

**CONFLICTS OF INTEREST IN BUSINESS LAW:
GUIDELINES FOR THE PRACTITIONER**

SECOND EDITION 2000

**COMMITTEE ON CONFLICTS OF INTEREST IN BUSINESS LAW
OF THE BUSINESS LAW SECTION
and
CONTINUING LEGAL EDUCATION
WASHINGTON STATE BAR ASSOCIATION**

**2101 FOURTH AVENUE – FOURTH FLOOR
SEATTLE, WA 98121-2330**



CLE

© Copyright 1990, 2000
Washington State Bar Association
2101 Fourth Avenue – Fourth Floor
Seattle, WA 98121-2330
(206) 727-8200

All rights reserved. Permission is hereby granted for the copying of pages or portions of pages in this book, by photocopying or similar process, or by manual transcription, by or under the direction of licensed attorneys, for use in the practice of law.

NO OTHER USE IS PERMITTED that will infringe the copyright without the express written consent of both the Washington State Bar Association and the author or authors of the material involved.

Library of Congress Catalog Card Number: 89-52071
ISBN 0-88129-228-1 (1990)
ISBN 0-88129-283-4 (2000)

This Deskbook should be cited as:
CONFLICTS OF INTEREST IN BUSINESS LAW:
GUIDELINES FOR THE PRACTITIONER
(Wash. St. Bar. Assoc. 2nd ed. 2000)

IMPORTANT NOTICE: Washington State Bar Association Continuing Legal Education publications are designed to help attorneys maintain their professional competence. Although all material herein is reviewed prior to publication, in dealing with specific legal matters, attorneys should research original sources of authority. The views and conclusions expressed herein are those of the authors or editors and are not necessarily those of the Washington State Bar Association or any division or committee thereof.

WASHINGTON STATE BAR ASSOCIATION
BUSINESS LAW SECTION
COMMITTEE ON CONFLICTS OF INTEREST IN BUSINESS LAW

Alfred M. Falk, Chair

Douglas L. Batey
Paul D. Fitzpatrick

Allen D. Israel
Michael A. Raskasky

Clyde W. Summerville
Joseph Weinstein

CONTINUING LEGAL EDUCATION COMMITTEE
1999 - 2000

Donald W. Carter, Chair

Peter H. Arkison
Dale L. Carlisle
Thomas L. Dickson
William P. Fite
Stephan J. Francks
Nina Harding
Alexander J. Higgins
William J. Jennison
Eric P. Johnson

Meg. L. Jones
Bernice C. Jonson
James H. Kaufman
Kurt Lichtenberg
M. Peter Philley
Robert J. Roche
Eugene C. Routh
Alan L. Rubens
William L. Sells

James M. Shore
Martin T. Silver
Shannon Skinner
Craig S. Sternberg
Joan E. Sullivan
Tamara A. Taylor
Adam E. Torem
Gordon H. Warren
Ronald L. Williams

CONTINUING LEGAL EDUCATION DEPARTMENT

Thomas B. Russell, Director
John M. Redenbaugh, Associate Director
Steven M. Rosen, Assistant Director
Garth B. Jacobson, Program Attorney
Margaret A. Morgan, Legal Editor
Dana West, Managing Editor
Sheila Harris, Program Coordinator
Michele Kramer, Program Coordinator
Sonia Pagonakis, Program Coordinator
Anné Sterling, Program Coordinator
Mickie Colony, Faculty Program Assistant
Stephanie Benson-Greer, Publications Coordinator
Kelly Cronin, Publications Coordinator
Ruth Weadock, Publications Assistant
Judy Ritchie, Secretary

TABLE OF CONTENTS

ABOUT THE EDITORS AND CONTRIBUTORS

TABLE OF CONTENTS

Chapter 1	INTRODUCTORY CONSIDERATIONS FOR DEALING WITH CONFLICTS IN A BUSINESS CONTEXT	
	§1.1 Overview of This Book	1-1
	§1.2 Business and Litigation Contexts Compared	1-2
	§1.3 General Rules and Obligations of a Lawyer	1-2
	§1.4 Consequences of Faulty Conflicts Recognition or Resolution.....	1-4
	§1.5 Checking for Conflicts	1-4
	(1) Intake Procedures	1-4
	(2) Need for Continued Alertness	1-5
	§1.6 Proceed With Caution	1-5
	§1.7 Cardinal Points	1-6
Chapter 2	WHO IS THE CLIENT?	
	§2.1 Introduction	2-1
	§2.2 Reasonable Expectations Test	2-1
	§2.3 Was an Attorney-Client Relationship Formed?	2-3
	§2.4 Who Speaks for the Entity?	2-3
Chapter 3	CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS; INTERMEDIATION	
	§3.1 Introduction	3-1
	§3.2 Conflicts of Interest Involving Current Clients: Rule 1.7.....	3-2
	(1) Current Clients With Adverse Interests: Rule 1.7(a)	3-2
	(a) Reasonable Belief Representation Is Proper	3-3
	(b) Informed Consent.....	3-3
	(c) Advance Consent	3-5
	(d) Necessity of a Writing.....	3-6
	(2) Representation Materially Limited by Responsibilities to One Other Than the Client: Rule 1.7(b)	3-6
	(3) Nonwaiveable Conflicts	3-7
	§3.3 Lawyer as Intermediary: Rule 2.2.....	3-7
	(1) Nature of Intermediary Role	3-8
	(2) Circumstances in Which Intermediary Role May Be Inappropriate	3-9
	(3) Duty of Consult With All Parties	3-9
	(4) Duty to Withdraw	3-10
	§3.4 Illustrative Example	3-11
	§3.5 Cardinal Points	3-11
Chapter 4	BUSINESS TRANSACTIONS WITH A CLIENT	
	§4.1 Overview	4-1
	§4.2 Elements of Rule 1.8(a)	4-2
	(1) Attorney-Client Relationship	4-2
	(2) Fair and Reasonable Terms.....	4-3
	(3) Full Disclosure by Attorney and Understanding by Client.....	4-3
	(4) Consent	4-3
	(5) Independent Counsel	4-3
	§4.3 Brief Illustrations	4-4
	(1) Loans	4-4

