

CONFLICTS OF INTEREST
AND THE CLIENT'S CONSENT
IN EUROPE

by

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*"No man can serve two masters:
for either he will hate the one, and love the other;
or else he will hold to the one, and despise the other.
Ye cannot serve God and mammon."
Matthew, 6:24*

*"Dealing with conflicts of interest
is inherent in a lawyer's life"
Geoffrey Hazard*

I. IN GENERAL

*"The question of conflict of interest may well be
the most controversial current issue in the legal profession"
Working Group for the revision of the CCBE Code of Conduct
Report 18 November 1996*

Conflicts of interest are one of the most debated issues in the legal profession at the dawn of the 21st century.

However, conflict of interest is by no means restricted to the legal profession; our whole life, personal and professional, is full of such conflicts. Any relationship between two people carries the potential for a conflict of interest: Each party has its own interests, which may conflict with the interests of the other person.

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II. DEFINITION OF CONFLICT OF INTEREST

A conflict of interest can be defined as a “situation in which a person, such as a public official, an employee, or a professional, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties”.

There are three key elements in this definition. First, there is a private or personal interest. Often this is a financial interest, but it could also be another sort of interest, say, to provide a special advantage to a spouse or child. Taken by themselves, there is nothing wrong with pursuing private or personal interests. The problem arises when this private interest comes into conflict with the second feature of the definition, an “official duty” – quite literally the duty you have because of the office you hold or because you act in an official capacity. As a professional you take on certain official responsibilities, by which you acquire obligations to clients, employers, or others. These obligations are supposed to trump private or personal interests. Third, conflicts of interest interfere with the ability of professional responsibilities in a specific way, namely, by interfering with objective professionals to be objective and independent. Factors, like private and personal interests, that either interfere or appear likely to interfere with objectivity are then a matter of legitimate concern to those who rely on professionals – be they clients, employers, professional colleagues, or the general public.²

III. CONFLICTS OF INTEREST IN ORDINARY LIFE

1. Unilateral of unipersonal conflicts

*“Video meliora, provoque
deteriora sequor”
Ovid*

Everyone in every part of his life faces constant oppositions between simultaneous but incompatible tendencies, wishes or drives, often leading to states of emotional tension.

We are constantly subject to internal confrontations. We face conflicts between our good inclinations and our bad tendencies. Ovid in the above quotation said: “I see and approve better things, but follow worse”. And along the same thought, St. Paul repeats: “it is not the good my will prefers, but the evil my will disapproves, that I find myself doing”.³

2. Bilateral or pluripersonal conflicts

But the most typical conflicts arise when our own interests have to fight with someone else’s interests.

² Michael McDonald, Ethics and conflict of interests, Centre for Applied Ethics, 2001.

³ St. Paul, Romans, 7, 19.

While it is hard enough to resolve dilemmas when our personal rules of conduct conflict, the real difficulties arise when we have to make decision which affect the interests of others. We can work out what weight to give to our own rules through trial and error. But bilateral decisions require us to do the same for others by allocating weights to all the conflicting interests, which may be involved. Frequently, for example, we must balance the interests of employees against those of shareholders. But even that sounds more straightforward than it really is, because there may well be differing views among the shareholders, and the interests of past, present and future employees are unlikely to be identical⁴.

IV. CONFLICTS OF INTEREST IN POLITICS

Woodrow Wilson found it impossible to compromise on the locating of the graduate school of Princeton or on America's entry into the League of Nations. On the one hand, it was expedient for him to resign from Princeton; and, on the other, he brought on the worsening of his health which was to shorten his life. Was he merely a poor diplomat, or was he illustrating that some issues do not lend themselves to compromise? He had to act, as every executive must, whether his constituents were ready to move him or not⁵

Everybody who holds a public job or position is frequently at risk of finding themselves with conflict of interests: legislators⁶, politicians⁷, lobbyists, diplomats⁸, all are targets of such opposition. Many codes of ethics⁹ and university policy rules¹⁰ have been established to regulate such conflicts.

V. CONFLICTS OF INTEREST IN MEDICINE AND SCIENCE

Conflict of interest occurs often in medicine and science in a situation in which professional judgement regarding a primary interest, such as research, education or patient care, may be unduly influenced by a secondary interest, such a financial gain or personal prestige. There is nothing unethical in finding oneself in a conflict of interest. Rather, the key questions are whether one recognises the conflict and how one deals with it. Strategies include disclosing the conflict establishing a system of review and authorization, and prohibiting the activities that lead to the conflict¹¹.

