

Conflict of Interest - Part 1

Posted 10/6/08 [Randy Johnston, Johnston ♦ Toby, P.C.](#)

Why is it that clients understand a conflict of interest but many lawyers do not?

For the next couple of months, we are going to be talking about conflicts of interest. The actual rules defining the lawyer's ethical obligations for dealing with conflicts of interest are found in Texas Disciplinary Rules of Professional Conduct, Rules 106, 107, 108 and 109. Today, however, we are going to look at only one aspect of Rule 106 (b). That rule makes it a conflict of interest for a lawyer to represent a client under circumstances where it reasonably appears that the representation of the client will become adversely limited by the lawyer's responsibilities to another client.

The rule sounds straight forward enough, right? But, is a violation of Rule 106(b) triggered when a lawyer attacks the credibility of a doctor on behalf of Client Jones, but the same lawyer must defend the good doctor's credibility in a separate proceeding on behalf of Client Smith? Is there a conflict when a lawyer argues for strict interpretation of a notice provision on behalf of Client Jones even though strict interpretation of that notice provision would result in the dismissal of the claims of Client Smith? Is there an ethical violation when one lawyer in a firm argues for Client Jones that \$600 per hour is a reasonable attorneys' fee, even though another lawyer in the same firm must argue before the same judge tomorrow on behalf of Client Smith that \$500 per hour is unreasonable?

This type of conflict is sometimes referred to as "*Issue Conflicts*": one client's side of an issue conflicts with another client's view of the same issue. They are presented when a lawyer's efforts for one client will adversely affect another client. Such *Issue Conflicts* are lurking everywhere in a law office, although not every *Issue Conflict* violates Rule 106. Every *Issue Conflict* should, however, be compared to the language, the comments, and the case law of Rule 106, to ensure that the lawyer has not unwittingly walked right into a conflict of interest.

Let's start with a bedrock principle: the fundamental baseline for all client representation is undivided loyalty. That is the foundation for Rule 106 also. It is important, not only that the lawyer give undivided loyalty, but also that the client sense that the lawyer is giving the client undivided loyalty. Imagine, for example, how Mr. Smith feels when he sits at the back of the courtroom during Ms. Jones divorce, and hears his lawyer argue to the very judge who will decide his divorce case that adultery should automatically result in a disproportionate division of community property. Or, alternatively, that a wife's adultery should have no effect upon the issue of child custody. The lawyer may believe that there is no conflict of interest, but Mr. Smith will undoubtedly disagree.

So does the lawyer have a conflict of interest? These issues rarely reach the courts. They tend to get decided by grievance committees, which are very understanding of the lawyer's predicament. So long as the lawyer did not actually compromise the representation, there's no violation. Just getting a good result for one client that hurts another client is not unethical. But the public hates it, and it is powerful evidence in a malpractice trial. Lawyers should be aware of the client's view of these issues at least, and more sensitive to it.

So what's a lawyer to do? The safe harbor for an *Issue Conflict* is client consent and waiver of the conflict. The test of whether you can navigate into the safe harbor, however, is whether you made a full and complete disclosure to the client before the consent. More on that next time.

Conflict of Interest - Part 2

Posted 10/7/08 [Randy Johnston, Johnston ♦ Toby, P.C.](#)

When can a lawyer represent both sides of a dispute?

The actual rules defining a lawyer's ethical obligations for dealing with Conflicts of Interest are found in the Texas Disciplinary Rules of Professional Conduct, Rules 1.06, 1.07, 1.08, and 1.09. Today we are only going to look at one aspect of this complicated subject.

Rule 1.06(a) states that a lawyer shall not represent opposing parties in the same litigation. Subsection (f) of that Rule makes it unlawful for another lawyer in the same firm to do what the individual lawyer cannot do, so two lawyers in the same firm cannot represent opposing parties in the same litigation. No great shock here, huh?

This seems like a simple rule, relatively easy to follow, and not likely to get any thoughtful lawyer in trouble. Historically, the lawyers who fall into this open and obvious trap are the ones who agreed to represent both the husband and wife in a divorce, to save them both money. Occasionally, the same thing will happen with a lawyer who agrees to handle both sides of a will contest, or other family dispute.

If you ask the lawyers what they thought the lawyer's role was in these situations and compared it to what the clients thought the lawyer's role was, you would find drastically different interpretations of the lawyer's duty to the clients. The lawyer would probably say that they thought they were acting as a combination Mediator and Scrivener, helping the parties reach agreement and then documenting it for them. The clients on both sides of this dispute, however, believe that the lawyer represents them, that the lawyer is looking out for each of their individual best interests. It is, of course, impossible for a lawyer to look out for the best interest of both sides of a dispute and lawyers should not need the Rules of Professional Conduct to know that a servant cannot serve two masters.

There is, however, a specific rule for the lawyer who is friends with both sides of a dispute and wants to help them try to resolve it. Rule 1.07 sets out the terms and conditions of a lawyer acting as an Intermediary. Not advocate - "Intermediary." To act in this capacity, the lawyer must, of course, consult with each client concerning the implications of the common representation and then obtain each client's written consent to the common representation. The consultation with the client must include a discussion about the loss of the attorney-client privilege and a candid explanation of both the advantages and disadvantages of not having individual, zealous, personal representation versus the use of an Intermediary. The law is silent on what constitutes adequate disclosure in this regard, but, as always, the more discussion and disclosure, the better. While the clients' consent must be in writing, the disclosure to the client is not required to be in writing but, the prudent lawyer would be wise to put the disclosures in writing also.

