
Volume 10
Number 3 *Symposium on The Attorney-Client
Relationship: Rights and Duties*

pp.433-452

Symposium on The Attorney-Client Relationship: Rights and Duties

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Recommended Citation

Charles P. Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, 10 Val. U. L. Rev. 433 (1976).
Available at: <https://scholar.valpo.edu/vulr/vol10/iss3/2>

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CONFLICT OF INTEREST AND THE LAWYER IN CIVIL PRACTICE

CHARLES P. KINDREGAN*

At the heart of the skills which a lawyer offers to his client is the exercise of his independent professional judgment. Given the realities of the Anglo-American adversary system, a lawyer's total loyalty must be to his client, restricted only by his duty to the court and to the law. An adversary system of jurisprudence simply will not work if a litigant's attorney has loyalties which conflict with the best legal interests of the client. Thus, the necessity that lawyers avoid conflicts of interest is a keystone of the profession. Yet, little has been written about the subject, and lawyers often appear insensitive to conflict of interest problems.

The following survey analyzes some major conflict of interest problems, concentrating especially on civil practice. Readers interested in the somewhat different problems of conflicts of interest in criminal cases will find that those problems have received more attention in the case law than those on the civil side.¹ A few studies have focused on conflicts of interest in specific kinds of civil cases,² but conflict problems arise so often in civil litigation³ that the subject should be explored more carefully in professional literature.

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1. See, e.g., cases dealing with representation of multiple criminal defendants: *Austin v. Erikson*, 477 F.2d 620 (8th Cir. 1973); *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *Craig v. United States*, 217 F.2d 355 (6th Cir. 1954); *Hall v. Wisconsin*, 63 Wis. 2d 304, 217 N.W.2d 352 (1974). Numerous cases deal with conflicts of interest between the client and a witness represented by the attorney. See, e.g., *United States v. Donatelli*, 484 F.2d 505 (1st Cir. 1973); *Hagman v. United States*, 205 F.2d 891 (9th Cir. 1953); *Commonwealth v. Geraway*, 73 Mass. Adv. Sh. 1281, 301 N.E.2d 814 (1973). Prosecutors have also been disqualified for conflict of interest. See, e.g., *State v. Brazile*, 90 So. 2d 789 (La. 1956); *New Mexico v. Chamber*, 524 P.2d 999 (N.M. App. 1974); *State v. Miner*, 128 Vt. 55, 258 A.2d 815 (1969). See also Allison, *Relationship Between the Office of the Public Defender and the Assigned Counsel System*, 10 VAL. U.L. REV. — (1976).

2. See, e.g., the excellent analysis of a lawyer-client conflict in school desegregation cases: Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

3. No statistics have been discovered to support this proposition. However, the author has discussed the subject of conflict of interest with bar disciplinary officials to determine the scope of the problem. There seems

The first code of ethics regulating the legal profession, adopted by the American Bar Association in 1908, expressly prohibited an attorney from representing conflicting interests unless all concerned consented after a full disclosure of the facts.⁴ In the 1970 Code of Professional Responsibility, the American Bar Association promulgated an even stricter, and certainly more extensive, set of rules governing conflicts of interest. Unlike the earlier code, the Code of Professional Responsibility adopted disciplinary rules and ethical considerations which generally prohibit a lawyer from participating in any conflict of interest situation. Even the client's consent to such representation will not save it. The Code thus stresses the need of the lawyer to "exercise professional judgement [*sic*] solely on behalf of his client,"⁵ thus prohibiting a lawyer from putting himself in a position where his own interest, those of other clients or third parties, or political, social or economic pressures are likely to infringe on the independent exercise of his judgment.

LAWYER'S SELF-INTEREST V. THE INTEREST OF THE CLIENT

The most obvious conflicts of interest are those in which the lawyer's personal interests clash with those of the client. The Disciplinary Rules expressly prohibit the creation of such a situation:

Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.⁶

Obviously, the client's rights to full and disinterested service by his lawyer will be meaningless if the lawyer must choose between his own and the client's interests. A few examples of such self-interest will underscore the reasons for the express prohibition contained in the Code.

to be a general belief that many client complaints about lawyers relate to real or perceived conflict of interest problems.

4. ABA CANONS OF PROFESSIONAL ETHICS No. 6 (1908).

5. EC 5-21. The Code of Professional Responsibility has been almost universally adopted by the states, with modifications to suit local traditions. The rules of the Code are commonly called Disciplinary Rules, and will be cited as "DR" throughout the text and footnotes in this article. The Disciplinary Rules are supported by more general Ethical Considerations, cited "EC" throughout the text and footnotes of the article.

