Conflicts of Interest

You Can't Be Everyone's Best Friend—or Their Lawyer, Either

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Agenda

- 4 common conflict scenarios which prohibit representation
- What are the "Encounter Points" which can create/alter Conflicts
- How to Make "Full" Disclosure
- 3 Questions A Lawyer asks
- Duties of a lawyer when Conflicts Arise
- Doing business with a client - ethically
- A close look at some recent Conflict cases
- Best Advice

ABA Model Rule 1.6

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(b)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

ABA Model Rule 1.6(b)

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

ABA Model Rule 1.6(b)

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

ABA Model Rule 1.6(c)

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

THE "LAW"

- The Disciplinary Rules of Your State:

  Most States have "versions" of the ABA Model Rules;

- State Case law

- The Opinions of the Professional Ethics Committee of your State

Historical Biblical Derivation: Matthew 6:24: "No man can serve two masters…"

Four Situations Which Prohibit Representation

1

Litigation:

Representing parties in the same litigation.

Four Situations Which Prohibit Representation

2

Business:

Representing someone in a "Substantially Related" matter where interests are Materially and Directly Adverse.

3

Other Duties:

Representation when it "Reasonably Appears" your duties to another client, third party or to your firm conflict.

4

Past Matter

Previous client's interest conflict when a dispute arises with same matter/ same parties.

When do Conflicts Arise?

Conflicts Arise in Three Primary Encounter Points:

1. Initial Contact

2. Introduction of New Parties/Counsel

3. Unexpected Change in Circumstance

“Encounter Point” 1:

Initial Contact Problems

1. Unsolicited information in emails, letters and phone calls: protect yourself!

2. During interviews: you need good interview skills! Don’t talk to someone for 45 minutes and then discover the conflict. Ask “who is involved?” EARLY ON.

Interviewing Skills a MUST!

Good lawyers learn to "vet" potential conflicts early in any new interview!

(The "first 5 minutes" rule: always determine,... "Who are the parties and entities involved.")

Remember: the client who pours out his heart to you has justifiably "formed an attorney client relationship."

Resolution of Initial Contact Conflicts

Know what to do when you discover an early conflict –

1. Inform client
2. Return any documents or information
3. Disclaimer: "I cannot represent you"
4. Destroy digital information which can't be returned

What About Website Contact?

Firms are advised to have a click tab requiring a person making an unsolicited contact via a firm website to waive confidentiality:

WARNING: "DO NOT SEND or include any information…if you consider the information confidential. By sending this email you agree that the information does not create a lawyer-client relationship,…and that any information is not confidential and not privileged."

Recent Texas Prof Ethics Opinion 651, November 2015

- Although there is no legal/ethical requirement to require such a warning tab, it is the ONLY WAY to protect yourself from the conflict of interest, fiduciary duty obligations with reference to prospective confidential information from prospective clients.

- Without such warning: You can't merely delete; No presumption that Client should not expect reasonable privacy.

- Thus, without the warning, your acquisition and use of information from prospective clients for yourself or another client is judged under the Disciplinary Rules.

“Encounter Point” 2:

Introduction of New Parties

Most often this occurs when:

1. A conflicted party comes into a deal, a contract, a lawsuit, or
2. A new lawyer is hired by firm, creating conflict,

..and the rules prohibit you from staying in the case.

When it happens: Know how to get out.

“Encounter Point” 3:

Your Activities &Businesses

The third primary area when conflicts develop are: the Lawyer’s Own Activities:

- Doing Business with Client
- Having Business Conflicts with Client
- Lawyer Serving on Organizations
- Law Firm’s Business Interests, including Partners and Associates (including real estate)

Dangerous Situations

- Lawyer is a Member of Organization & Counsel to same
- Taking Inconsistent Legal Positions before Agencies or Courts
- Representing both Officers and Organization itself

Dangerous situations

- Representing both Employee and Company or Agency (multiple representation) [Use "Tag-along counsel"]
- Imputed Disqualification (Partner/Associate)

John Rothermel's 3 Questions

Ask yourself:

Between Parties:

1

Will my representation of **A** be materially and directly adverse to the interest of **B**?

John Rothermel's 3 Questions

2

To Third Parties:

Do I have any duties to third parties which will limit my representation of either **A** or **B**?

John Rothermel's 3 Questions

3

My own or my firm's interests:

Is my representation of **A** or **B** adversely limited by my own interests?

Rights and Duties

The **lawyer** has the duty to bring up the conflict (not the Client)

Rights and Duties

The **lawyer** has the duty to make sufficient disclosure.

Rights and Duties

The **lawyer** has the duty to secure permission.

Rights and Duties

The **lawyer** has the duty to withdraw when appropriate.

Watch out for EXCEPTIONS!

