

CHAPTER 1

INTRODUCTORY CONSIDERATIONS FOR DEALING WITH CONFLICTS IN A BUSINESS CONTEXT

Summary

- §1.1** Overview of This Book
- §1.2** Business and Litigation Contexts Compared
- §1.3** General Rules and Obligations of a Lawyer
- §1.4** Consequence of Faulty Conflicts Recognition or Resolution
- §1.5** Checking for Conflicts
 - (1) Intake Procedures
 - (2) Need for Continued Alertness
- §1.6** Proceed with Caution
- §1.7** Cardinal Points

§1.1 OVERVIEW OF THIS BOOK

The duty of loyalty is at the heart of the attorney-client relationship. Lawyers must serve their clients' needs, and business lawyers are no exception. The purpose of this book is practical—to help business lawyers recognize, measure, and manage the risks they encounter when they perform work involving conflicts or potential conflicts of interest. The bare-bones conflicts of interest rules (rules 1.7 – 1.10 and 2.2, hereafter referred to as the “Conflicts Rules”) in the Washington Rules of Professional Conduct (“WRPC” or “rules”) exist largely to codify the duty of loyalty and work best if they are clothed in the practical experience of practicing lawyers. Widespread observance of the Conflicts Rules will also enhance the protection they afford the public far more than will disciplinary actions by the bar or civil claims against lawyers.

This book is divided into seven chapters. This chapter provides a brief overview of the principal Conflicts Rules and the underlying legal and ethical duties on which they are based. Chapter 2 addresses the “Who is the Client” question that often lies at the heart of any conflicts issue. Chapter 3 addresses conflicts of interest questions involving the existing clients and deals with both rule 1.7 and rule 2.2. Chapter 4 deals with conflicts of interest involving former clients and deals largely with rule 1.9. Chapter 6 addresses screening as a means of avoiding ethical violations and deals primarily with rule 1.10. Chapter 7 deals with multi-state ethics issues that may confront both practitioners within a single state and practitioners in multi-state firms. These chapters are followed by Appendices that contain the full text of all of the WRPCs, a bibliography with leads for further research, and sample forms.

§1.3 / INTRODUCTORY CONSIDERATIONS

Caveat: There are some conflicts issues that this book does not address. These include, for example, (1) conflicts problems that may arise when a lawyer becomes concerned that he or she may have committed (or has been accused of) malpractice; and (2) conflicts problems that may arise when the lawyer concludes that he or she must withdraw because of a client's attempt to use the lawyer's services to commit fraud or another crime. The bibliography refers the reader to sources that address these issues.

Note: Lawyers with conflicts or other ethics questions can call the Washington State Bar ethics hotline for free advice at (206) 727-8284.

This book is the result of work by present and former members of the Committee on Conflicts of Interest in Business Law of the Business Law Section of the Washington State Bar Association. The present members of the committee are listed on page iii. The collective reference to "we" indicates a consensus, although not necessarily a unanimous opinion, of the present members of the committee.

§1.2 BUSINESS AND LITIGATION CONTEXTS COMPARED

The Conflicts Rules present particular challenges to business attorneys. Although parties in litigation typically bear telling labels such as "plaintiff" and "defendant," the world of business is often characterized by shades of gray. In competitive commercial relations, businesses may at the same time share a wide range of mutual concerns and a narrow band of contrary interests. Today's competitors may also be today's or tomorrow's allies, partners, or even subsidiaries. In utilizing an attorney, businesspersons may prefer economy and efficiency to the values sometimes associated with zealous advocacy. This interest in efficiency may lead business clients to believe that their goals can best be accomplished by a single lawyer with expertise, experience, and a history of relationships and trust even though there are areas in which the clients' interests do not coincide. In addition, conflicts waivers are often far easier to obtain in a business setting than in a litigation "war."

As noted in Comment 11 to the ABA Model Rules of Professional Conduct (Rule 1.7): "Conflicts of interest in contexts other than litigation sometimes may be difficult to assess.... The question is often one of proximity and degree." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT at 93 (ABA 4th ed. 1999). The goal of this book is to provide guidance for the attorney who works in the marketplace rather than in the courtroom. The good news is that even though it is not always possible to hit a home run, it is almost always possible to avoid striking out.

