

(Second version)

LAWYERS' CONFLICTS OF INTEREST

**(with a proposal for the review
of art. 3.2 of the CCBE Code of Conduct)**

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"
Matthew, 6:24*

PURPOSE

*"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
Final Report February 1998*

The purpose of this paper is twofold: to identify areas in which the traditional conflicts of interest rules can be updated for today's legal practice, and to make a proposal towards the revision of art. 3.2 of the CCBE Code. The paper is divided into four chapters: the first considers conflicts of interests in life in general; the second concentrates on conflicts of interest in the legal profession; the third discusses the revision of art. 3.2 of the CCBE Code; and the fourth proposes a new text for art. 3.2.

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FIRST. CONFLICTS OF INTEREST

I. In general

Conflicts of interests are by no means restricted to the legal profession; daily life is full of such conflicts. Any relationship between two people carries the potential for a conflict of interests. Each party has its own interests, which may conflict with the interests of the other person.

Generally, a conflict of interests is a situation in which a person, such as a public official, a businessman or a professional, has a private or personal interest sufficient to at least appear to influence the objective exercise of his or her duties.

In a conflict for professionals, for instance, there are three key elements. 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. Second, the problem arises when this private interest comes into conflict with the second feature – the duty to the profession you practice. As a professional you take on certain responsibilities, by which you acquire obligations to clients, employees 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 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 – whether they are clients, employers, professional colleagues, or the general public².

Conflicts of interest have become an important issue in today's world. Enron/Arthur Andersen/WorldCom and subsequent scandals in the USA and in the EU that have shaken the world economy and the confidence of investors, have their origin in unresolved conflicts of interests of managers, analysts, financial advisers, auditors and lawyers.

II. Personal interior conflicts

*“Video meliora, provoque,
deteriora sequor”
Publius Ovidius (Ovid)*

As mentioned earlier conflicts of interest do not exclusively affect the legal profession. Each individual has his own internal conflicts. Everyone faces constant oppositions between incompatible tendencies, wishes or drives, often leading to states of conscience or emotional tension.

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

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 better things, try them but follow worse”. And along the same thought, St. Paul said: “it is not the good my will prefers, but the evil my will disapproves, that I find myself doing”³. As Chesterton⁴ put it, “the perplexity of life arises from there being too many interesting things in it for us to be interested properly in any of them”.

III. Bilateral or pluripersonal conflicts

“Such an adjustment of conflicting interests as gives each adversary the satisfaction of thinking he has got what he ought not to have, and is deprived of nothing except what was justly his due”
Ambrose Bierce, The Devil’s Dictionary (definition of compromise)

However, typical conflicts arise when our own interests clash with someone else’s interests.

While it is hard enough to resolve internal dilemmas, the real difficulties arise when we have to make decisions which affect the interests of others. Through trial and error, we can work out what weight to give our own rules, but bilateral decisions require us to do the same for others by allocating weights to all the conflicting interests, which may be involved. For example, businessmen 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 identical⁵.

IV. Conflicts of interest in politics

“Experience suggest that the first rule of politics is never to say never. The ingenious human capacity for manoeuvre and compromise may make acceptable tomorrow what seems outrageous or impossible today.”
William S. Shannon, “Vietnam: America’s Dreyfus Case”, The New York Times, 3 March 1968

Woodrow Wilson found it impossible to compromise on the location of school of Princeton University or on America’s entry into the League of Nations. On one hand, it was expedient for him to resign from Princeton and, on the other, he brought on the worsening of his health, which shortened 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 with him or not⁶.

³ St. Paul, Romans, 7, 19. Robert Browning, Men and women, 1855: “When the fight begins within himself, a man’s worth something”.

⁴ G.K. Chesterton, Tremendous Trifles, 1909.

⁵ Adrian Cadbury, “Ethical managers make their own rules”, in Ethics in practice. Managing the moral corporation, 1989, edited by Kennet R. Andrews, p. 71.

⁶ Louis William Norris, “Moral hazards of an executive”, in Ethics in practice...., p. 35.

