Conflicts of Interest

What is a conflict of interest, and why is everyone so worried about it?

Licensed lawyers are given some very special powers. When we become attorneys, we become officers of the courts of the state granting the license and of the courts affirmatively admitting us to their respective bars pursuant to that license (e.g., federal courts).

The law license allows us to represent (usually "for pay") the property rights and legal interests of others while we, in essence, are allowed to stand aloof from the embattlement of interests. Not that attorneys do not become viscerally, laboriously, and even emotionally, engaged in the tug-of-war between the actual adversaries, but, as the late Sam Passman once said to a young associate: "Always remember, they're not talking about *your* money."

In exchange for this professional immunity from the struggles our clients and their adversaries endure, society demands of all attorneys, through well-settled rules, certain minimum standards of conduct.

The expectations of society are:

(1) that the relationship between an attorney and client be one of complete **trust** and openness (fostered by the attorney-client privilege that attaches to communications between the two) and that the attorney not create circumstances that suggest a weakness in that trust,
(2) that the representation of a client's interests be **zealous** and to the fullest extent permitted by law, and
(3) that the **confidences** shared between client and attorney, in the course of the representation, always be respected, protected, and never thereafter disclosed.

To codify these expectations, specific rules of behavior have developed under the category of what we call "**conflicts of interest**." In a very general sense, these are rules society imposes on us in order to cement the "trust" relationship between lawyer and client and to assure that the attorney remains **undistracted** in his or her devotion to the best interests of any person or entity the attorney claims as a client.

That sounds easy, so where's the problem?

The problem is that there will always be a dynamic tension among at least four "moving targets" of conduct: (a) the lofty "conflict rules" that govern attorney conduct, (b) the permit to relax some parts of the rules with the informed consent of the affected parties, (c) the need for attorneys to retain their professional independence from their clients without lowering the level of trust, and (d) the necessity to earn a living by accepting new clients, new matters, new business.

The Texas Rules

Texas lawyers must abide by (i.e., must not violate) the **Texas Disciplinary Rules of Professional Conduct** (which we will call the "**Texas Rules**").

Texas Rule **1.06** provides us with the "**general rules of conflicts of interest**."

Texas Rule **1.07** addresses the specific practice of an attorney's acting as an **intermediary** between and among two or more clients seeking a common purpose or a mutual resolution of legal issues.

Texas Rule **1.08** addresses **prohibited** transactions between attorney and client.

Texas Rule **1.09** gives the special conflicts standards pertaining to **former clients**.

The Texas Anomaly

Texas Rule **1.06** is central to our discussion at this point. Because it is not worded with altogether unmitigated clarity, it is often summarized as to its effect as opposed to being quoted. Here's what it actually says:

Texas Rule **1.06**

a) A lawyer shall not represent opposing parties to the same litigation.
b) In other situations, and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
    1. involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
    2. reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
c) A lawyer may represent a client in the circumstances described in (b) if:

Part (a) is clear enough (e.g., an attorney cannot represent both plaintiff and defendant in a litigation matter).

But, part (b) often confuses the reader at first, because the scenario it is prohibiting is stated in something of a backward way. Most readers will break it down successfully by taking it, one step at a time, from the end to the beginning.

"If my law partner is representing Client A in a matter against adversaries X, Y and Z, and X later comes to me and asks me to represent him in a new matter *against* Client A, I have to turn down that tendered representation if I conclude that this second (new) matter is related, in some substantive way, to the already pending matter in which Client A is our firm client and Client X is Client A's adversary."

This refusal is required by the rule because (in the rule's own language) the new matter in question (where X would become our client) is "substantially related" to a "matter" (the preexisting matter) in which "that person's interests" (X's interests) are already "materially and directly adverse to the interests of another client" (being Client A).

Restated in the affirmative, if the newly tendered matter, in which the new client would be directly and materially adverse to a current client of the firm ("Client A"), is factually *unrelated* to any current or previous representation of Client A, there is no conflict of interest, and no waiver or consent of Client A is required. Or, put another way, **a Texas lawyer can become adverse to a current client, without a waiver, as long as the new matter does not relate, in substance, to any other matter where the firm is representing that current client.**

While the Texas Rule did not exactly declare open season for "suing one's own clients on unrelated matters" (Texas attorneys still need to clear the **adverse limitation** hurdle posed by part 1.06(b)(2) of the rule), it did create what still appears to be a unique opening for Texas attorneys to become directly and materially adverse to their own current clients without consent – ***something not found in the attorney conduct rules of any other state***.

Interestingly, after articulating a rule that permits Texas lawyers to sue their own clients, the Comments to the Texas Rules urge us not to actually do it:

> Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflicts to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.
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> Comment 11 to Texas Rule 1.06.

Best Practices for Avoiding a Conflict

Know How to Interview Clients:

- Ask *early* who is involved.
- Don't create attorney-client relationship "by accident" (e.g., a 45 minute call is too long).
- Listen thoroughly. Ask about the prospective client's goals.
- Ask what "the other side" would be telling you.
- Talk about fees, unless you enjoy working for free.
- Document meetings: your best protection.

Know Whom You Represent:

- Ask who will be the client.
- Explain that you can't keep secrets between joint venturers.
- If others are present, explain the duties of confidentiality during the process.
- Document those decisions and have the client acknowledge the advice and decision.

Secure "Tag-Along" Counsel When Necessary:

- Do not make the mistake of representing both the corporation and employee. Have another lawyer tag along for the employee.
- If there are numerous related parties on the same side in litigation, do NOT attempt to solely represent them all.
- Have clear written communications about whom you represent. If you are authorized to communicate with related parties, document it.

Remember Continuing Duties to Old Clients:

- The former attorney-client relationship never dies, but duties can be waived.
- You can't take positions that conflict with or comment on your opinion of your former client.
- Always be SAFE: secure permission and waivers from both new and old clients.

Document Your Representation Adequately:

- Engagement letters should include file destruction protocols.
- Designate who will be working on file, and the matter, and any additional matters not undertaken.
- Have a bail-out clause in case the client refuses to follow advice.
- Have waiver of conflict letters in proper form under Rule 1.06, which requires the lawyer to disclose:
  - The **existence** of the conflict;
  - The **nature** of the conflict;
  - The **implications** of the conflict;
  - Possible **adverse consequences** of common representation;
  - **Advantages** of common representation.

Adapted from the article "Conflicts of Interest—Who's your Client?" by Claude E. DuCloux, presented at *Essentials of Business Law Course,* State Bar of Texas, 2016.

Full article by Claude DeCloux
Rules of Ethics 1.06, 1.07, 1.08 and 1.09
Ethics Opinions 472, 525, 626, 627
Ten Minute Mentor video on Conflicts