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Complete Disclosure AND Permission

- Mere disclosure is not sufficient
- Lawyer must still "reasonably believe" that their interests will not be affected by joint representation
- DISCLOSURE MUST MEET ABA Rule STANDARDS

Complete Disclosure

1. The **existence** of the conflict
2. The **"nature"** of the conflict
3. The **implications** of the conflict
4. Possible **adverse consequences** of common representation
5. **Advantages** of common representation

Doing Business with a Client

- Must be fair to client
- Must have full disclosure
- Must have a writing to protect yourself
- Give client the right to seek independent advice
- GET THE CONSENT IN WRITING !

Leaving Government Employment

- Firm may use "Chinese Wall" (now referred to as "Screening")
- Must notify Agency where you worked – the Agency has a right to know and object.

”Screening an Incoming lawyer”

- Incoming lawyer must be screened from participation in possible conflict
- “Screened” means a written firm plan, no use of files, no access to database, and no participation in firm conferences about the case
- Be prepared to testify as to implementation of the “Screen”

New Case Law

In Re RSR Corporation, Texas Supreme Court, 13-0499, December 4, 2015

RSR represented by Bickel & Brewer, sues Inppamet, (a Chilean manufacturer of mining anodes) for, *inter alia,* breach of a licensing agreement and misappropriating trade secrets.

The “Sobarzo Papers”

- Sobarzo is a disaffected Inppamet employee who resigns from Inppamet in 2010, taking 2.3GB of data with him, including 17,000 emails and including attorney-client communications between Inppamet and lawyers.
- SOBARZO offers these documents/emails to RSR’s ATTORNEYS! The Attorneys accept and review them.

Disqualification of Lawyers Results

Inppamet moves to disqualify RSR's Attys because they have **"freely viewed the documents Sobarzo took,"** many of which were allegedly privileged or confidential.

Court disqualifies Attorneys, citing:

***In Re American Home Products,* 985 S.W.2d 68** (Tex. 1998) and finding that lawyers *should have screened* Sobarzo from participating in the case.

Appeal to Texas Supreme Court

THE ISSUE: What is the "standard" that applies to fact witnesses divulging information about a former employer?

AND, is that different from how we treat a legal assistant moving between firms?

Supreme Court Holds

- TX Supreme Ct holds *American Home Products* (1998) applies to law firm employees.
  - It's the Wrong Standard in this case, which is a third party former employee of opposing party.
- The correct standard to guide the Trial Court is ***In Re Meador,* 968 S.W.2d 346 (Tex. 1998).** Supreme Court says it is "clear… Sobarzo supplied significant information regarding Inppamet …."

American Home Standard

Supreme Court says under *American Home Products,* there is a presumption that the firm is irreparably tainted by not shielding the legal assistant, thus "genuine threat" exists that they'll use the information.

But Sobarza is a fact witness and a different standard applies.

So, what happens when "someone" drops confidential information in your lap?

The *Meador* Standards

Tx. Sup. Court remanded it to Trial Court to discuss **these factors:**

1. Whether the attorney **knew or should have known** that the material was privileged.
2. The **promptness** with which the attorney notifies the opposing side of receipt of privileged information.
3. The **extent** to which the attorney reviews and digests the privileged information.
4. The **significance** of the privileged information: prejudicing a claim or defense and the extent to which return may mitigate the prejudice.
5. The extent to which the **Movant** may be **at fault** for unauthorized disclosure.
6. The extent the non-Movant will suffer **prejudice** from the disqualification of his or her attorney.

What's our Take-Away?

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You still don't have the right to review privileged documents produced surreptitiously by a former Employee.

SO…Don't look at documents provided by a disaffected employee, and if they arrive, notify the other party.

Where do we stand today?

Lawyers – Secretaries - Employees

Referenced cases find three presumptions:

- Courts recognize that when a **lawyer or staff** member works on a client matter, there is a conclusive presumption that confidential information was **imparted to** the lawyer or staff member.
- A second conclusive presumption is that **a lawyer** moving to new firm **shares** the client's confidential information with the lawyers in the new firm.
- However, when a staff member moves to a new firm, there is a presumption that staff member shares clients confidential information but that presumption is **not** conclusive and it can be overcome by implementation of appropriate screening procedures.
- See Opinion 644 (August 2014) and Opinion 650 (May 2015)

Changing Firms

Lawyers – Secretaries – Employees

- See TX Opinion 644 (August 2014) (Can't "screen" a lawyer employee who participated in case)
- and Opinion 650 (May 2015) (may screen non lawyer previous employee who did not work on matter)
- Professional Ethics Committee Opinion 472 (June 1991) (also allows a legal asst to be screened)

Go to TXETHICS.ORG for copies of opinions

Best Advice

- Know whom you represent.
- Get consent in writing.

Best Advice

- If you must withdraw from representing one client, usually you must completely withdraw.

Best Advice

- Don’t interview or recruit lawyers involved in the current case. Wait until it’s over.

Best Advice

- Remember your fiduciary duty to clients
- Interview well…discover conflicts early on in the first interview
- Be cognizant of encounter points.
- Get permission/waivers when appropriate.

My New Favorite Quote:

"When education works, behavior changes." -*Charles Darwin*

What will you change in your practice?

Questions?

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