BIOGRAPHICAL INFORMATION

EDUCATION

B.A. Political Science  University of Iowa  1973
J.D. cum laude Creighton University School of Law  1976

PROFESSIONAL ACTIVITIES

Admitted to practice in Nebraska (inactive), North Dakota and Texas
Member, Standing Committee on Legal Services to the Poor in Civil Matters, State Bar of Texas
Member, ABA Section of Legal Education and Admissions to the Bar, Site Evaluation Teams for
Law School Accreditation
Past Member, Board of Directors, West Texas Legal Services
Advisory Board, Lubbock County Dispute Resolution Center
State Bar of Texas, Pro Bono College 2003- present
2002 John Crews Pro Bono Lawyer of the Year Award (Lubbock County Bar Association/West Texas Legal
Services)

ACADEMIC APPOINTMENTS AND RECENT PUBLICATIONS

Professor and Director of Clinical Programs
Texas Tech University School of Law  2001- present

Professor and Director of Clinical Programs
University of North Dakota School of Law  1983-2001

Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated
Into the Practice of Law, 56 BAYLOR L. REV. 141 (2004). [Selected Outstanding Texas Law Review Article Award
for 2005 by the Texas Bar Foundation]

The Unfinished Agenda for Law Schools in Nurturing a Commitment to Pro Bono Legal Services by Law Students. 72 UMKC L. REV. 477 (2001).


Opportunities and Challenges of Providing Equal Access to Justice in Rural Communities. 28 WM MITCHELL L.
ETHICAL ISSUES FACING PRACTICING ATTORNEYS

I. INTRODUCTION

Attorneys face a myriad of ethical issues on a daily basis while engaged in the practice of law. The purpose of this article is to identify and discuss two interrelated and prevalent issues that frequently arise for practitioners in undertaking the representation of clients in numerous situations, the practice of dual representation and conflicts of interest. Recognizing how these ethical dilemmas arise and how to address them is important not only to avoid disappointed clients but to prevent possible disciplinary action.

As the Preamble to the Texas Disciplinary Rules of Professional Conduct notes in paragraph 7:

In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

II. SELECTED ETHICAL ISSUES ARISING FOR THE ATTORNEY IN PRACTICE

A. Dual Representation

Each individual client of a lawyer has an expectation that the lawyer will give their particular legal matter the utmost priority and will, at all times, be bound to serve the interests of the client to the exclusion of all other interests. This is referred to as the duty of undivided loyalty to the client, an essential element in the lawyer’s relationship to the client.

However, in the course of a lawyer’s practice, it is usual for a lawyer to represent numerous individual clients at any one time with individual legal problems. Thus, a lawyer is often faced with the task of balancing a number of different legal matters and individual clients as a part of their practice on a daily basis.

Dual representation, on the other hand, involves a lawyer being asked to represent two or more individuals in the same legal matter. While the objectives and interests of these individuals may, at the outset, appear to the lawyer to be consistent with each other making dual representation possible, undertaking such representation can become problematic if their interests later become divergent. The concept of a lawyer being expected to serve two or more masters in the course of representation would seem ordinarily to be improper inasmuch as a client has the right to expect undivided loyalty from their attorney, and the attorney’s zealous representation of one client might come at the expense of another client. Does that mean dual representation is impossible and unethical?

There may be a variety of situations where individual clients may believe it is in their best interests to have a common attorney, thereby avoiding the unnecessary expense of retaining more than one lawyer. Additionally, it may be thought that the individual parties have entirely consistent objectives in the representation so that retaining a common attorney to represent their interests is entirely proper and efficient. Some of the areas of legal practice where dual representation is commonly undertaken and a lawyer is asked to provide dual representation include the following situations: an insurer and insured in a tort claim; a husband and wife in an anticipated amicable divorce; individuals in business planning matters; estate planning for a married couple; multiple family members in the sale of land; employers and employees in immigration matters; and co-defendants in a criminal case.

Any time that a lawyer is asked to undertake the representation of the interests of more than one individual in a single legal matter, the practice of dual representation is presented. The critical questions that must be resolved by a lawyer when confronted with a situation involving common representation is, first, whether to undertake dual representation and, second, if representation is undertaken, how to carry out their duties to multiple clients with potentially differing interests without violation of the ethical rules. Dual representation can undermine the lawyer’s ethical duty of undivided loyalty and client confidentiality, fundamental principles of the attorney-client relationship.

If the individual client’s interests or objectives become inconsistent at any point during the course of the representation, a lawyer pursuing the objectives of one client to the exclusion of the other will compromise the lawyer’s duty of undivided loyalty to the other as well as their obligation to exercise independent professional judgment. Maintaining client confidences is fundamental to attorney-client relationship. However, the general rule with respect to clients receiving dual representation is that the
attorney-client privilege does not apply as between them. Comment 6 to Tex. Disciplinary R. Prof. Conduct Rule 1.07.

