Conflicts of Interest

Do I Have One? If So, Can I Cure It?

by David H. Dugan III

Conflicts of interest abound in the practice of law. They may be present before representation begins, or may arise during representation. They may involve simultaneous representation or representation that is successive. They may extend from one lawyer to include, by imputation, an entire firm. They may be the subject of disciplinary charges or malpractice liability or motions to disqualify. Some are curable by client consent. Some are curable by screening. Some are not curable by any means.

Conflicts of interest law is complex and diverse. Although the relevant Rules of Professional Conduct (RPC 1.7 through 1.14) provide a helpful framework, they are difficult to apply because they are loaded with terms requiring attorney judgment and discretion, such as "reasonably believes," "full disclosure," "reasonable opportunity," "substantial risk," "substantially related matter," and so forth. The law's diversity results from court decisions and advisory committee opinions going back many years, which have not been always anchored in code rules and vary in their focus. Many of the court decisions are in response to disqualification motions, and many conclude by prohibiting representation where the conflicts are not actual but only potential in character.[1]

The advisory committee opinions raise problems for other reasons. First, many, particularly older ones, do not constitute carefully written expressions of what the rules prohibit, but instead are expressions of what, on a somewhat higher plane, a lawyer would be wise to refrain from doing. Second, many reference the appearance of impropriety standard, which the Supreme Court discarded in its 2004 revisions to the Rules of Professional Conduct. Without the appearance of impropriety standard, New Jersey's conflict of interest code law is considerably less vague. Not only that, but it can be said that the New Jersey code now prohibits only actual conflicts of interest. The code continues to prohibit imputed conflicts under RPC 1.10. But, the conflicts that are imputed are the actual ones prohibited under other rules, chiefly RPC 1.7 and RPC 1.9.

In considering conflicts, some confusion can arise from the word "risk:" RPC 1.7(a)(2) speaks of "significant risk;" RPC 1.8(k) speaks of "substantial risk." A risk of conflict is not a potential future conflict. Rather, the risk is a present fact. What remains potential is any actual harm to the relationship between lawyer and client and the effectiveness of the lawyer's representation.[2] This interpretation is consistent with the New Jersey Supreme Court's decision to abolish RPC 1.7(c), which spoke of "situations creating an appearance of impropriety rather than an actual conflict." The intention is to narrow the rules to prohibit only actual conflicts, with significant risk or substantial risk referencing a present situation, not a potential one.

In general, three categories of conflicts are proscribed: concurrent conflicts (RPC 1.7 and 1.8); conflicts involving former clients (RPC 1.9); and imputed conflicts (RPC 1.10). In each of these categories, provision is made for curing most conflicts with client consent. Imputed conflicts involving former clients may also be cured in some situations by screening, even without client consent. This article is limited to the topic of concurrent and *per se* conflicts under RPC 1.7.

Identifying Concurrent Conflicts

RPC 1.7(a) refers to "concurrent" (*i.e.*, contemporaneous) conflicts of two sorts, derived from former RPC 1.7(a) and (b): conflicts involving "directly adverse" client interests and conflicts involving representation that is "materially limited" by the lawyer's responsibilities to others or by the lawyer's own interests.[3]

Directly Adverse Interests

Typically, directly adverse situations are obvious. Opposing parties in litigation—a buyer and seller, or an employer and employee—are examples. Some adverse situations are not as obvious, such as where a lawyer represents one client against a party the lawyer simultaneously represents in another matter, even though the two matters may be completely unrelated.[4] And, some directly adverse situations develop later in the course of what may have been a conflict-free representation, such as where a lawyer represents the maker and guarantor of a note when a loan is negotiated, but later is asked to defend both in collection proceedings brought by the payee.[5]

Materially Limited Representation

By comparison, "materially limited" situations tend to be more difficult to identify, for three reasons. First, the terminology is less precise. "Significant risk" and "materially limited" are terms requiring considerable sensitivity and discretion in their application. Second, the scope is broader. Interests to be evaluated include not only other contemporaneous clients but also former clients, third persons and the lawyer's own interests. Third, the elimination of the appearance of impropriety from the code calls into question many, if not most, of the existing New Jersey court and advisory committee conflict of interest rulings that would otherwise provide guidance in materially limited situations, since these rulings so often cite the appearance of impropriety standard in support of their holdings.