6. DR 5-101(A).

When an attorney has a financial interest in the outcome of litigation, other than fees, the temptation to further that interest to the detriment of the client may be difficult to overcome. For example, an advocate working on a case drawing considerable public attention might be tempted to accept exclusive publication rights in the story of the case as part of his fee. The Code recognizes the danger of such financial interest, since a lawyer may be "influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client."⁷

The same prejudice may come to bear when an attorney with an interest in a business venture is requested to give business or investment advice. In such a situation, the lawyer must give careful thought to the scope of any recommendation he may give. If he chooses to suggest an investment in that same business venture, the recommendation should be accompanied by an indication of the attorney's interest in the matter. Any other course of action is a breach of the fiduciary relationship between attorney and client.

Failure to reveal the advisor's personal interest may merit severe sanctions. For example, a lawyer in Ohio was suspended from the practice of law for having "falsely and fraudulently counselled" the beneficiaries of an estate for which he was the attorney.⁸ The attorney had advised the beneficiaries to invest in a corporation which intended to purchase a plant and lease it back to the seller. However, he failed to disclose that he was the sole owner of the purchasing corporation. The attorney also had attempted to induce the investment by representing that he was investing \$20,000 of his own money, in addition to the \$85,000 that the beneficiaries were investing, when in fact he was only investing \$5,000 in cash. Finally, the attorney did not inform the beneficiaries that he would benefit by the depreciation deduction which he could take against the entire property for income tax purposes. The seller-lessee went bankrupt four years later and defaulted on its rental payments. The beneficiaries did not learn of their lawyer-advisor's self-interest in the investment until after the investment failed. The lawyer argued that he should not be penalized because the clients "knew where they were coming out."⁹ Nevertheless, the Supreme Court of Ohio ordered that the

7. EC 5-4.

8. Toledo Bar Ass'n v. Miller, 22 Ohio St. 2d 7, 257 N.E.2d 376 (1970).

9. *Id.* at 377.

lawyer be suspended from the practice of law for an indefinite period, noting that:

[h]e had a lawyer's professional obligation not to acquire an interest adverse to his clients, not to represent conflicting interests except with their consent, . . . and not to accept employment as a lawyer without first disclosing to these clients his relationship with any adverse party and his interest in the subject matter of the employment.¹⁰

The fiduciary relationship is also strained when a client wishes to confer a benefit on a lawyer. The lawyer should not lose sight of the possible impression of wrong-doing in such cases. The lawyer is a fiduciary, and "courts of equity will scrutinize with jealous vigilance transactions between parties occupying fiduciary relations toward each other."¹¹ Perhaps the most recognized example of such fiduciary duty is that of the attorney who is to receive a benefit under a will should not draft the will. Courts confronted with will contests have gone so far as to suggest that a presumption of undue influence arises when the will is drafted by an attorney-beneficiary:

Our courts have on occasion said that where a testator wishes to name his attorney or a member of the attorney's family as a beneficiary, ordinary prudence requires that the will be drawn by some other lawyer of the testator's choosing, and thus to avoid the suspicion of an abuse of the confidential relationship.¹²

The same principle would seem to apply to inter vivos conveyances, since an attorney simply cannot give the kind of independent advice which a client should expect when the attorney's own property and personal interests are involved.

10. *Id.* at 379.

11. *McFail v. Braden*, 19 Ill. 2d 108, 117 N.E.2d 46, 52 (1960). The Massachusetts Appellate Court, explaining this scrutiny, stated that the attorney has the burden of showing that the transaction was in all respects fair and equitable. The court required an attorney to return collateral to a client when the collateral was much greater in value than the amount the attorney had loaned the client. The fact that the attorney actually advised the client that the loan arrangement was contrary to his financial interest would not save the transaction. *Goldman v. Kane*, 329 N.E.2d 770 (Mass. App. 1975).

12. *In re Blake's Will*, 21 N.J. 50, 120 A.2d 745 (1956).