⁴ Adrian Cadbury, "Ethical managers make their own rules", in Ethics in practice. Managing the moral corporation, 1989, edited by Kennet R. Andrews, p. 71

⁵ Louis William Norris, "Moral hazards of an executive", in Ethics in practice..., p. 35.

⁶ Gerard Carrey, "Conflicts of interests: legislators, ministers and public officials", Transparency International.

⁷ Andrew Stark, Conflict of interest in American public life, 2000.

⁸ Susan Schmidt, "Ex-diplomat pleads guilty to conflict of interest in Chang case", Washington Post, 31 August 2001.

⁹ See for instance: US Senate Ethics Manual; Ethics manual for members, officers and employees of the US House of Representatives; Canadian Lobbyists Code of Conduct; Irish Ethics in Public Office, etc.

¹⁰ Stanford Research Administration, University of Illinois at Urbana-Campaign.

¹¹ Trudo Lemmens and Peter Singer, "Bioethics for clinicians, 17 Conflict of interest in research, education and patient care" in Canadian Medical Association Journal, 20 October 1998.

The objectivity of researches is an essential value in the scientific world and the basis for public confidence. Researchers should be led by their data, not by ulterior interests that might undermine the scientific integrity of this work. Concern is raised when financial considerations may compromise an investigator's professional judgement and independence in the design, conduct or publication of research. Public health service regulations are promulgated and international review boards are created to protect the judgement independence of the investigators¹².

VI. CONFLICTS OF INTEREST IN BUSINESS

In 1976, the *Harvard Business Review* submitted a questionnaire on business ethics and social responsibility to 5,000 readers. One of the questions asked if they had ever experienced a conflict between what was expected of them as efficient, profit-conscious managers, and what was expected of them as ethical persons. Four of every seven of those who responded said that they had experienced such conflicts. The nature of compromising circumstances where conflicts between company interests and personal ethics was headed by honesty in communication (22.3%), followed by gifts, entertainment and kickbacks (12.3%) and fairness and discrimination (7.0%)¹³.

Businessmen must make continuous compromises. For one thing, they must choose between present and long-term values. Shall the dividends be higher or the capital improvements greater? Secondly, a conflict between individual and institutional values must often be resolved. Loyalty to an institution is fundamental to the institution's success. Yet an individual can hinder its success in spite of his loyalty. It may be better for the company for the vice president to be dismissed, though this could ruin his health and reputation. Again, shall decisions be made in the interest of few or many? Democratic morality commonly holds up its nose when legislative or executive action is taken or threatened that favours the few. Unquestionably, the most significant compromises are those that balance material and nonmaterial values.

Perhaps the chief evil in compromise lies in its apparent disregard of universal principle. An executive undermines his own influence if he becomes motivated largely by expediency. The great executives have been considered "men of principle", no matter how much they may have trimmed their sails on minor points. Virtue remains largely a habit of the will to follow principle, as Aristotle and Kant emphasised. Members of any institution want the security supplied by the knowledge that their executive is "unpurchable". Deviation from principle may become habit forming. Fear of mediocrity, short-sightedness, or unpredictability sets in when principle falls out¹⁴.

It has been said¹⁵ that neither the proposition that business and spiritual considerations are separable nor the view that ethics is good business is a fully adequate guide for action. Both represent oversimplified attempts to find an easy way out of an

¹² NIH Guide, Financial conflicts of interest and research objectivity, 5 June 2000.

¹³ Steven N. Brenner and Earl A. Molander, "Is the ethics of business changing?" in Ethics in practice..., p. 122.

¹⁴ Louis William Norris, op. cit., p.38

¹⁵ Edmund P. Learned, Arch R. Dooley, and Robert L. Katz, "Personal values and business decisions", in Ethics in practice... p. 54.