Despite such analytical difficulties, some of the more widely recognized materially limited situations include representing co-plaintiffs or co-defendants in litigation; representing multiple parties to a negotiation (such as formation of a joint venture); representing several family members (or even simply a husband and wife) in estate planning; representing a lawyer in one matter while both lawyers also represent adverse parties in other litigation and the old standby, representing both an insurance company and the insured. Identification of materially limited conflicts can be especially difficult in non-litigation matters.[6]

Critical Recordkeeping

Identification of conflicts requires that law firms maintain detailed records of conflict data, including the names of all clients and prospective clients, former clients and former prospective clients, organizations with which the lawyers in the firm are affiliated, law firms with which firm lawyers were formerly associated, lawyers in other firms or organizations who have family ties to lawyers in the firm, and so forth. When prospective clients are first interviewed, forms should be completed containing the names of the prospective clients, adversaries and adverse law firms, and that data should be compared with the firm's conflict data records before the firm agrees to any new representation.

When a conflict search produces a match, a conflict determination must be made, preferably by a lawyer or lawyer-committee in the firm having some expertise in ethics law. The determination process should include not only whether an actual conflict exists but also, if there is a conflict, whether and how to resolve it by client consent (or, in former client conflicts under RPC 1.9, by screening). Note that this same process should be invoked again any time a new party or adversary counsel becomes part of the case, or when a new lawyer joins the firm.

Curing Concurrent Conflicts

RPC 1.7(b) allows for the curing of concurrent conflicts. The curing process involves two elements: 1) client consent to the conflict, and 2) the lawyer's belief that the representation will not be impaired by the conflict.[7]

Client Consent

Regarding the consent element, each affected client must consent. This includes former clients as well as current clients, but not third parties. The consents must be informed. "Informed consent" is defined in RPC 1.0(e) as follows:

> the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RPC 1.7(b) requires that the consents be "confirmed in writing, after full disclosure and consultation," and if the conflict involves multiple clients in a single matter, the consultation "shall include an explanation of the common representation and the advantages and risks involved." The rule does not specify what is to be included in each client's written confirmation. Presumably, at a minimum, the writing must contain a simple statement of the facts constituting the conflict, a reference to there having been a consultation with the lawyer, and a confirmation of consent by the client. The written document also should be signed by the client. The rule does not state when such consent must be obtained, but consent should be obtained before the conflicting representation commences.

In practice, counsel may wish to set forth in the consent document a fuller statement of what disclosures were made and what explanations were given in terms of the common representation, the advantages, the risks and the available alternatives. Counsel also might provide the client with the basis for the lawyer's belief that he or she will be able to provide competent and diligent rep-

resentation to each affected client. If there is a possibility that future events might render the lawyer unable to continue the multiple representation, counsel's disclosure should indicate that in such circumstances he or she would have to withdraw completely from the representation.

The Supreme Court also has recommended a further step: When representing co-clients, counsel should obtain from the clients an agreement on the sharing of confidential information that may come to the lawyer's attention during the representation.[8] The Court left it to counsel and their clients to decide whether such information should be shared or kept confidential, but as a practical matter, the lawyer's preference should be for such information to be shared.

RPC 1.7(b) does not state whether a consent, once given, may later be revoked. Comment 21 to the American Bar Association Model Rules of Professional Conduct opines that a client should be able to revoke the consent, since clients generally may terminate representation at any time for any reason. The difficult issue, however, is whether the lawyer may continue with the representation of the other client or clients. Here, Comment 21 hedges, indicating that it would depend upon the circumstances.

The Lawyer's Belief

Turning to the second curing element, the lawyer also must believe that he or she will be able to provide competent and diligent representation to each affected client. Competence and diligence are duties imposed by RPC 1.1 and 1.3. Although the New Jersey rule and the model rule of RPC 1.3 are identical, the two versions of RPC 1.1, both new and former, are very different. The model rule speaks of competence as "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The New Jersey rule simply prohibits gross negligence or a pattern of negligence. New Jersey's version of RPC 1.1 does not coincide with competence, as that word is used in RPC 1.7 (b)(2); the model rule's four-part standard is likely what was intended.

Critical to this second curing element is that the lawyer's belief be reasonable. This is an objective issue, subject to independent review by the court.[9] Logically, the lawyer's approach on reasonableness would follow the same pattern as the lawyer's subsequent approach with respect to client disclosure and consultation; namely, to assemble facts, identify all relevant persons in interest, and evaluate the risks in terms of undivided loyalty and preservation of confidences. In view of these rigorous requirements for the curing of conflicts, the reader may conclude that curing is not worth the effort. A conservative approach is prudent, particularly where the risks associated with the conflict are high. Directly adverse conflicts are particularly risky. Increasingly, courts have created *per se* prohibitions in directly adverse situations.