1. Applicable Law

RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 121 (2000) sets forth the fundamental rule prohibiting a lawyer’s conflict of interest, which can include the practice of dual representation:

“Unless all affected clients and other necessary persons [give informed consent]. . ., a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if 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.”

Rules of ethics do not create a *per se* prohibition on multiple representation in all cases. See Tex. Disciplinary R. Prof. Conduct Rule 1.06. On the other hand, an exception to this general rule is commonly recognized in the case of dual representation in the context of criminal cases. As comment 3 to Tex. Disciplinary R. Prof. Conduct Rule 1.06 indicates:

The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.

How then can a lawyer determine under what circumstances it may be ethically permissible to undertake dual representation in a particular case?

The comments to Tex. Disciplinary R. Prof. Conduct Rule 1.06 suggest that representation of multiple parties with similar interests is permissible if the risk of adverse interests and potential conflicts of interest is minimal. In fact, “common representation may be permissible where the clients interests are generally aligned in interest even thought there is some difference of interest among them.” Comment 14 to Tex. Disciplinary R. Prof. Conduct Rule 1.06.

On the other hand, the lawyer must not undertake dual representation unless the lawyer “reasonably believes the representation of each client will not be materially affected” and each client gives informed consent to the representation. Otherwise, representation should be declined at the outset. Tex. Disciplinary R. Prof. Conduct Rule 1.06 (c).

It should also be noted that even when dual representation may be authorized in a particular situation at the commencement of the representation, it may thereafter become impermissible where the interests and objectives of the parties diverge sufficiently to the point where remedial action is required to eliminate the conflict, including withdrawal as counsel for either one or all parties involved. Tex. Disciplinary R. Prof. Conduct Rule 1.06 (e).

Tex. Disciplinary R. Prof. Conduct Rule 1.07 also authorizes an attorney to act as an intermediary between clients under certain circumstances, in effect allowing the attorney to represent two or more parties with potentially conflicting interests. As the comments to the rule suggest, these may include situations involved in organizing a business entity, arranging a property distribution in settlement of an estate or mediating a dispute between clients, among others.

2. Avoiding the Ethical Dilemma of Dual Representation

The determination that a conflict of interest exists in dual representation does not necessarily result in a conclusion that a lawyer is absolutely prohibited from undertaking the common representation. However, it does require that clients waive the conflict and give informed consent.

Again, RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 121 (1) (2000) states:

“A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.”

The corresponding rule in Texas is Tex. Disciplinary R. Prof. Conduct Rule 1.06 (c) which allows a lawyer to undertake dual representation despite a concurrent conflict if (1) each client gives informed consent and (2) the lawyer reasonably believes that the representation of each will not be materially affected. As a result, a lawyer contemplating undertaking dual representation in a particular matter should always carefully advise those for whom such representation is to be undertaken of the potential conflicts that may arise and be certain to obtain their informed consent.

However, there may be certain situation where dual representation is not subject to consent and the lawyer should not even seek to obtain the consent of the clients, particularly where a disinterested lawyer “would conclude that the client should not agree to the representation under the circumstance.” Comment 7 to Tex. Disciplinary R. Prof. Conduct Rule 1.06. This is likely to be the case where the lawyer can reasonably
anticipate that significant conflicts will likely arise in the course of the representation between the individuals as to the objectives of the case, making it impossible for the lawyer to effectively represent all parties without material limitations.

When undertaking dual representation, as a matter of prudent practice, a lawyer should obtain the client’s informed consent to such representation in writing, either through confirmation in an engagement letter or, preferably, in a separate written document executed by the client. Any writing should acknowledge that the lawyer thoroughly and completed consulted with the client about the various risks and benefits of dual representation and also confirm that all parties have been specifically advised of their right to obtain independent counsel. The purpose of obtaining the informed consent of the parties in writing is not only to impress upon them the gravity of the decision that they are being asked to make but also to avoid later disputes that might arise in the absence of written consent. Almost any occasion when a lawyer represents more than a single individual in a particular matter raises a risk that the individual interest of the clients will conflict. The likelihood that their interests will always be consistent with one another must be assessed to avoid subsequent disputes that cannot easily be resolved.

Carefully assessing the ability of a lawyer to undertake dual representation of clients in a situation where, on its face, there does not appear to be a conflict of interest is necessary to avoid professional discipline, disqualification in litigated matters, and claims of professional malpractice. A lawyer, thus, is often expected to predict the likelihood of divergent interests of the clients and possible conflicts at the very outset of the representation.