Everybody who holds a public office or position is frequently at risk of finding themselves trying to solve conflicts of interests whether they be legislators⁷, politicians⁸, lobbyists, diplomats⁹, all are targets of such opposition. Many codes of ethics¹⁰ and university policy rules¹¹ have been established to regulate such conflicts.

V. Conflicts of interest in science

Conflicts of interests often occur in science and medicine in situations where professional judgement regarding a primary interest, such as research, education or patient care, may be unduly influenced by a secondary interest, such as financial gain or personal prestige. There is nothing unethical in finding oneself in a conflict of interests. Rather, the key issues are whether one recognises the conflict and then 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 conflict¹².

Researchers' objectivity is not only an essential value in the scientific world, it is also the basis for public confidence. Researchers should base findings on their data, not by ulterior interests that might undermine the scientific integrity of their work. The situations where financial considerations may compromise an investigator's professional judgement and independence in the design, conduct or publication of research raises concerns. Public health service regulations are promulgated and international review books are created to protect researcher's independence of judgement¹³.

VI. Conflicts of interest in business

"Western doctors take the Hippocratic Oath before becoming physicians and lawyers swear to protect the rule of law, but businesspeople have no comparable creed by which to live. Strictly speaking, the only obligation businesspeople have is to obey the law and make a profit."¹⁴

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 out of every seven of

⁷ Gerard Carrey, "Conflicts of interests: legislators, ministers and public officials", [Transparency International](#).

⁸ Andrew Stark, [Conflict of interest in American public life](#), 2000.

⁹ Susan Schmidt, "Ex-diplomat pleads guilty to conflict of interest in Chang case", [Washington Post](#), 31 August 2001.

¹⁰ 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.

¹¹ Stanford Research Administration, University of Illinois at Urbana-Champaign.

¹² 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.

¹³ [NIH Guide, Financial conflicts of interest and research objectivity](#), 5 June 2000.

¹⁴ Voigt, Kevin. "Businesspeople can strive to avoid common pitfalls through the 'three M's'." [The Wall Street Journal Europe](#). 3 September, 2002.

those who responded said that they had experienced such conflicts. The nature of compromising circumstances between company interests and personal ethics was characterized by honesty in communication (22.3%), followed by gifts, entertainment and kickbacks (12.3%) and fairness and discrimination (7.0%)¹⁵.

Businessmen must continuously make compromises. First, they must choose between present and long-term values. Shall the dividends be higher or the capital improvements greater? Second, oftentimes a conflict between individual and institutional values must 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 a few or many? Democratic morality commonly "sticks its nose up" when legislative or executive action is taken or threatens that which favours the few. Unquestionably, the most significant compromises are those that balance material and nonmaterial values.

Great executives have been considered "men of principle", for no matter how much they may have trimmed their sails on minor points, virtue remains largely a habit of the will to follow principles. As Aristotle and Kant emphasised, members of any institution want the security supplied by the knowledge that their executive is "unpurchasable". Deviation from principle may become habit-forming. Fear of mediocrity, short-sightedness, or unpredictability sets in when principle falls out¹⁶.

It has been said¹⁷ that in business 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 sharply conflict with one another, 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. There are a multitude of forces in any organisational framework which make conflicts inevitable and negative consequences unavoidable. Someone will always be placed under restrictions or denied things that he believes to be rightly his. More often than not, individual interests must be sacrificed for the good of the larger organisation.

Lawyers, as professionals who often face conflicts of interest, are in the best position to identify the conflicts that may occur to their clients. Sol M. Linowitz, senior partner of Coudert Brothers,¹⁸ asked a colleague how was it that so many lawyers were becoming chairmen of companies, and he was told "not to deal with legal problems but to know when there is a legal problem". Linowitz further relates a personal experience when sitting on a board, as he realised that there was a real conflict in a merger which the management had not seen.

¹⁵ Steven N. Brenner and Earl A. Molander, "Is the ethics of business changing?" in *Ethics in practice...*, p. 122.

¹⁶ Louis William Norris, *op. cit.*, p. 38.

¹⁷ Edmund P. Learned, Arch R. Dooley, and Robert L. Katz, "Personal values and business decisions", *Ethics in practice...* p. 54.

¹⁸ Sol M. Linowitz, *The Betrayed Profession*, p.64.