However, the one area in which the Code condones a direct assertion of the lawyer's own self-interest against the client's interest is in collection of fees. Indeed, one of the few instances in which an attorney can reveal a client's confidence is when the revelation is "necessary to establish or to collect" a fee.¹³ Moreover, the "retaining lien" of an attorney allows him to withhold a client's papers and documents until the fee is paid. While such a lien is analogous to the mechanic's or banker's lien, the lawyer has always rejected the "tradesman" image of those businesses. Presumably the lien can be asserted even if it is harmful to the client and prevents successor counsel from pursuing the client's case. Because of the questionable nature of the retaining lien, not all states have recognized it.¹⁴

The very form of the fee arrangement may establish a conflict of interest between the client and the attorney. For example, while the Code of Professional Responsibility does not prohibit contingency fees in divorce cases,¹⁵ apparently a contingency fee agreement based upon the amount of support ordered or upon the property settlement places the attorney in an interested position, conflicting with his duty to seek marital reconciliation whenever possible.¹⁶ This is probably one reason that Massachusetts lawyers are prohibited by court rule from using a contingent fee agreement "in respect of the procuring of a divorce, annulment of marriage or legal separation."¹⁷ The policy behind this Massachusetts rule was illustrated in *McInerney v. Massasoit Greyhound Association*,¹⁸ in which the lawyer had a divorce client sign a contingent fee agreement after "ten or fifteen minutes conversation," one month after she separated from her husband of ten years. The court felt that the lawyer's conduct manifested a desire to get some of the client-wife's property for himself.¹⁹

13. DR 4-101(c) (4).

14. The retaining lien differs from the judgment lien, under which an attorney enjoys a lien on any judgment collected for his client to the extent of the fee still due to him. This form of the attorney's lien does not have the same potential for conflict between the client's and the attorney's interests as the retaining lien does.

15. DR 2-106(c) only prohibits the collection of "a contingent fee for representing a defendant in a criminal case."

16. Contingency fee agreements in divorce cases were recently held to be "void as against public policy." *Aucoin v. Williams*, 295 So. 2d 868 (La. 1974); *Succession of George Butler*, 294 So. 2d 512 (La. 1974).

17. SUP. JUD. CT. RULE 3:14(3).

18. 359 Mass. 339, 269 N.E.2d 211 (1971).

19. *Id.* at 351.

Like divorce and property settlement matters, personal injury fee arrangements may induce conflicts, but in such cases, the contingent fee arrangement may be necessary. While a conflict may not be so apparent in the personal injury situation, some writers have noted that in fact, "the lawyer's financial interest lies in an early discounted settlement while the client's interest lies in waiting out the insurer."²⁰ Most personal injury lawyers will spend more time on a clear liability-good damage tort case than a case involving questionable liability issues and small damages. However, that does not mean that contingency fee personal injury suits are not handled to the best of each lawyer's ability; generally, both lawyer and client have an identical community of interest in procuring the best possible settlement. Furthermore, critics of the contingent fee agreement often forget that from the client's point of view, such an arrangement may be the only method by which he can finance the payment of a lawyer to handle a tort case. It is axiomatic that the victim of tortious conduct, offered a choice between the contingent fee method of compensating his lawyer and an hourly or *per diem* basis, will inevitably choose the former rather than the latter. In truth, the contingency system ensures that legal services are rendered to a vast number of persons who would not otherwise receive them. This identity of interest between the lawyer and the client must be kept in mind in evaluating alleged conflicts of interest in the use of contingent fee agreements.

When someone other than the client is the source of the fee, the lawyer may feel a sense of responsibility to the person paying the fee as well as to the client.²¹ That source may subject the attorney to pressures adverse to the client's interest. On the other hand, the fact that a lawyer is merely being paid by a source which is also paying the opposing counsel does not of itself create a conflict of interest. In a New York case,²² a public defender refused to represent a party in a family court proceeding because the county attorney was representing the opposing side in a child protective proceeding. Although the public defender argued that there was a conflict of interest since both he and the county attorney were appointed by and paid by the county, the court held that these facts alone did not create a conflict of interest.²³

20. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

21. EC 5-22.

22. *Owen v. Mogavero*, 77 Misc. 2d 581, 355 N.Y.S.2d 90 (Sup. Ct. Otsego County, 1974).

23. The source of the attorney's fee may create a conflict where

THE LAWYER IN OTHER ROLES

An attorney may frequently fulfill various non-lawyer functions, outgrowths of his practice of law, which present possible conflicts of interest. For example, attorneys may serve as guardians, public office holders or executors of estates. In various courtrooms, attorneys may be called on to serve as public defenders or special judges. Perhaps the most familiar conflict of interest situation is the lawyer who is also a potential witness and must decide before or during trial whether his client's interest is best served by withdrawing from the case to testify or by remaining as counsel in the action.