§1.3 GENERAL RULES AND OBLIGATIONS OF A LAWYER

The WRPCs impose general obligations of undivided loyalty, independent judgment, and confidentiality upon all attorneys. *See, e.g.*, WRPC 1.6 – 1.9, 2.2. In any dispute about their meaning and application, the Conflicts Rules are likely to be interpreted to promote the satisfaction of these responsibilities.

It is not always easy to determine how the principles of undivided loyalty, independent judgment, and confidentiality should or will work themselves out in practice. Can an attorney have undivided loyalty to more than one client at a time if the clients wish it so? Alternatively stated, how strong or pervasive does adversity between two people have to become before it is impossible to be completely loyal to both? How independent is independent judgment and what does independence mean? When is it appropriate or inappropriate to share information among multiple clients? What about a client who is more interested in economy and efficiency than in loyalty, independent judgment, or confidentiality? No matter how difficult the questions or bothersome the answers, the Conflicts Rules must be obeyed.

At the risk of oversimplification, the following principles may prove helpful:

- By definition, a lawyer who has only one client in a matter cannot have a multiple current-client conflicts problem. Lawyers should therefore act with care before they agree to represent multiple clients in a single matter. Care should also be taken before opposing a client on a matter that is unrelated to the work that the lawyer is doing for that client.
- In analyzing conflicts problems, lawyers must consider not only the question of potential adversity of positions but also questions of potentially confidential or secret client information.
- A lawyer can never oppose a current client—even on a matter that is wholly unrelated to the work that the lawyer is performing for the client—without a valid conflicts waiver. In fact, there are some conflicts situations that current clients cannot waive.
- A former client conflict exists only if the work that a lawyer proposes to do adversely to a former client is sufficiently related to the work that was previously done for that client. This can be true either because a significantly related transaction or matter is involved or because of overlapping client confidences or secrets.
- All conflicts waivers must, on pain of discipline, be confirmed in a contemporaneous writing.
- Screening a lawyer from involvement in a matter as a means of avoiding disqualification is available as a matter of right only when lawyers change firms and cannot be used as a matter of right in most other situations. If one lawyer in the firm cannot undertake a matter with or without a conflicts waiver, no other lawyer in the same firm will generally be able to undertake that matter.
- Lawyers should be on guard not only with respect to current and former multiple client conflicts but also with respect to personal, business, or economic conflicts between lawyers and clients. These too require waiver.
- It is not enough to assess conflicts of interest at the outset. Continued monitoring is required.
- Conflicts of interest are sufficiently complex that a “white heart, empty head” defense will often be insufficient. As Professor Robert H. Aronson has written:

It is not sufficient that the attorney believes himself able adequately to represent potentially differing interests, or even that all parties have consented. The possibility of subconsciously favoring the interests of either party, the appearance of impropriety that may arise from even the slightest dissatisfaction, the likelihood of receiving confidential information from one party that is damaging or helpful to the other, and the possibility that a court will subsequently disagree with the attorney’s decision that he was able adequately to represent both interests—all dictate extreme caution in these situations.

Aronson, *Conflicts of Interest*, 52 WASH. L. REV. 807, 826–27 (1977) (footnote omitted).

§1.5(1) / INTRODUCTORY CONSIDERATIONS

§1.4 CONSEQUENCE OF FAULTY CONFLICTS RECOGNITION OR RESOLUTION

The consequences of faulty conflicts recognition or resolution are clear:

- A lawyer or firm may lose clients and personnel or may destroy a hard-won reputation.
- A lawyer or firm may be civilly sued, not only for malpractice but for the potentially far more damaging tort of breach of fiduciary duty. *See, e.g., Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).
 - A lawyer, and others at the lawyer's firm, may be disciplined. *See, e.g., WRPC 5.1, 5.2. Cf. In re Disciplinary Proc. Against Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998).
 - A lawyer or firm may be disqualified from undertaking or continuing with a particular representation. *See, e.g., In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996); *First Small Bus. Inv. Co. v. Intercapital Corp.*, 108 Wn.2d 324, 738 P.2d 263 (1987).
 - Even if no damage to a client results, a lawyer may have to forego or even refund potentially substantial fees. *See, e.g., Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982).