Martin Wolf, The Financial Times' columnist referring to the flaws of modern capitalism in November 2002¹⁹ referred to the career businessman's lack of accountability, lack of transparency and institutional failure and added "everything is made far worse by a plethora of conflicts of interests: financial conglomerates are more concerned with pleasing corporate management than with maximising the values of funds they control; outside directors owe more loyalty to the managers who choose them than to the shareholders they represent; and accountants owe more to the people who employ them than to the investors who rely on their work.

VII. Conflicts of interests and professionals

Professionals have to face cases of conflicts of interests often because an essential element in the professional-client relationship is trust. Clients trust that the professional will dedicate all his efforts to the relevant service without the interference from other preoccupations.

Take as an example, accountants. They must deal with important conflicts between the public interest and the best business interests of its members²⁰. Arthur Andersen's story is another example of this type of conflict of interests. But, even today the US accounting regulator has been considering banning accounting firms from doing tax work for audit clients, because, according to Paul Walckers, former chairman of the Federal Reserve, this could breach the maxim that accountants should not audit their own work²¹.

On the other hand, conflicts of interests compose just one of the stumbling stones which makes the multidisciplinary practice between lawyers and accountants ethically difficult²².

Today, some support that traditional legal analysis has led conflicts of interests to legal rules that are too severe and unjustifiable and are inept to deal with the problems that arise in a modern sophisticated commercial society²³.

SECOND. CONFLICTS OF INTEREST AND THE LEGAL PROFESSION

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

¹⁹ Martin Wolf, "The flaws of modern capitalism", The Financial Times, 19 November 2002.

²⁰ Nigel Page, "Conflicting interests?", Legal business, September 1992, p. 42.

²¹ Andrew Parker, "Auditors should end tax role", Financial Times, 17 March 2003.

²² 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.

²³ Justice Aikens, Foreword to Charles Hollander and Simon Salzedo, Conflicts of interest & Chinese Walls, Sweet & Maxwell, 2000.

I. In general

Although others face similar questions, the conflicts questions lawyers face are perhaps greater in number and intensity than those faced by most other people. The rules regarding conflicts in non-lawyer relationships are not a sure guide in analysing a lawyer's conflict of interest. The lawyer-client relationship is unique by definition; i.e., it is a relationship whose objectives are the rendering of legal advice and counsel²⁴ and the provision of justice in the world.

Globalisation, the development of bigger firms and the change of methods in which lawyers operate has led to the call for a need to revise and harmonise conflict of interest rules. The Working Group for the revision of the CCBE Code²⁵ in 1999 recognised that conflict 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.”

But this is easier said than done. For instance as Hans-Jürgen Hellwig says, the rules on conflicts of interest should be seen in the context of the legal definition and public perception of a lawyer in any given jurisdiction. In the civil law tradition, a lawyer, with regard not only to his court work but also to his legal advice, is considered an instrument in the administration of justice, an officer of the legal system and a co-minister of justice and the clients' consent to representation of conflicting interests is therefore irrelevant. In common law countries, a lawyer has no such position, or has it only with regard to court work and not when advising a client out of court. In those countries conflict rules are primarily derived from the lawyer's contractual duties vis-à-vis his client and accordingly, the clients may waive the conflict rules. Therefore, there will be no significant harmonisation of conflict rules unless there is harmonisation of the underlying definition of the lawyer's role in a democratic society that follows the rule of law²⁶.

II. Proliferation of lawyers' conflicts of interests

²⁴ Geoffrey Hazard and al., *op. cit.*, p. 620.

²⁵ Council of the Bars and Law Societies of the European Union (CCBE), Code of Conduct for Lawyers in the European Union, revised version 1999.

²⁶ Hans-Jürgen Hellwig, Vice-president of the German Bar Association, “Independence, conflicts and secrecy”, European Lawyer, April 2001.

Globalisation, sophistication of corporations and financial transactions, the ever greater role of lawyers in such transactions and the growing of large firms have caused conflicts of interests to proliferate in the legal profession.

However, many lawyers tend to ignore conflicts or justify their intervention in spite of the conflict. Sol M. Linowitz²⁷ exclaims: “Until recently, it would have been unthinkable that a lawyer would have interests that might conflict with those of his clients. Now, conflicts sometimes grow so severe that courts must remind lawyers that the privilege of confidentiality in communications between clients and lawyers exists to benefit the client, not the lawyer....”