The Lawyer as Witness

A lawyer cannot testify to a matter in dispute between parties in litigation and still fulfill his function as an advocate. The Ethical Considerations of the Code of Professional Responsibility remind: "[T]he role of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively."²⁴ The lawyer-witness may be more easily impeached as a witness when he also serves as counsel to the party for whom he testifies. Because of this conflict, the rules of the Supreme Judicial Court of Massachusetts flatly provide that "no attorney shall be permitted to take part in the conduct of a trial in which he has been or intends to be a witness for his client, except by special leave of court."²⁵ Similarly, the Code of Professional Responsibility prohibits a lawyer from accepting employment in contemplated or pending litigation "if he knows or it is obvious that he or another lawyer in his firm ought to be called as a witness."²⁶

If, after accepting employment, a lawyer learns that he ought to be called as a witness on behalf of his client in "contemplated or pending litigation," the Code provides that he should withdraw as counsel.²⁷ If a lawyer learns only in the course of the trial

several attorneys work for a legal services organization. See *Estep v. Johnson*, 383 F. Supp. 1323 (D. Conn. 1974); *Owen v. Mogavero*, 77 Misc. 2d 581, 355 N.Y.S.2d 90 (Sup. Ct. Otsego County, 1974). For a discussion of this potential conflict in criminal matters, see Allison, *Relationship Between the Office of Public Defender and the Assigned Counsel System*, 10 VAL. U.L. REV. — (1976).

24. EC 5-9.

25. SUP. JUD. CT. RULE 2:24.

26. DR 5-101(B).

27. DR 5-102(A).

that he ought to appear as a witness and his withdrawal from the trial would prejudice the case of his client, good sense dictates that the lawyer should be permitted to testify. If a lawyer learns subsequent to employment that he or someone in his firm may be called as a witness by the opposing side, he may continue to represent his client unless he determines that such testimony will be prejudicial to his client.²⁸

The rule prohibiting an attorney from testifying is clearest in cases in which a lawyer is a witness to any substantive matter in dispute.²⁹ In such cases he must withdraw as counsel. In an Illinois case,³⁰ an Assistant Attorney General testified in a Civil Service Commission discharge hearing in which he was also counsel for the state. The plaintiff, a state safety inspector, had testified that he had not visited specified plants for at least a month before his discharge hearing. Despite the fact that he represented the state in the hearing, the Assistant Attorney General took the stand and was permitted to testify, solely in rebuttal, that he had seen the plaintiff at one of the plants the day before the hearing. In reviewing the Commission's admission of his testimony, the Illinois Court of Appeals stated:

We condemn the conduct of the Assistant Attorney General. While acting as counsel for the Department of Labor, a public body, he abandoned his role as advocate and became a witness for the party he was representing without withdrawing from the case. This practice of acting as both advocate and witness has been consistently frowned upon and discouraged by the legal profession—in the instant case, this conduct was totally unnecessary and inexcusable.³¹

In certain exceptional circumstances, the Code permits a lawyer to testify where the potential for conflict is *de minimus*.³² Thus, an attorney's testimony is allowed:

28. DR 5-102(B).

29. The fact that an attorney submitted an affidavit on jurisdictional facts in dispute was held not to be grounds for disqualifying him as counsel, if the same facts were supported by independent testimony. *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

30. *Lavin v. Civil Service Comm'n*, 18 Ill. App. 3d 982, 310 N.E.2d 858 (1974).

31. *Id.* at 865.

32. DR 5-101(B).

(1) If the testimony will relate solely to an un-contested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship³³ on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.³⁴

When a lawyer is in some doubt as to whether he would better fill the role of witness or the role of advocate in a given case, "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."³⁵

The Lawyer as Administrator or Guardian

An attorney who holds office as a fiduciary, such as an executor, administrator or guardian *ad litem*, may encounter conflicts of interest. Although there appears to be little case law relating to the subject, an attorney-administrator or attorney-executor may be in a potential conflict of interest situation if

33. An example of a "substantial hardship," is found in LOS ANGELES BAR ASSOCIATION LEGAL ETHICS COMMITTEE OPINIONS, No. 312 (1969), which permits the lawyer to continue in the case when his partner is a witness and the following conditions are met:

- (1) the partners represented the client previously to the litigation,
- (2) the testimony supports the client's position,
- (3) the lawyers have intimate knowledge of the details of the litigation which would cause substantial prejudice to the client if he were not represented by them,
- (4) the court and opposing counsel are informed that the partner will be a witness.

A recent opinion of the Massachusetts Bar Association Committee, No. 75-2, suggests that when the pending case is an unusually complex matter such as a patent infringement case involving sophisticated technical matters or a complex anti-trust case, "the expense and inefficiency of having a new lawyer become familiar with the case would come within the substantial hardship exception of DR 5-101(B) (4)."