excruciatingly complex situation. How can the belief that in the long run good ethics is good business help the manager who is responsible for immediate results, particularly if attention to spiritual values entails a risk of financial loss or even immediate failure for the individual himself, the enterprise or both? Every decision involves a conflicting set of forces. This is particularly true in business, where the individual often finds himself forced to choose among personal values and ultimate loyalties that may be in sharp conflict with each other, with the values held by others (which look “right” from their points of view), or with urgent organisational considerations. The terrible task of leadership is to live with conflicts and tensions, to make discriminating judgements where necessary, and to find mutual relationships where possible. What is crucial is that the administrator realise that he always has a choice of what his behaviour or decision will be –(at least, if he is willing to accept the inevitable discomforts entailed by different courses of action). There are a multitude of forces in any organisational framework which make conflict inevitable and negative consequences unavoidable. Someone will always be placed under tensions or restrictions, or denied things that he believes to be rightly his. Individual interests must frequently be sacrificed for the good of the larger organisation. For these reasons we do not believe that it is satisfactory either to ignore spiritual considerations in business or to try to make spiritual and business considerations identical. Both approaches are oversimplifications: the former because it requires a man who wants to serve God to compartmentalise his life; the latter because it offers no way of dealing with the conflicts which occur in every decision-making situation. Neither recognises the inevitability of conflict or the complexity of the situation in which business decisions must be made¹⁶.

VII. CONFLICT OF INTERESTS AND PROFESSIONALS

Professionals have to face multiple cases of conflicts of interest. The reason is because one of the most essential elements in professionalism is trust. Clients trust that the professional will dedicate all his effort to the relevant service without the interference of preoccupations.

Accountants, for instance, are facing an important conflict between the public interest and the best business interests of its members¹⁷.

On the other hand, conflict of interest are one of the stumbling stones which make ethically difficult the multidisciplinary practices between lawyers and accountants¹⁸.

VIII. CONFLICT OF INTEREST AND LAWYERS

“When a client employs an attorney, he has the right to presume, if the latter be silent on the point, that he has no engagement, which interfere, in any degree,

¹⁶ Edmund P. Learned and others, *op. cit.*, p55.

¹⁷ Nigel Page, “Conflicting interests?”, *Legal business*, September 1992, p. 42.

¹⁸ See for instance, Ramon Mullerat, “The multidisciplinary practice of law in Europe”, *Journal of Legal Education*, Vol 50, December 2000, Annex 4, pp. 481, ss.

with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgement, or endanger his fidelity”.
Justice Joseph Story (1779-1845)¹⁹

1. In general

*“The pressures facing the legal profession worldwide challenge old rules and long-standing patterns of behaviour. In a world in which law firms grow in size, power and revenue and as other professions converge into areas previously reserved to the legal profession, it is not surprising that ethical rules face reassessment”.*²⁰

Although everyone faces similar questions, the conflicting questions faced by lawyers are perhaps greater in number and intensity than those faced by most other people. Nor are the conflict rules in non-lawyer relationships (e.g., a business partnership) a sure guide in analysing lawyer’s conflict of interest. The lawyer-client relationship is unique by definition, i.e.; it is a relationship whose object is the rendering of legal advice and counsel²¹

My father, a solo practitioner working in litigation for individual clients in a provincial town in Spain, had very few conflicts of interest. Today, large firms of fifteen hundred lawyers or more with thirty or more offices specialising in business law, often deal with complex transnational transactions face many conflicts of interest. That is why conflicts of interest have become a central issue in legal ethics.

The Working Group for the revision of the CCBE Code of Conduct²² recognised that conflicts of interest:

“... has become a subject of increased interest because of the trend towards bigger law firms. The bigger they get the more acutely they feel the conflicts of interest. Mergers between law firms create conflicts of interest because the merging firms often have clients that are in dispute with each other. It is necessary to discuss whether the current provisions are adequate when coping with the new developments in our profession...”

The rules on conflicts of interest are of fundamental importance to the trust of the public in the legal profession. Great care must therefore be exercised when looking at ways of coping with the development of the legal profession when writing the rules concerning conflict of interest.”

The rules on conflicts of interest do not attempt the elimination of all possible conflicts; this is impossible. Even if we envisioned lawyers as ascetics, renouncing all self interest, devoted only to their calling, even if our notion of a lawyer was someone who served one client for the entirety of his career, of course, this is not so, conflicting interests would be present: The client’s interest would still conflict with the interests of

¹⁹ Williams v. Reed, 3 Mason 405, 418, 29 F. Case No. 17.733 (C.C.Me. 1824).

²⁰ R.S.G. Chester, J.W. Rowley and Brett Harrison, “Conflict of interest, Chinese walls and the changing business of law”, B.L.I., issue 2, International Bar Association, 2000, p. 35.

²¹ Hazard and al., op. cit., p. 620.