It used to be that a lawyer would work in one or two firms for their entire legal career. Now, lawyers change firms as often as four or five times in the same period. This has created a new problem regarding conflicts of interests as the courts have not changed the relevant laws and still allow the disqualification of counsel based on the imputation doctrine that each and every lawyer at a firm is deemed to know everything that the other lawyers at the firm know²⁸. The 2000 case of *County of Los Angeles v. United States District Court*²⁹ held that law firms in California may use Chinese Walls to prevent a conflict of interest of one lawyer being imputed to the entire firm. This is especially important as many firms are so large that its members don't know, even by sight, all the people working within the firm, and numerous firms have several branches of the main office. In the latter situation, a lawyer from an office in the States may never have physical contact with any matter that the office in Abu Dhabi deals with. However, with the technological advancements of today, with shared file servers etc., attorneys in a firm can access information from another of the firm's office instantaneously.

III. Definition of lawyer's conflict of interest

*“Probably the chief problem with conflicts of interests lies in their identification”*³⁰

Sol M. Linowitz³¹ reminds us that speaking to a seminar on conflicts of interests at the 1972 ABA convention, Richard H. Paul of Paul Weiss said when he advised clients confronted with conflicts situations: “My one and only touchstone in this: In answering them, I ask myself, ‘how would it look in the New York Times?’”.

Defining conflicts of interest in general can be done in a positive way, as a struggle between opposing forces, but when referring to a lawyer's conflict of interest, it is generally defined negatively, as a prohibition to participating in such clashes of

²⁷ Sol M. Linowitz, *The Betrayed Profession*, 1994, p.40. See the mentioned cases of highly distinguished lawyers who incurred in conflicts of interests.

²⁸ SeLegue, Sean M., “Ethical Walls Find Acceptance in Ninth Circuit”, Rogers Joseph O'Donnell & Phillips Professional Liability News, Issue 8, March 2002.

²⁹ 223 F.3d 990 (2000).

³⁰ Donald Nicholson and Julian Webb, *Professional Legal Ethics. Critical Interrogations*, 1999, p. 129, n. 41 who cite R. Gramston, *Legal ethics and professional responsibility*, 1995, p.17 and A. Paterson, *Legal ethics: its nature and place in the curriculum in Cranston*, 1995, p.17.

³¹ Sol M. Linowitz, *op.cit.* p.228.

opposing interests. The lawyer can serve different clients, different masters, but not if the clients have opposing interests.

Conflicts are arrangements which are adverse to the interests or are to the disadvantage of present or former clients. The CCBE Code does not define conflicts of interests, but (art. 3.2.1) only prohibits conflicts (“to 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”). The ABA Model Rules (Rule 1.7) also define conflicts of interests as a prohibition of a lawyer representing one client in a manner “directly adverse to another client” or under circumstances causing the lawyer’s representation of the client to “be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer”.

IV. Conflicts of current situations

The situations of conflicts for lawyers are so numerous and varied as life itself. Obviously, conflicts in litigation cases are more easily detectable than in transactional matters.

The modern economy raises new conflicts problems. For instance:

- What if a lawyer attended a beauty parade and failed to get the work? Will he be precluded subsequently from acting for the other party?
- Is a lawyer who has given some very preliminary advice at an initial meeting, i.e. by a wife in a divorce suit, and the wife finally uses a different lawyer, allowed to represent the other party, i.e. the husband?

V. Types of conflicts of interest

The four major types of lawyers’ conflicts of interest are:

- a) Conflicts between the lawyer’s personal interests and the interests of the client (e.g. the lawyer wishes to enter into business transactions with the client, receive a gift from the client, etc.)
- b) Conflicts between the interests of two or more clients that the lawyer is concurrently representing. Especially a problem in litigation matters, this now arises more and more in non-litigation situations.
- c) Conflicts between the client’s interests and those of third parties to whom the lawyer owes obligations, for instance, when a third party pays the lawyer’s fee (e.g. a lawyer for the insurer representing the insured).
- d) Conflicts between the lawyer’s duties to a present client and the lawyer’s continuing duties to a former client³².

