly represent the new client and, thus, adversely affect either the new client or another client or both; and fourth, conflicts in which the lawyer's duties to a third person may significantly impair the lawyer's ability to represent the client and, thus, adversely affect the client.³¹

The overriding concerns in each of these four circumstances are (1) loyalty to the client, and (2) protecting the client's confidences and secrets. Closely related is concern about maintaining a lawyer's professional independence. The conflicts that arise in each of these circumstances, to some degree, impair a lawyer's ability to properly represent the client, create a risk that a client will be adversely affected by the conflict, and compromise a lawyer's professional independence.

SUMMARY

A lawyer should analyze all conflict of interest issues through the prism of (1) loyalty to the client; (2) maintaining the client's trust; (3) protecting the client's confidences and private information; and (4) maintaining the lawyer's professional independence. When confronted with a possible conflict of interest, a lawyer analyzing the conflict should ask the following practical questions:

If I undertake this representation –

- 1) Are my personal interests or my law firm's interests such that I may be tempted to "pull my punches" or fail to vigorously advocate for the client?
- 2) Are the interests of another existing or former client such that I may be tempted to fail to vigorously advocate for the new client?
- 3) If I fail to assert a position on behalf of a new client because of a conflict with my interests or the interests of my law firm or another client, will that failure adversely and materially affect the interests of the new client?
- 4) If I vigorously assert a position on behalf of the new client, will that vigorous advocacy adversely and materially affect the interests of an existing or former client?
- 5) Is there a risk that I will need to use (or may use) information about a current or former client in a way that materially disadvantages that client?

If the answer to any of these questions is "yes," then the lawyer may have a conflict of interest and the lawyer should think very carefully about the proposed representation.

Each lawyer should possess that quiet, nagging, internal voice that signals a potential problem. If that internal voice suggests that there may be a problem with a conflict of interest, then there usually is a problem. A lawyer ignores that internal voice at his or her peril.

¹ Cmt.1, Utah Rule of Professional Conduct (*hereinafter*, Utah RPC) 1.7 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."); Cmt. A 2 *Restatement (Third) of the Law Governing Lawyers (hereinafter Restatement)*, Section 121, p. 245; *Restatement* Section 128, p. 338 (2002).

² *Id.*

³ Cmt.a, *Restatement*, Section 121, p.245.

⁴ *Id.*

⁵ *Id.*

⁶ *See Restatement* Section 16, p. 146.

⁷ Cmt. c(iii), *Restatement*, Section 121.

⁸ *Restatement* Section 121, pp. 244-45.

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- ⁹ Cmt. c, *Restatement* Section 121, p.247.
- ¹⁰ *See, e.g.*, Disciplinary Rule 5-105(A), ABA Model Code of Professional Responsibility (1969).
- ¹¹ Cmt. c(i), *Restatement* Section 121, pp. 247-48.
- ¹² *E.g., In re Cimino*, 3 P.3d 398, 401 (Colo. 2000). (“The absence of injury does not negate the violations of Colo. RPC 1.7(b) or 1.8(a).”) (interpreting the identical language as in Utah’s RPC 1.7(b)).
- ¹³ *Id.*
- ¹⁴ Utah RPC 1.7(a)(2).
- ¹⁵ Cmt. c(ii), *Restatement* section 121, p. 248.
- ¹⁶ *Id.*; *see also* Cmt.6, Utah RPC 1.7.
- ¹⁷ Cmt. c(iii), *Restatement* § 121, pp. 248-49.
- ¹⁸ Cmt. 26, Utah RPC 1.7; Cmt. 26, ABA Annotated Model Rules of Professional Conduct 1.7, 5th ed. (American Bar Association Center for Professional Responsibility, 2002) (*hereinafter*, ABA Model Rules).
- ¹⁹ *Id.*
- ²⁰ Cmt. c(iv), *Restatement* § 121, pp. 250-51.
- ²¹ *Id.*
- ²² *Id.*
- ²³ Cmt. d, *Restatement* § 121, p. 251.
- ²⁴ Cmt. 1, “General Principles,” Utah RPC 1.7; Cmt. 1, “General Principles,” ABA Annotated Model Rules, p. 107.
- ²⁵ *People ex rel. Peters v. District Court*, 951 P.2d 926, 929-30 (Colo. 1999) (emphasis added); Cmt. 1, “General Principles,” Colorado and Utah RPC 1.7 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).
- ²⁶ Cmt. 1, Utah RPC 1.7.
- ²⁷ Syllabus, CBA Ethics Committee Formal Opinion 57 (March 21, 1981) (emphasis added).
- ²⁸ Cmt. b, *Restatement* § 121, pp. 245-57.
- ²⁹ Cmt. 8, former Colo. RPC 1.7 (“As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.”); *see also* Cmt. 3 “Loyalty to a Client,” former Colo. RPC 1.7 (“Loyalty to the client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”); *accord* Code of Professional Responsibility, DR-5-105(A) (“A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest . . .”).
- ³⁰ *See* Cmt. 5, “Loyalty to a Client,” former Colo. RPC 1.7.
- ³¹ *See* CBA Ethics Committee Formal Opinion No. 57 (March 21, 1981), for a similar list of such situations.