TABLE OF CONTENTS

	(2) Corporate/Partnership Arrangements	4-5
	(3) Purchases of Real Property	4-6
	(4) Investments	4-7
	(5) Referrals of Independent Counsel	4-7
	§4.4 Detailed Hypothetical Analysis—Investing in a Business PartnershiP the Attorney Represents	4-8
	(1) Facts	4-8
	(2) Analysis	4-8
	§4.5 Cardinal Points	4-9
Chapter 5	RULE 1.9: CONFLICTS OF INTEREST INVOLVING FORMER CLIENTS	
	§5.1 Introduction	5-1
	§5.2 Has the Representation Ended?	5-2
	§5.3 Are the Matters the Same or Substantially Related?	5-3
	§5.4 Are the Clients' Interests Materially Adverse?	5-5
	§5.5 Has the Former Client Consented to or Waived the Conflict of Interest?	5-6
	§5.6 Even If the Conflict Is Resolved, Will Confidences or Secrets Be Used?	5-8
	§5.7 Consent of the New Client	5-8
	§5.8 Hypothetical Case	5-8
	§5.9 Cardinal Points	5-10
Chapter 6	RULE 1.10: IMPUTED DISQUALIFICATION; GENERAL RULE	
	§6.1 Imputed Disqualification Generally	6-2
	§6.2 Imputed Disqualification When Lawyers are in a Continuing Association	6-2
	§6.3 Imputed Disqualification When a New Lawyer Joins a Firm	6-4
	§6.4 Imputed Disqualification When a Non-lawyer Joins a Firm	6-6
	§6.5 Imputed Disqualification of a Lawyer's Former Firm	6-7
	§6.6 Imputed Disqualification Cured Through Consent	6-7
	§6.7 Rule 1.10(b) in Practice (Illustration and Analysis)	6-7
	§6.8 Cardinal Points	6-8
Chapter 7	MULTI-STATE ISSUES	
	§7.1 Overview	7-1
	§7.2 Choice of Conflicts of Interest Rules in Business Transactions Involving Multiple States: Washington and Model Rule 8.5	7-3
	§7.3 A Lawyer Could Be Subject to Discipline in a State in Which He or She Is Not Admitted	7-5
	§7.4 Policy Considerations in Conflicts of Interest	7-5
	§7.5 Choice of Ethics Rules by Contract? Probably Not	7-6
	§7.6 Cardinal Points	7-6
APPENDICES		
	A. Washington Rules of Professional Conduct	AA-1
	B. Bibliography	AB-1
	C. Sample New Client-Matter Form	AC-1
	D. Sample Conflict Check Information Sheet	AD-1
	E. Letter to Unrepresented Person Disclosing Attorney's Role (RPC 4.3)	AE-1
	F. Letter to Client Confirming Oral Consent to Common Representation	AF-1
	G. Clients' Consent to Representation (RPC 1.7)	AG-1
	H. Intermediary Letter to Be Signed by Client (RPC 2.2)	AH-1
	I. Former Client's Consent to Representation Under RPC 1.9	AI-1
	J. Letter to New Client Acknowledging Lawyer's Duties to Existing Client and Securing Advance Consent	AJ-1
INDEX		I-1

**CONFLICTS OF INTEREST IN BUSINESS LAW:
GUIDELINES FOR THE PRACTITIONER**

SECOND EDITION 2000

EDITORS

Alfred M. Falk
Peter R. Jarvis

CONTRIBUTORS

Alfred M. Falk
Paul D. Fitzpatrick
Allen D. Israel
Peter R. Jarvis
Michael A. Raskasky
Clyde W. Summerville
Joseph Weinstein

WSBA LEGAL EDITOR

Margaret Morgan

WSBA MANAGING EDITOR

Dana West

ABOUT THE EDITORS AND CONTRIBUTORS

EDITORS

ALFRED M. FALK is a partner in the firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. and chairs that firm's Trusts & Estates Practice Group. He is a graduate of the University of Washington and the University of San Francisco School of Law. He also received an LL.M. in federal taxation from the Holland Law Center at the University of Florida. His practice focuses on estate planning, probate and trust administration, and the representation of closely-held businesses. He currently serves on the Executive Committee of the Business Law Section of the WSBA, and as chair of that Section's Committee on Conflicts of Interest in Business Law.