²² Council of the Bars and Law Societies of the European Union (CCBE), Code of Conduct for Lawyers in the European Union, revised version 1999.

their parties and with the law itself. Dealing with conflicting interests is inherent in a lawyer's life²³

2. Definition of conflict of interest for lawyers

The Working Group for the revision of the CCBE Code of Conduct made in its 18 November 1996 proposal a step forwards defining conflict of interest by proposing the introduction of a new subarticle 3.2.1 This subarticle described what a lawyer could do by way of representing or acting as legal advisor for more than one client without a conflict of interest occurring. With so many varying activities by lawyers it is of great importance to define as precisely as possible what is and what is not conflict of interest. The proposal did not go far enough in this respect. A regulation for conflict of interest should define as thoroughly as possible: both what is and what is not conflict of interest, and what it is in relation to submitting legal advice to as well as representing a client.

"1. A conflict of interest exists where:

1.1 When acting as an adviser for several clients, the lawyer, having the obligation to give his clients complete and loyal information without any reservations, be it through factual analysis, cannot do so without compromising the interests of one or several of his clients"

1.2. In his function as representative or defender of several clients, the lawyer has to present a defence or pleading which in its development, argumentation or final presentation is different from what it would have been if he had only represented one of his clients.

2. A conflict of interest does not exist where:

2.1 A lawyer acts as a legal adviser for several persons or other legal entities when they ask the lawyers to assist them in realisation of a common project between clients.

2.2 A lawyer acts as a representative, adviser or defender of more than one client in the same case or matter where the interests of the clients are the same.

2.3 A lawyer who with their express consent acts as mediator, conciliator or arbitrator between two or more clients with conflicting interests, cfr. 1.1 and 1.2 above".

3. Types of conflicts of interest

The four major kinds of conflicts of interest are:

1. Conflicts between the lawyer's personal interest and the interest of the client (e.g., the lawyer wishes to enter into business transactions with the client, receive a gift from the client, etc.)
2. Conflicts between the interests of two or more clients that the lawyer is concurrently representing. This is especially a problem in litigation matters but can also arise in nonlitigation situations.

²³ Hazard and al., op. cit., p. 619.

3. Conflicts between the client's interest and that of a third party to whom the lawyer owes obligations (e.g., a lawyer for the insurer representing the insured).
4. Conflicts between the lawyer's duties to a present client and the lawyer's continuing duties to a former client.²⁴

Often conflicts of interest have an economic nature, but they are not always economic. For instance, a lawyer who becomes involved in a sexual relationships with a client should consider whether this may place his or her interests with those of the client²⁵.

4. Lawyer's ethical values protected

The policies underlying conflict of interests are basically two: loyalty and confidentiality.

Loyalty is one of the most important aspects of a lawyer's relationship with his client. In an adversary system, the client depends upon the lawyer's undiluted loyalty to his client's interests. The potential variety of interests which might dilute a lawyer's loyalty to his clients includes the lawyer's personal interests (e.g., financial security, prestige, and self-esteem) and the interests of third persons (family, friends, business associates, employer, the legal profession, and society as a whole).

Preserving a client's secrets and confidences is often as important to the client as winning his lawsuit or avoiding embarrassment or undue expense. Whereas loyalty relates to zeal or diligence, confidentiality relates to information which the client has entrusted to her lawyer.²⁶

5. The manifold issues of a lawyer's conflict of interest

The duty to avoid conflicting interests raises multiple issues, which we cannot analyse in this paper.

Amongst the more important are the following²⁷:

- a. Does a conflict of interest appear when two clients with adverse or potentially adverse interests seek representation by the same lawyer in matters totally unrelated to the matter in which their interests differ?
- b. Is a lawyer allowed to sue a former client on behalf of a next client where the matter of the lawsuit is unrelated to the matter in which the former client was represented?
- c. Can two or more clients seek joint representation? What is the degree of adversity in their respective interest to prevent such joint representation?

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²⁵ The Guide for Professional Conduct of Solicitors. The Law Society, ed. 6th, 1999.

²⁶ Riobert H. Aronson and Donald T. Weckstern, Professional Responsibility, 1991, p. 223.

²⁷ Most of these issues are taken from Hazard and al., op. cit., p 620 and ss.

- d. Are lawyers of the same firm with a lawyer who is disqualified because a conflict disqualified them?
- e. What is a firm for the purposes of the rules on conflict? When associations/networks/corresponding firms are considered as a firm for these purposes
- f. Does the taint of disqualified lawyer travel with that lawyer if he or she moves from one firm to another?
- g. When the client is an organisation, who is the real client to whom the lawyer owes the duty of communication? From whom shall he take instructions on settlement? To whom does he owe the duty to keep confidences?
- h. Can a law firm with several international offices represent competing bidders.