Ultimately, a lawyer must ask whether or not they are willing to undertake the potential risks involved in dual representation, even if it is ethically permissible. In any case where the lawyer will be expected to represent more than a single client in the same legal matter, the lawyer must carefully consider, under the circumstances, whether the potential exists for the interests of the client to be in conflict with one another.

There may be situations where a lawyer can reasonably anticipate the likelihood of an actual conflict of interest arising in the course of the representation so that they should simply decline to undertake the dual representation in the first place. For example, a lawyer cannot undertake common representation where contested litigation between the clients is reasonably expected. Comment 4 to Tex. Disciplinary R. Prof. Conduct Rule 1.07 There may also be some situations where the lawyer will be required to decline representation if it is not “obvious” that they can “adequately represent the interests of each.”

Even in those situations where a lawyer believes that dual representation is permissible and should be undertaken, it is required that the lawyer obtained the informed consent of all parties to the representation before proceeding. By considering and discussing explicitly all of the risks and benefits of dual representation as opposed to representation by separate counsel clients will have the opportunity to consider all of the ramifications of dual representation and make an informed decision. Documenting this analysis will provide a measure of protection to the lawyer involved as to any future disciplinary complaint.

B. Conflicts of Interest

Conflicts of interest may arise in many different forms and in a variety of contexts. While, as previously discussed, conflicts of interest can arise in the case of dual representation, involving the representation of more than one client in the same matter who have either actual or potential differing interests, this is but one of a number of ways in which conflicts of interest may arise in the course of the representation of a client. Conflicts of interest may arise when a lawyer is asked to represent a client against another client whom the lawyer represents currently in another case or a former client in either a related or unrelated matter. Conflicts may arise as well when the representation of a client is inconsistent with the lawyer’s own interests which may materially limit the ability of the lawyer to advance the interests of the client.

Conflicts of interest arising in the course of the representation of clients has become one of the most prevalent ethical issues for the practicing lawyer today with an increasing likelihood that lawyers and law firms will be faced with the reality of representing conflicting interests at various times. As a result, lawyers must be constantly sensitive to and vigilant about both actual and potential conflicts of interest arising in practice.

The failure to identify and avoid conflicts of interest can lead to serious consequences for the individual practitioner as well as members of the practitioner’s firm. Such conflicts of interest may lead to disqualification of the lawyer, civil liability in the form of a claim for professional malpractice and breach of fiduciary duty, the forfeiture of fees and, ultimately, professional discipline.

Primary obligations underlying the lawyer-client relationship is the duty of undivided loyalty and a duty of exercising independent professional judgment on behalf of the client. Whenever those duties are compromised because of a lawyer’s obligation to other clients, third parties or the lawyer’s own interests, a conflict of interest is implicated. While there is an infinite number of ways in which conflicts of interest may arise in the course of representing clients, they generally fall into three broad categories: when the
client’s interests conflict with the interests of another client of the lawyer, a former client of the lawyer, or the lawyer’s own interests.

**Concurrent Conflicts**

Concurrent conflicts typically arise between two present or prospective clients or between one present and one prospective client. This includes representing opposing parties to the same litigation. Tex. Disciplinary R. Prof. Conduct Rule 1.06 (a). It also includes representation in substantially related matters where the interests of the parties are materially adverse or where it reasonably appears that the lawyer may be materially limited by other interests, whether to another client, a third party or the lawyer’s own interests. Tex. Disciplinary R. Prof. Conduct Rule 1.06 (b).

**Former Clients**

Conflicts of interest may arise when representing a current client against a former client in a substantially related matter. Such representation would be precluded, absent informed consent, where there is a reasonable probability that the lawyer would violate the duty of confidentiality to the former client. Tex. Disciplinary R. Prof. Conduct Rule 1.09 (a)(2). Additionally, representation would be impermissible, absent prior consent, where the representation would involve the same or substantially related matter. Tex. Disciplinary R. Prof. Conduct Rule 1.09 (a)(3). Consequently, absent prior informed consent, a lawyer would not be able to represent a current client against a former client of the lawyer under such circumstances.

**Conflicts Between Interests of the Client and the Lawyer’s Own Personal Interest**

Conflicts may arise as well in circumstances where a lawyer may be precluded from considering, recommending or carrying out an appropriate course of action for a client because of the lawyer’s own personal interests, whether they be financial or professional. Such conflicts may result in precluding the consideration of alternatives otherwise available to the client. This may in turn affect the lawyer’s exercise of independent professional judgment in considering available alternatives or pursuing courses of action that would otherwise be pursued on behalf of the client.