³² Thomas D. Morgan, Legal ethics, 1996, p. 60.

VI. The values protected by the conflicts' prohibition

“When a client engages the services of a lawyer in a given piece of business he is entitled to feel that... he has the undivided loyalty of the one upon whom he looks as his advocate and champion.”

*Grievance Committee v. Rottner*³³

1. The lawyer's values

There are many classifications of the lawyer's ethical duties. Nicholson and Webb³⁴ sustain that lawyers owe three types of duties: a) to clients; b) to the administration of justice; and c) to specific third parties and the general public. Duties to clients, in turn, are further divided into: a) loyalty; b) diligence; and c) confidentiality. Loyalty itself is said to encompass its own set of duties, which are: a) zeal; b) integrity; and c) independence. The obligation to avoid conflicts would be, in my view, a consequence, at the same time of the duties of loyalty, independence and zeal.

However, the reasons supporting the duty to avoid conflicts are based on different lawyer's ethical obligations, depending on the type of conflict of interest. What usually leads to the profession in the conflicts of interests between the fiduciary obligation of loyalty owed by the lawyer to an existing client and the obligations owed to another existing or former client whose interests conflict. In the case of the existing clients conflicts, it is the conflict between two competing obligations of loyalty. In the case of conflicts between existing clients and former clients, it is the conflict between the obligation of loyalty to the existing client versus the obligation of confidentiality to the former client³⁵.

2. Independence

Independence is the quintessence of a lawyer's activities. There is no free society and no free man without independent lawyers. Independence means that lawyers must not allow themselves to be restricted in their acting on behalf of or in giving advice to their clients. Many of the lawyer's ethical duties derive from the need to act independently. Hand in hand with independence is confidentiality. The basis of confidentiality on the part of the lawyer is the need for the client to have total confidence in his lawyer and to rely on him to handle the matter he is charged with.

Lawyers must avoid conflicts of interest in order to keep the necessary independence to carry out their function adequately. A lawyer cannot give independent advice in the case of opposing conflicts of his own or of others.

3. Confidentiality

Confidentiality (“professional secrecy” according to the civil law system or “confidentiality” or “attorney-client privilege” according to the common law system) is

³³ *Grievance Committee V. Rottner*, 152 Conn. 59, 203 A.2d 82(1964) cited from Morgan and Rotunda, *op.cit.*, p. 55.

³⁴ Donald Nicholson and Julian Webb, *op.cit.*, 1999, p 104.

³⁵ Charles Hollander and Simon Salzedo, *Conflicts of Interest and Chinese Walls*, Sweet & Maxwell, London, 2000, p.11.

one of the essential principles of the lawyer's function. The CCBE Code (art 2.3) proclaims that confidentiality is "a primary and fundamental right and duty of the lawyer" and that "it serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state".

On this basis, the Working Group submitted that the following provision should be included as an express reference to the importance to confidentiality and independence:

"In the field of conflict of interest the lawyer must be especially attentive towards and maintain respect for his obligation of confidentiality towards his client and his duty to remain independent. The lawyer must not act in a way that may cause a risk of breach of his confidence or impairment of his independence."

4. Loyalty

The special feature of the fiduciary in the obligation of loyalty to the person for whom he acts. He has an obligation to defend and advance the interests of the persons to whom he owes the fiduciary obligation³⁶.

Lawyers owe loyalty to their clients because they are their fiduciaries. The definition of fiduciary and its duties were clearly expressed by Lord Millet:

*"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which gives rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principle is entitled to the simple-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interests may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his client... he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary"*³⁷

The fiduciary relationship comes to an end with the termination of the retainer. The obligation of confidentiality survives the termination of the retainer. After termination of the retainers the professional has no obligation to defend and advance the interests of his former client although he has a continuing duty to preserve the confidentiality of information imparted during its subsistence.

VII. The rules

1. In general

³⁶ Hollander and Salzedo, op.cit. p.13.

³⁷ Lord Millet in *Bristol & West Building Society v Mathew* [1998] Ch. 1.18, cited by Hollander and Salzedo, op.cit., p.14.