Conflicts of interests constantly increase in number and in pecuniary consequences. Chester, Rowley and Harrison referred to one Oklahoma firm which was reportedly hit with a \$ 120 million claim for attempting to switch sides in an oil industry dispute; in 1996, Louisiana's appellate court upheld a \$ 5.5 million judgement against a lawyer who tried to act for both sides in a corporate merger; firms also had to forfeit fees, with Milbank Tweed reportedly losing a \$ 1.9 million free award in 1997 and Wilkie Farr almost \$ 3 million the following year²⁸.

6. The rules

A. In general

Codes of ethics regulate conflicts of interest very differently. The codes of ethics of the common law tradition (f.i., the ABA Model Rules) tend to do it with great detail while the ones of the civil law tradition (f.i., the CCBE Code of Conduct) tend to do it concisely.

B. The CCBE Code of Conduct²⁹

The CCBE Code of Conduct, section 3.2 regulates the conflict of interest in Europe

“3.2 Conflict of interest

3.2.1 A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2 A lawyer must cease to act for both clients when a conflict of interests arises between those clients and also whenever there is a risk of breach of confidence or where his independence may be impaired.

3.2.3 A lawyer must also refrain from acting for a new client if there is a risk or a breach of confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of three affairs of the former client would give an undue advantage to the new client.

3.2.4 Where lawyers are practising in association, paragraphs 3.2.1 and 3.2.3 above shall apply to the association and all its members”.

²⁸ Chester, Rowley and Harrison, *op. cit.*, p. 37.

²⁹ Code of Conduct of the CCBE, 1988, revised 1998.

C. The ABA Model Rules of Professional Conduct³⁰*“Rule 1.7. Conflict of interest: General rule*

“(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the client; and

(2) each client consents after consultation

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved

Rule 1.8 Conflict of interest: Prohibited transactions

“(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to 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 and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse and substantial gift from a client, including a testamentary gift, except when the client is related to the donor.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplate litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, 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.

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

(1) the client consents after consultation;

(2) there is no interference with the lawyer’s independence of professional judgement or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected and required by Rule 1.6.

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

³⁰ American Bar Association, Model Rules of Professional Conduct, 1999.

(h) 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 of former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not require 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 with a client for a reasonable contingent fee in a civil case".*

D. The international Code of Ethics of the International Bar Association (IBA) 1998

"Rule 13

Lawyers should never represent conflicting interests in litigation. In non-litigation matters, lawyers should do so only after having disclosed all conflicts or possible conflicts of interest to all partners concerned and only with their consent. This Rule also applies to all lawyers in a firm".

E. The Richtlinien für die Ausübung des Rechtsanwaltsberufes, für die Überwachung der Pflichten des Rechtsanwaltes und für die Ausbildung in Austria

“§ 10. Vorhehmste Berufspflicht des Rechtsanwaltes ist die Treue zu seiner Partei. Interessen des Rechtsanwaltes und Rücksichten auf Kollegen haben im Widerstreit zurückzutreten.

§ 11. Der Rechtsanwalt darf Auftrag und Vollmacht in der Regel nur von demjenigen annehmen, dessen Interessen ihm anvertraut werden.

§ 13. Hat es der Rechtsanwalt von nur einer Partei übernommen, Vertragsverhandlungen zu führen oder einem Vertrag zu verfassen, so ist er berechtigt, diese Partei in einem Rechtsstreit aus diesem Vertrag zu vertreten, wenn auch die andere Partei von einem berufsmäßigen Parteienvertreter beraten war oder der Rechtsanwalt sogleich ausdrücklich erklärt hatte, nur seine Partei zu vertreten.

§ 14. Hat der Rechtsanwalt eine Gesellschaft ausschließlich über Auftrag eines Gesellschafters oder ausschließlich auf Grund der von diesem erteilten Information vertreten oder beraten, so ist ihm die Vertretung und Beratung dieses Gesellschafters in Angelegenheiten seines Gesellschaftsverhältnisses nur gestattet, sofern er nicht gleichzeitig die Gesellschaft vertritt oder berät.”

F. The Code of Ethics for the legal profession in Spain

“Artículo 13.- relaciones con los clientes

(...)

4.- El abogado no puede aceptar la defensa de intereses contrapuestos con otros que esté defendiendo, o con los del propio abogado.