1. **Applicable Law**

The primary rules governing client conflicts of interests include Tex. Disciplinary R. Prof. Conduct Rule 1.06 [Conflicts of Interest: General Rule], Rule 1.07 [Conflict of Interest: Intermediary], Rule 1.08 [Conflict of Interest: Prohibited Transactions] [adverse representation against current clients], Rule 1.09 [Conflict of Interest: Former Client]

Tex. Disciplinary R. Prof. Conduct Rule 1.06 (a) deals with adverse representation against current clients and includes a general prohibition against representing opposing parties in the same litigation. While Tex. Disciplinary R. Prof. Conduct Rule 1.06 (b) contains a general rule against concurrent representation where the interests of the clients are materially adverse and the lawyer may be materially limited by other interests, there is an exception made if the lawyer “reasonably believes the representation of each client will not be materially affected” and each client gives informed consent. Tex. Disciplinary R. Prof. Conduct Rule 1.06 (c). The threshold question that must be asked in the case of a current client is whether or not the lawyer may be materially limited because of duties to the current client.

In the case of former clients, a lawyer is prohibited, without prior consent, from representing a client in a matter that is materially adverse to the former client if the representation will involve to a reasonable probability the violation of client confidences or it involves the same or a substantially related matter. Tex. Disciplinary R. Prof. Conduct Rule 1.09 (a).

Finally, a lawyer should avoid situations where the representation of the client may conflict with the lawyer’s own personal interests. Tex. Disciplinary R. Prof. Conduct Rule 1.08.

2. **Avoiding the Ethical Prohibition of Conflicts of Interest**

The avoidance of conflicts begins by gathering the necessary information to reveal any actual or potential conflicts that may arise in connection with representing a particular client or providing representation in a particular matter. This requires that every attorney have an effective conflicts checking system in place which is continuously maintained and updated to identify potential conflicts with clients, subject matter and a lawyer’s personal and financial interests. Once a conflict, either actual or potential is identified, the lawyer must carefully analyze and resolve the conflict by understanding the purposes behind each of the relevant ethical rules.

Obtaining the client’s consent to waive a conflict is ordinarily a serious matter and should be undertaken only very carefully after the lawyer is satisfied that, despite the conflict of interest, the lawyer is able to represent the client ethically and without being materially limited by duties or obligations to others. The attorney should recognize that there may be situations where the conflict is so significant to the representation that it is prudent to decline the representation altogether.

Even when the lawyer concludes that representation can be undertaken despite the conflict of interest, either actual or potential, the lawyer must...
nevertheless consider how to ethically obtain the client’s informed consent to waive any conflict. In order for a waiver of the conflict to be effective, the client must be provided sufficient information about the material risks and consequences of the representation despite the possible conflict of interest to make an informed decision. Clients should ordinarily have the ability to waive conflicts of interest to allow them freedom of choice in selecting an attorney so long as their consent is voluntarily given and is provided with full and complete knowledge of all risks associated with retaining the attorney despite the conflict of interest. As a result, it is incumbent upon the attorney to be certain that the prospective client is aware of the dangers of engaging the lawyer despite the conflict and is cognizant of all other reasonably available alternatives.

III. CONCLUSION

Realizing how to recognize, avoid and address conflicts of interest are essential for every attorney engage in any area of practice. Familiarity with the Texas Disciplinary Rules of Professional Conduct is essential in guiding an attorney’s conduct in undertaking the representation of clients in areas involving dual representation and conflicts of interest. A lawyer should carefully consider the ethical limits of representing clients where a conflict of interest exists, either actual or potential, to avoid serious consequences for both the client and the attorney.
APPENDIX

Relevant Provisions of Texas Disciplinary Rules of Professional Conduct

Rule 1.06 Conflict of Interest: General Rule
(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 lawyers firm; or
   (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.
(c) A lawyer may represent a client in the circumstances described in (b) if:
   (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
   (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.
(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Rule 1.07 Conflict of Interest: Intermediary
(a) A lawyer shall not act as intermediary between clients unless:
   (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client’s written consent to the common representation;
   (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the client’s best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
   (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.
(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.
(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.
(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer’s firm may engage in that conduct.

Rule 1.08 Conflict of Interest: Prohibited Transactions
(a) A lawyer shall not enter into a business transaction with a client unless:
   (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;
   (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
   (3) the client consents in writing thereto.
(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyers employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:
   
   (1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and
   
   (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless:

   (1) the client consents;
   
   (2) there is no interference with the lawyers independence of professional judgment or with the client-lawyer relationship; and
   
   (3) information relating to representation of a client is protected as required by Rule 1.05.

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement to guilty or nolo contendere pleas, unless each client has consented after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

   (1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and
   
   (2) contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer’s firm may engage in that conduct.

(j) As used in this Rule, “business transactions” does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

   (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
   
   (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
   
   (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.