34. DR 5-101(B).

35. EC 5-10.

he is also the attorney for the estate.³⁶ This common practice probably does not result in any direct conflict in the majority of cases, but retention of an independent attorney for the estate might serve to deter the larcenous tendencies of a given administrator. Clearly there is no such check when the same person acts as both attorney and administrator.

In a recent Ohio case,³⁷ an attorney was disbarred for serving as guardian of an incompetent person who held a note payable by another client of the same attorney. While he was guardian, he cancelled the note. The court rejected the attorney's argument that "as guardian he was not acting as an attorney."³⁸ Recognizing this potential conflict in other situations, the Committee on Professional Responsibility has held that an attorney serving on the board of directors of a bank and/or counsel for the bank cannot act to foreclose a mortgage of property held by an estate for which he is executor.³⁹

The hydra-headed role of a guardian *ad litem* may itself create a potential conflict of interest for an attorney appointed to that position. For example, under Massachusetts practice, a person appointed as guardian is expected to advise the court of the circumstances of his ward. While the guardian's report has "no authoritative standing as establishing the facts in the case,"⁴⁰ it is expected to give an added dimension to assist the court. However, the guardian-attorney is also expected to advance the best interests of his client, which may require him to assume a strong adversary position in a case. Is it possible for the same person to be both an advisor to the court and a vigorous advocate for his client?

The dilemma of the lawyer-guardian is poignantly illustrated in cases in which a guardian *ad litem* is appointed to represent a minor donor in bone marrow transplant or kidney transplant cases.⁴¹ In these cases, the hospital and operating physicians sue

36. According to ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 836 (1965), there is no impropriety *per se* in allowing a guardian of person or property to perform legal services for the benefit of that person or property.

37. Toledo Bar Ass'n v. Bartlett, 39 Ohio St. 2d 100, 313 N.E.2d 834 (1974).

38. *Id.* at 838.

39. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 930 (1966) [hereinafter cited as ABA OPINIONS].

40. Young v. Tudor, 323 Mass. 508, 83 N.E.2d 1 (1948).

41. These cases are unreported proceedings before a single justice

for a declaratory judgment against the donor, seeking immunity from liability for non-negligent torts. Since the minor ward wants to make the tissue donation to save the life of a relative, the attorney as guardian is under strong pressure to consent. On the other hand, the operation creates some substantial risks for the donor without medical benefits to him, a situation which causes some lawyers to object to hospital and doctor immunity. Should the guardian then oppose the operation when the net effect of the operation would be to threaten the life of his ward's donee? The basic dilemma of the lawyer-guardian in these cases is whether or not he sees this declaratory judgment proceeding as truly adversary.

The Lawyer as Public Official

A lawyer serving as a public official is required to avoid a conflict between the duty he owes to the public and his own interest or that of a client. The Code of Professional Responsibility is explicit on this point:

A lawyer who holds public office shall not:

- (1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.
- (2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.
- (3) Accept anything of value from any person when the lawyer knows or it is obvious that the offer

of the Supreme Judicial Court. See generally *Nathan v. Meekins*, No. 74-109-Equity (July 14, 1974); *Camitta v. O'Mealia*, No. 73-86-Equity (April 25, 1973); *Nathan v. Clark*, No. 73-71-Equity (April 12, 1973); *Kennedy v. Nathan*, 72-136-Equity (October 3, 1972); *DeCaro v. Klein*, No. 72-88-Equity (July 18, 1972); *Huckey v. Harison*, No. 68-674-Equity (November 20, 1957); *Masden v. Haarison*, No. 68-651-Equity (June 12, 1957). In *Nathan v. Farinelli*, No. 74-87-Equity (July 3, 1974), the guardian-lawyer expressly opposed the transplant and attempted to file a cross claim. He successfully sought to compel the purchase of insurance for non-negligent injury, an order which was later modified. In *Nathan v. Cruz*, No. 75-96-Civ. (April 17, 1975), the guardian filed a motion to dismiss for want of jurisdiction; the action was dismissed, and the donee child later died.

is for the purpose of influencing his action as a public official.⁴²

Even after a lawyer has left public office, he may not use the office for his own self-interest, such as by stating this former position on a business card or letterhead.⁴³ The former public official cannot ethically represent a private client in any matter in which he previously participated as a public employee. Thus, a former deputy city attorney may not defend a client against alleged zoning violations partly investigated by him while he was employed by the city.⁴⁴

Lawyers in public positions should be aware of another conflict of interest dimension. The lawyer as a public official is frequently limited in what he can do, not only by the Code of Professional Responsibility, but also by public-interest conflict rules. The federal government has adopted statutory conflict of interest rules,⁴⁵ as have some states.⁴⁶

Thus, we have seen the problems which may be presented when an attorney has a self-interest which conflicts with that of his client. Likewise, an attorney serving as executor, guardian, or office holder must be alert to potential conflicts. The ethical and practical dilemma which arises in conflict of interest situations is most clearly seen in civil litigation.