Per Se Conflicts

Not all RPC 1.7 conflicts are curable. Three exceptions are listed in RPC 1.7(b). The most notable is in matters involving public entity clients who are specifically not permitted to give consent. The rule also prohibits simultaneous representation of clients having opposing claims in litigation. This *per se* rule excludes only clients in the same litigation with claims against each other. It does not cover cases involving representation of parties who are on the same side, such as co-plaintiffs or co-defendants, where any conflicts are, at least theoretically, curable. Finally, the rule excludes consent to cure in any other matters prohibited by law—obviously a reference to court rulings and advisory committee opinions in which the extreme nature of a particular conflict requires a *per se* prohibition. Not surprisingly, most of the *per se* rulings involve directly adverse conflicts, where the risk of harm is greatest. A commonly cited example is *Baldasarre v. Butler*,[10] where the New Jersey Supreme Court ruled that even with consents from the parties, one attorney may not represent both the buyer and the seller in a complex commercial real estate transaction.[11]

A nearly *per se* rule exists in the matter of representing co-defendants in criminal proceedings. In that context, joint representation is presumed to be prejudicial, resulting in ineffective assistance of counsel under the Sixth Amendment.[12] However, valid joint representation may exist with informed waivers in cases where there is no actual conflict, provided the waivers are put on the record and explored by questioning each defendant.[13] Thereafter, pursuant to Rule 3:8-2, the court determines whether the joint representation will be permitted.[14] Where, however, actual adverse conflicts exist, the conflict is not waivable."[15]

Public Entity Conflicts

Representation of public entity clients is governed by both the general conflict of interest rules such as RPC 1.7 and by RPC 1.8(k), a special rule added in 2004 as a replacement for RPC 1.7(c) in public entity situations. Unlike the Model Rules, the New Jersey rules expressly prohibit public entities from giving consent to cure conflicts.[16] Because of this limitation, in order to proceed with public entity representation the New Jersey lawyer must be very confident that no conflict exists.

The threshold issue in public entity representation is identifying the public "client." The general conflict rules (1.7, 1.8 and 1.9) refer simply to a "public entity." However, RPC 1.11, the former government employee rule, refers repeatedly to "the appropriate govern-

ment agency," and RPC 1.13, the organizational client rule, defines organization in 1.13(f) to include "state or local government or political subdivision thereof." These provisions suggest that a public "client" is the specific department or agency for which the lawyer is providing representation.

That notion is inconsistent, however, at least at the county and local levels, with the "official family doctrine" which, historically, lumped all county or municipal agencies into a single county or municipal government client for conflicts purposes. (At the municipal level the principle was usually referred to as the "municipal family doctrine"). This doctrine had a long history in New Jersey, extending back to *ACPE Opinion 4* (1963).[17]

In 2006 the New Jersey Supreme Court overturned prior case law and eliminated the official family doctrine as traditionally expressed. In *ACPE Opinion 697* the committee had been asked whether an attorney whose partner represented a township zoning board or housing authority might simultaneously appear on behalf of private clients in that township's municipal court.[18] The committee ruled against the inquirer, relying upon the municipal family doctrine and insisting that such private representation would create a directly adverse conflict under RPC 1.7(a).

The Supreme Court chose to review *ACPE Opinion 697*, combining in its review consideration of another situation which the committee had condemned based upon *ACPE Opinion 697*. In that second matter the inquiring firm had asked whether it would be precluded *per se* from serving as bond counsel or as special litigation counsel for a municipal governing body while simultaneously representing private clients before boards, agencies or the municipal court in that municipality. The Supreme Court reversed the committee. In doing so, the Court provided much needed clarification of the law on several points:

1. The Court acknowledged that the official family doctrine (designated the municipal family doctrine in the Court's opinion since that was the factual context) was rooted in the appearance of impropriety standard and, as traditionally formulated, the doctrine had been effectively nullified when the appearance standard was eliminated in 2004.
2. Although the doctrine as traditionally formulated had been nullified, the Court chose to retain the title but give it a new meaning, one which fit into the "contours" of RPC 1.8(k). The new "municipal family doctrine" is in reality simply a *per se* rule created by case law opinion to the effect that if the lawyer represents a municipal governing body in a "plenary" role the lawyer is prohibited from concurrently representing private clients before any subsidiary boards or agencies of that municipality including courts.
3. This new *per se* prohibition only applies where the lawyer represents the governing body itself in a "plenary" role. It does not apply if representation of the governing body is pursuant to a "limited scope engagement" (such as serving as bond counsel or special litigation counsel, for example). Nor does the *per se* prohibition apply if the representation only involves subsidiary boards, agencies or courts. Situations not covered by the per se rule are governed by RPC 1.7(a) and RPC 1.8(k).
4. The Court emphasized the overriding importance of RPC 1.8(k) in non *per se* situations. The Court did not explain what role, if any, RPC 1.7(a) should play in the conflict analysis. The Court did, however, declare that if a lawyer represents an agency subordinate to the governing body, the lawyer is barred from representing private clients before that agency.[19]