§1.5 CHECKING FOR CONFLICTS

No attorney wants to blunder inadvertently into a conflicts situation. Such blunders can be avoided only by thorough initial conflicts checks as well as a repetition of any conflicts analysis as the facts change.

(1) Intake procedures

All attorneys and firms need a detailed intake procedure to check for conflicts arising from new clients or new matters for existing or former clients. An intake form is useful in gathering and organizing information. See Appendices C and D.

At or before the initial client conference, an attorney should determine the identity of all persons having an interest or role in the subject matter of the representation.

If at all possible, the information needed for conflicts screening should be obtained before substantive discussions that may result in disclosure of confidential client information. If confidential information is in fact disclosed, the attorney and firm may be disqualified from subsequent involvement in a matter even if no formal attorney-client relationship ever arose. *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 358 (1990); *see also Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1318 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977).

A thorough intake procedure ideally should include the principals and related entities of a prospective client or opponent, because relationships other than an attorney-client relationship can materially limit the quality of representation. Under WRPC 1.7(b), for instance, if a law firm is suing a key manager of a corporation on a collection matter, that action may materially limit the law firm's representation of the corporation.

INTRODUCTORY CONSIDERATIONS / §1.6

The information on the identity and interests of parties to a transaction must then be reviewed for actual or potential conflicts. Comment 1 to the ABA Model Rules of Professional Conduct (rule 1.7), amended February 17, 1987, suggests adoption of “reasonable [screening] procedures, appropriate for the size and type of firm and practice.” Although we do not think there is a single process that is perfect for all lawyers and firms, most firms utilize a procedure containing one or more of the following components:

(a) *Search by Assigned Staff Person.* An assigned staff person checks all the names listed on the intake form against a master file to determine whether the names appear in any other context, indicating a possible conflict. If a potential conflict surfaces, the issue is referred either to involved attorneys or, perhaps, to a separate conflicts committee within the firm. In addition, the names and relationships indicated on the intake form are entered on the master file. The staff person then initials the intake form to indicate that the conflict search had been completed.

(b) *Computerized Conflicts of Interest Search.* Computerized procedures are becoming increasingly prevalent, but caution is recommended in cases in which the search program would not cause the computer to recognize a name of an entity if there is a typographical error or variation in spelling, abbreviated or shortened name form, or change of name.

(c) *Circulate Intake Forms Among Attorneys.* The lawyers within the firm may be aware of relationships that do not show up on an intake form or as a part of a formal conflicts check. Absent compelling reasons to the contrary, information about new clients or new matters should therefore be circulated to all lawyers in a firm.

(2) Need for continued alertness

A conflicts analysis cannot be done once and then put away forever. As a result of changed circumstances or position, changes in parties, and the like, the analysis may have to be repeated. *See, e.g., In re Altstatt*, 321 Or. 324, 897 P.2d 1164 (1995).

§1.6 PROCEED WITH CAUTION

Although the Conflicts Rules are designed to protect clients, compliance will benefit not only the clients but also their attorneys.

It has been suggested that a good rule of thumb is “when in doubt, don’t.” Washington State Bar Association Legal Ethics Committee Op. No. 161, *reprinted in* WASHINGTON STATE BAR ASSOCIATION RESOURCES (1999–2000); *see also Saylor v. Elberfeld Mfg. Co.*, 30 Wn. App. 955, 964, 639 P.2d 785 (1982). Two qualifications are nonetheless appropriate. On the one hand, “doubt” by someone who has not analyzed the Conflicts Rules may be misplaced. On the other, the absence of “doubt” on the part of someone who has not analyzed the Conflicts Rules is not a sufficient basis on which to proceed.

§1.7 / INTRODUCTORY CONSIDERATIONS

§1.7 CARDINAL POINTS

1. Conflicts of interest questions can be difficult to answer in a complex, changing business environment. Nonetheless, they must be answered.
2. The Conflicts Rules are best understood in the light of underlying values of undivided loyalty, independent judgment, and confidentiality.
3. Any failure to detect or respond to conflicts situations can be costly in terms of time, money, clients, and professional standing. On the other hand, no one is likely to be disciplined for taking too much care to review a conflicts situation.
4. Detailed information about clients and related parties as well as about the proposed transaction is needed for a conflicts check.
5. Conflicts issues must be reconsidered as circumstances change.