PETER R. JARVIS received a B.A. from Harvard University in 1972, and an M.A. in Economics and J.D. from Yale University in 1976. He is a member of the Oregon and Washington Bars. A partner at Stoel Rives LLP, Portland, Mr. Jarvis is chair of the Stoel Rives Professional Responsibility Practice Group. He is a frequent writer and speaker on legal ethics issues, and his practice includes advising attorneys with legal ethics questions and defending attorneys accused of legal ethics violations. Mr. Jarvis is also the 2000 chair of the ABA Center for Professional Responsibility Conference Planning Committee. Mr. Jarvis is a former member of the Washington State Bar Rules of Professional Conduct Committee and the Oregon State Bar Legal Ethics Committee. Among other publications, he was Editor-in-Chief and author of several chapters in *The Ethical Oregon Lawyer*, published by the Oregon State Bar; co-author of *Oregon Rules of Professional Responsibility Annotated* (4th ed. 1997), and an ethics columnist for *The Multnomah Lawyer*, a newsletter of the Multnomah Bar Association. In 1991, Mr. Jarvis received the President's Membership Services Award from the Oregon State Bar for his ethics work. In 1993, Mr. Jarvis received the Harrison Tweed Special Merit Award from ALI-ABA for his continuing legal education work in ethics. In 1995, Mr. Jarvis was elected to membership in The American Law Institute.

CONTRIBUTORS

ALFRED M. FALK. See "Editors," above.

PAUL D. FITZPATRICK is a Spokane attorney at Fitzpatrick Law Group, P.S., practicing in the areas of small business and estate planning; probate, estate, and trust administration; and taxation. In 1992-93, he was the chair of the Washington State Bar Association Disciplinary Board and was a member of the Joint Task Force on Lawyer Discipline in Washington. He is a member of the executive committee of the tax section of the Washington State Bar Association. He received his B.A. degree from Washington State University, his J.D. degree from Gonzaga University School of Law, and his LL.M. degree in taxation from the University of Florida.

ABOUT THE EDITORS AND CONTRIBUTORS

ALLEN D. ISRAEL is head of Foster Pepper's Business Practice Group and serves on its five-member Executive Committee. Practicing since 1978, he focuses on corporate, business, M&A, real estate and contract law, including the representation of a variety of management, investment, sports, sports facilities, real estate, and other businesses and non-profit organizations. He represented Football Northwest in its acquisition of the Seattle Seahawks and in the development of their new Stadium and Exhibition Center. Active in a number of professional and community activities, he serves on the University of Washington Law School Dean's Advisory Board, the Visiting Committee for the University of Washington College of Engineering, the Board of *The Jewish Transcript*, and is President of the Northwest Museum of Natural History. He is past Chair of the Pacific Northwest Region of the Anti Defamation League. He received his J.D., M.B.A., and B.S.M.E. from the University of Washington.

PETER R. JARVIS. See "Editors," above.

MICHAEL A. RASKASKY is a senior associate with Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, P.L.L.C. in Tacoma. He graduated from Rutgers University in 1988 and earned his law degree, cum laude, from the University of Puget Sound (now Seattle University) School of Law in 1992. He is a member of the Washington and Oregon Bars. His practice emphasizes representation of businesses and financial institutions in connection with corporate, regulatory compliance, lending and other business and operational matters. His experiences include assisting banks, corporations, cooperatives and other business entities on a wide range of matters including mergers and acquisitions, securities transactions and compliance, complex loan documentation, contract drafting and review, and other business and corporate issues.

CLYDE W. SUMMERVILLE is a member of the partnership of the Seattle-based law firm of Preston Gates & Ellis LLP. He is a graduate of Stanford University (B.A. 1973) and Seattle University (J.D. 1976). He is admitted to practice in Washington state, and before the U.S. District Court, Western District of Washington, the U.S. Court of Appeals, Ninth Circuit, and the U.S. Court of Appeals, District of Columbia Circuit. His practice focuses on general corporate and business matters. He is a member of his firm's Ethics Committee, and he is a member of the Washington State Bar Association Business Law Section Committee on Conflicts of Interest in Business Law.

JOSEPH WEINSTEIN is a business transactions lawyer with an emphasis in mergers and acquisitions and the representation of high net worth individuals, international companies, and the maritime industry. He is a loss prevention partner at the Seattle office of Davis Wright Tremaine, and a frequent speaker on topics concerning conflicts of interest and business ethics. He is a member of Washington State, King County, Western District of Washington, and Ninth Circuit Court of Appeals Bar Associations, as well as the Maritime Law Association of the United States. Before joining Davis Wright Tremaine, Mr. Weinstein served as the Senior Foreign Legal Consultant to the firm of Lee & Ko in Seoul, Korea. Mr. Weinstein is a Washington State native, and received his undergraduate and law degrees from the University of Washington.