CIVIL LITIGATION

The Code of Professional Responsibility states that a lawyer should not accept employment, or should withdraw from employ-

42. DR 8-101. The fear of such a conflict is also the reason for prohibiting assistant district attorneys from having private criminal law practices. ABA OPINIONS, No. 922 (1966).

43. DR 2-102. In *State v. Schumacher*, 210 Kan. 377, 502 P.2d 748 (1972), an attorney was suspended from practice for six months for printing "Former Workmen's Compensation Commissioner" on his letterhead. However, a lawyer who is starting a new professional association may mail to lawyers, clients, former clients, personal friends and relations a brief announcement card which states "the immediate past position of the lawyer." DC 2-102(A) (2). He may not place such an announcement in a local newspaper. See MASS. BAR ASS'N ETHICAL OPINIONS, No. 75-3.

44. ABA OPINIONS, No. 647 (1963).

45. 18 U.S.C. §§ 201-18 (1969).

46. See, e.g., MASS. GEN. LAWS ch. 268A (1970); N.Y. EXEC. LAW § 63(11) (McKinney 1972); WASH. REV. CODE ANN. § 42.22.010-.070 (1972). For a discussion of the Illinois law, see Spak and Parent, *Conflict of Interest*, 52 CHI-KENT L. REV. 64 (1975).

ment, "if it would be likely to involve him in representing differing interests."⁴⁷ Obviously an attorney cannot represent both the plaintiff and the defendant in the same case;⁴⁸ yet, other situations in which such "differing interests" arise may not be so clear. These differing interests described in the Code which would disqualify a lawyer may be "conflicting, inconsistent, diverse, or otherwise discordant."⁴⁹ Thus, an attorney cannot represent both the lender and the borrower,⁵⁰ the mortgagor and the mortgagee,⁵¹ the vendor and vendee,⁵² or the insurer and the insured.⁵³

As a result of the expanding use of complex, multi-party litigation in this country, civil attorneys are increasingly faced with potential conflicts of interest which until recently arose mainly in a criminal setting. It has become apparent that the interests of multiple plaintiffs or defendants may be adverse in the civil context. For example, in a tort case where one lawyer represents several plaintiffs, he may not make an aggregate settlement of their claims unless each client consents to the aggregate settlement after being informed of the existence, nature and amount of all the claims being settled.⁵⁴

A lawyer asked to represent various parties should carefully examine whether there is a totality of interest among the parties he represents. In the dissenting opinion of a recent federal case, a lawyer was criticized for not showing the "slightest concern for the welfare of the minor plaintiff"⁵⁵ when he represented both an anonymous minor and an abortion clinic which sought to have a portion of the Massachusetts abortion statute⁵⁶ declared unconstitutional. The majority of the court was also criticized for not appointing a guardian *ad litem* for the minor when it became clear that there was not a totality of interest among the various plaintiffs who were all represented by one lawyer.⁵⁷

47. DR 5-105(A) (B).

48. *Crowley v. O'Connell*, 174 Mass. 253, 54 N.E. 558 (1899).

49. EC 5-14.

50. *Matter of Greenberg*, 21 N.J. 213, 121 A.2d 520 (1955).

51. ABA OPINIONS, No. 643 (1963).

52. *Matter of Hall*, 73 Wash. 2d 406, 438 P.2d 874 (1968).

53. *Kelly v. Greason*, 23 N.Y.2d 638, 244 N.E.2d 456 (1969).

54. DC 5-106.

55. *Baird v. Bellotti*, 393 F. Supp. 847, 859 (D. Mass. 1975) (Julian, J., dissenting), *vacated* — U.S. —, 96 S. Ct. 2857 (1976).

56. MASS. GEN. LAWS ch. 112, § P (1971).

57. Judge Julian wrote in his dissenting opinion:

The record shows that his sole objective was to have the statute declared unconstitutional for the benefit of the adult and corporate

Several themes are repeated in many conflicting interest cases: the potential for abuse of confidences, inability of counsel to serve each of his clients fully, and the need to preserve the profession from the appearance of impropriety. Each of these is of concern to courts and to the bar. One series of cases may be used to show how conflicts of interest may develop and why they may not be tolerated.