Before the lawyer consults with a client, however, they must first satisfy themselves that they reasonably believe: (1) that the matter can be resolved without contested litigation, (2) on terms compatible with each client's best interest, (3) that each client is capable of making an informed decision in the matter, and (4) that there is little risk of a material prejudice to the interest of either client if the hoped-for settlement does not occur. And lastly, that the lawyer is capable of undertaking this common representation impartially, with fairness to both sides. These requirements in the rule essentially obligate the lawyer to be honest with themselves about the prospects of success and their ability to act fairly and impartially as an Intermediary on behalf of both clients.

Once the lawyer has assumed the role as Intermediary between two parties to a dispute, the lawyer has the obligation to consult with each client concerning the decisions to be made by the client. This consultation usually relates to settlement discussions back and forth and whether settlement offers should be accepted or not. As an aside here, let me just ask: what will the Intermediary do if the husband tells the Intermediary that he really needs the

case to settle quickly, before the wife discovers his bank account in Bermuda? Remember, the role of an Intermediary is a role of representing two parties: it is not the role of a Mediator where one side or the other can insist that the Mediator keep something secret from the other side. In addition, the lawyer is obligated to withdraw immediately as an Intermediary if either of the clients so requests or if the lawyer's previous reasonable belief in the probable success of an Intermediary arrangement changes.

The lawyer who successfully serves as an Intermediary has performed a valuable service for both clients. The lawyer who assume the role of Intermediary, in the hope of helping two common friends resolve a dispute should recognize, however, that they may end up losing both friends in the process.

As we will discuss next month, the ethical challenge to acting as an Intermediary is the same as the challenge anytime a lawyer requests a client's consent in connection with the conflict of interest: how do you satisfy the obligation of full and complete disclosure as a predicate for securing the consent?

More on that next time.

Conflict of Interest - Part 3

Posted 10/7/08 [Randy Johnston](#), [Johnston ♦ Toby, P.C.](#)

Have you ever had your shield turned into a sword, and then used against you?

What does every lawyer think is the shield that protects the lawyer from discipline because of a conflict of interest? The client's consent to waive the conflict.

Let me start by observing that there are some conflicts of interest that cannot be waived by the client, no matter what. Like representing opposing parties in the same lawsuit or preparing an instrument giving the lawyer a substantial gift from a non-relative client. Most other conflicts of interest, however, can be waived by the client. A client's waiver would, for example, permit a lawyer to represent Client A in a substantially related matter in which Client A's interest is materially and directly adverse to the interest of Client B. As we discussed last month, a lawyer could even represent opposing parties in a non-litigation dispute, as an intermediary, pursuant to Rule 1.07, with the two clients' consent.

In each of these instances, it is the client's agreement that permits the lawyer to go forward without risk to her law license. So, how do you secure the client's consent?

First, the consent always, always, always, has to be in writing. The fact that the Rule requires conflict waivers to be in writing really only codifies what we already instinctively know: if the lawyer says the client orally consented and the client denies the oral consent, the client is probably telling the truth.

Having secured the client's signature on a letter that waives the conflict of interest, some lawyer's believe that they now have the impenetrable shield to protect them from allegations of improper, unethical behavior. How then, can this shield be turned into a sword against the lawyer? Here's how.

Virtually every time the Disciplinary Rules refer to client consent to waive a conflict of interest, you will find some form of the following words: "after full and complete disclosure to the client." As Hamlet said, "Ah, there's the rub." Failure to make full disclosure to the client invalidates the consent every time.

Typically, there is no requirement that the "full disclosure" be in writing, so you end up with the lawyer telling one story about what was disclosed and the client telling a completely different story. Guess who juries and grievance committees are going to believe? Smart lawyers include as a part of the conflict waiver the "full and complete disclosure," so that there is no dispute about what was disclosed. This is a wise practice but is still not without its perils.

My personal experience has been that every disclosure to a client concerning a conflict of interest is unavoidably incomplete and, therefore, fails to satisfy the requirement of full and complete disclosure. Trust me, a motivated adversary can always find something that you failed to disclose. And then the shield no longer protects you.

So, how then does the shield become a sword? When I have a waiver of a conflict of interest letter in a legal malpractice case, I usually mark it Plaintiff's Exhibit #1. Here's what the juries think when they see the waiver of the conflict letter, prepared by you, and signed by your client: *"Well, would you looky here. That lawyer knew she was doing something wrong from the start and she talked her client into letting him do it anyway. That sneaky so-and-so!"*

And there is your sword, turned against you.

Let me close by saying that there are obviously situations where a conflict can be waived and the client wants to waive the conflict. The best client consent to waive a conflict would have the following components:

- The consent is in writing;
- The letter sets out an honest attempt at full and complete disclosure, which includes the reason for the conflict rule and the consequences of both waiving and not waiving the conflict;
- The letter encourages the client to seek separate counsel to advise the client on whether to waive the conflict;
- The letter offers to pay for the separate counsel to advise the client on whether to waive the conflict, so that the client does not incur additional expense in order to accommodate the lawyer's conflict; and
- The client actually contacts independent counsel (not picked by the lawyer) and after such consultation, waives the conflict.

Now that, my friends, is a shield that can't be turned into a sword.