To summarize, in public entity-private client situations, the Supreme Court's revised official family doctrine, working in combination with RPC 1.8(k) and 1.7(a), provides that if the lawyer's public entity role is plenary, representation of a private client anywhere in that public entity system is prohibited *per se*. If the lawyer's public entity role involves a subordinate entity, representation of a private client before the same subordinate entity is also prohibited *per se*. All other public entity-private client situations as well as all public-public situations, except for specific *per se* rulings such as in *ACPE Opinion 722* (2011), are subject to the lawyer's own assessment of risk per RPC 1.8(k) and 1.7(a)(2). Note that these two rules speak generally of conflicts involving "another client." Although that other client was a private one in the *Opinion 697* analysis, "another client" may also include another public entity, as in *ACPE Opinion 706* (2006), *Opinion 707* (2006) and *Opinion 722*. Note also that recusal is available as a temporary solution in appropriate situations.[20]

ACPE Opinion 707 stands for the proposition that the committee's prior opinions based upon the appearance of impropriety standard are no longer binding on attorneys. This represents an enormous shift in the law with respect to public entity clients. Instead of having recourse to a vast collection of rulings addressed to dozens of different public entity client situations, New Jersey lawyers now have for their guidance only the RPCs (primarily 1.7(a) and 1.8(k)) and the precious few opinions that have been rendered by the Supreme Court and the committee since the abo-

lition of the appearance standard in 2004. Until we have more case-made law to work with, lawyers should take a conservative approach, consistent with a recognition that representation of a public entity is a position of public trust, requiring the lawyer to be especially circumspect.[21] ⚖

Endnotes

1. *See, e.g., Hill v. N.J. Dept. of Corrections*, 342 N.J. Super. 273 (App. Div. 2001), *certif denied*, 171 N.J. 338 (2002).
2. Hazard and Hodes, *The Law of Lawyering*, Third Edition (Aspen Law and Business, 2002), Sec. 10.4; Restatement of the Law, the Law Governing Lawyers, Third (ALI 2000), Sec. 121, Comment c(iii).
3. The 2004 version of RPC 1.7(a) reads: "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, or a third person or by a personal interest of the lawyer."
4. *See, e.g., Gray v. Commercial Union Ins. Co.*, 191 N.J. Super. 590 (App. Div. 1983); ABA Model Rules of Professional Conduct 1.7, Comment (6).
5. Advisory Committee on Professional Ethics Opinion 556 (1985).
6. Rotunda and Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA Center for Professional Responsibility, 2005), Sec. 1.7-2(d).
7. Under RPC 1.7(b):

   > Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved; the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

8. *A. v. B.*, 158 N.J. 51 (1999).
9. *Whitman v. Estate of Whitman*, 259 N.J. Super. 256, 263 (App. Div. 1992).
10. 132 N.J. 278 (1993).
11. *Id. See also In re Opinion 682 of the Advisory Committee on Professional Ethics*, 147 N.J. 360 (1997).
12. *State v. Bellucci*, 81 N.J. 531 (1980); *State v. Land*, 73 N.J. 24 (1977).
13. *Id.*
14. *See also* Restatement of the Law, the Law Governing Lawyers, Third (ALI 2000), sec. 129, Comment c.
15. *State ex rel. S.G.*, 175 N.J. 132 (2003).
16. RPC 1.7(b)(1). *See also* RPC 1.8(1) and 1.9(d).
17. *See, for example, Perillo v. ACPE*, 83 N.J. 366, 378-379 (1980); *In re Opinion 452*, 87 N.J. 45, 48 (1981); *ACPE Opinions 104* (1967) and *423* (1979); and *Matter of ACPE Opinion 621*, 128 N.J. 577-594 (1992).
18. *In re ACPE Opinion 697*, 188 N.J.549 (2006).
19. *Supra* at 569.
20. *ACPE Opinion 706* (2006).
21. *In re Opinion 415*, 81 N.J. 318, 324 (1979).

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