United Mine Workers Cases

In addition to illustrating the reasons for barring conflicts of interest, the series of United Mine Workers cases is also the classic example of how complex conflicts cases can be. The UMW cases show that an attorney's conflict of interest may develop during a civil suit even when the attorney-client relationship arose in a different matter.⁵⁸

In *Yablonski v. United Mine Workers of America*,⁵⁹ the court held that a well-known Washington law firm had to disqualify itself as counsel for the union in an action brought by dissident union members for an accounting and restitution of funds allegedly misappropriated and misspent.⁶⁰ The dissidents joined as defendants certain officers of the union who were allegedly responsible for the misuse of funds. The law firm was regularly outside counsel for the union. During the first six months after the complaint was filed, the law firm represented both the union and the defendant officers. The firm then withdrew as counsel for the individual defendant officers but continued to represent the union. The plaintiffs filed a motion to disqualify the law firm from continued representation of the union as well, because it had represented the officers of the union in other litigation; this

plaintiffs The court should have appointed a guardian *ad litem* for the minor plaintiff to insure representation of her interests. Baird, 393 F. Supp. at 859.

58. Another example of a conflict of interest in one suit arising from a relationship in another suit is found in *Kansas v. Kopke*, 210 Kan. 330, 502 P.2d 813 (1972), in which an attorney represented a client in a personal injury suit. At the same time, he represented the client's employer in an independent workman's compensation claim in which the client proceeded *pro se*. While the client did not complain about this situation, the court found a conflict of interest. The lawyer should have withdrawn from the workman's compensation case or insisted that the client obtain independent legal counsel.

59. 448 F.2d 1175 (D.C. Cir. 1971).

60. The action was brought under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 501(b) (1975).

allegedly brought the firm into conflict with its representation of the union in the present litigation. On appeal from the district court's pretrial denial of plaintiff's motion, the United States Court of Appeals for the District of Columbia Circuit ordered disqualification of the law firm.⁶¹

The court noted that the law firm was representing the defendant officers individually in four other separate cases pending between the plaintiffs and the officers. Since the interests of the individual officers and the union may have been both distinct and adverse in these other cases, the ability of the law firm to give total fidelity to the union in the instant case was in doubt:

It is undeniable that the regular U.M.W.A. Counsel have undertaken the representation of Boyle individually in many facets of his activities as a U.M.W.A. official, as a trustee of the Fund, as a Director of the Bank owned 74% by the union. With strict fidelity to this client, such counsel could not undertake action on behalf of another client which would undermine his position personally. Yet in this particular litigation, counsel for the U.M.W.A. should be diligent in analyzing objectively the true interests of the U.M.W.A. as an institution without being hindered by allegiance to any individual concerned.— Even if we assume the accuracy of the appellee's position, at the present time there is no visible conflict of interest, yet we cannot be sure that such will not arise in the future.—The public interest requires that the validity of appellant's charges against the U.M.W.A. management of breach of its fiduciary responsibility be determined in a context which is as free as possible from the appearance of any potential for conflict of interest in the representation of the union itself.⁶²

After remand to the district court for trial, the union's General Counsel entered its appearance for the union. Plaintiff again moved to disqualify the defendant's attorney. The district court denied this motion, and again an appeal was taken to the circuit

61. The court rejected the argument that the firm should be disqualified because it had represented both the union and the individual officer-defendants for the first six months of the litigation. The court noted that representation of both for six months was "an effort to ascertain the exact nature of the lawsuit and protect the interest of all the defendants." 448 F.2d at 1177.

62. 448 F.2d at 1179-80.

court. Once again the Court of Appeals for the District of Columbia Circuit reversed the district court-ordered disqualification of the union's General Counsel on grounds of his close association with the individual defendant officers and his representation of such officers in other litigation.⁶³

The *UMW* case had a bizarre ending: plaintiffs subsequently were elected to positions of power in the union. The union was realigned as party-plaintiff to the suit. The new union leadership then moved for leave to have *its* General and Associate Counsel represent the union in the litigation. While its action might seem inconsistent with the prior proceedings, the District of Columbia Circuit ruled that the General and Associate Counsel could now represent the union, although those same lawyers formerly represented the individual plaintiffs who initiated the suit. After the union shake-up, the court found that the interests of the new individual officers were not antagonistic to the interests of the union; therefore, representation was permitted.⁶⁴

Other Civil Conflicts

An attorney may himself become plaintiff in a civil action. Of course, he enjoys the rights of any litigant to represent himself. But may he represent himself as plaintiff while also representing other plaintiffs? While this situation is not prohibited *per se*, it holds such a great potential for conflict of interest that "the lawyer would be well advised not to undertake such representation."⁶⁵

In domestic relations cases, a conflict of interest exists if an attorney represents both husband and wife. Parties may agree on a divorce, on terms of separate support, property, and child custody, yet their interests will remain adverse. This would clearly preclude one lawyer advising both husband and wife. Since both husband and wife may have an existing relationship with one lawyer, the attorney must be careful when his advice is

63. *Yablonski v. United Mine Workers of America*, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

64. *Weaver v. United Mine Workers of America*, 492 F.2d 580 (D.C. Cir. 1973). The extensive litigation over the issue of representation apparently produced unusual bitterness between counsel. Charges of unethical conduct, subornation of perjury, brides to witnesses, as well as conflicts of interest have found their way into print. See, e.g., Gillers, *Joe Rauh: An Integrated Life*, JURIS DOCTOR, Feb. 1975, at 36; *Rauh v. Williams*, JURIS DOCTOR, May 1975, at 6.

65. ABA OPINIONS, No. 899 (1965).

sought on a domestic dispute. One ethical opinion has stated that an attorney who represented a married couple in an adoption proceeding may later represent the wife in a divorce action against the husband, but must disqualify himself if, in the course of the adoption case, he learned any confidential information which would be advantageous to the wife in the divorce.⁶⁶

In an Ohio case,⁶⁷ an attorney was censured by the state's supreme court because he allowed himself to drift into dual representation of husband and wife. While he was representing the husband in a personal injury action, the husband and wife agreed to the terms of a separation and requested the attorney to draft it. This agreement provided that the wife was to receive one-third of any settlement of the tort case. The attorney then filed a divorce petition for the wife. At the uncontested divorce hearing, the attorney, representing the wife, asked the court to incorporate into the decree the terms of the previously drawn separation agreement. Even though the tort case was subsequently settled, the attorney refused to communicate the amount of the settlement to the wife; rather, he paid the proceeds directly to the husband. While there was never any direct understanding between the wife and the attorney that he would protect her interests in the tort settlement, the Supreme Court of Ohio nevertheless felt that the attorney acted improperly: "Too many experienced lawyers have accepted such employment for separation or divorce matters under said circumstances, only to ultimately abandon the interest of one or the other of their clients."⁶⁸

Derivative suits in corporate practice provide another example of the complexities of conflicts of interest hidden below the surface of civil litigation. Since a corporation is a legal person with an identity separate from both stockholders and officers, an attorney in a professional relationship with stockholders or officers must concern himself with potential conflicts between his duty to the corporation and his duty to these individuals. Whether the attorney is corporate counsel, or outside counsel commonly retained to represent corporate interests, he will find the stockholder derivative suit to be a source of conflict if he undertakes to represent or advise any individual defendant-officer. The very thrust of such a suit is to assert the interests of the corporation

66. MASS. BAR ASS'N ETHICAL OPINIONS, No. 76-12 (1976).

67. Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

68. *Id.* at 300.

against the allegedly wrongdoing officer. Even though the corporation is a nominal defendant, it is clear that the corporate entity has interests both different and potentially adverse to those of the individual defendants in the suit. The most that corporate counsel can do in such cases is to urge the individual defendants to seek separate legal counsel; he should never undertake to represent them. The mere fact that the individual defendants, if successful, may seek reimbursement from corporation assets does not mean that they are entitled to have corporate counsel represent them.

CONFLICTS AS A RESULT OF SUBSEQUENT PLEADING

Sometimes no conflict of interest exists between an attorney and a party at the outset of a suit, but as a result of some subsequent pleading, a conflict arises. A counterclaim or cross claim filed pursuant to FED. R. CIV. P. 13 or the addition of a third-party defendant under FED. R. CIV. P. 14 may create a previously unexpected conflict of interest for counsel, since parties are then realigned.

An attorney found himself in such a dilemma in *Jedwabny v. Philadelphia Transportation Company*,⁶⁹ a case arising out of a collision between an automobile and a streetcar. The owner-driver of the motor vehicle and two of his guest passengers brought suit against the streetcar company for injuries sustained in the collision. All three plaintiffs were represented by a single attorney. Subsequently the streetcar company joined the owner-driver as a third-party defendant on a theory that his negligence was the cause of the collision. Thus, when the case was called for trial, one attorney was representing three plaintiffs and the third-party defendant. The jury returned a verdict for the plaintiff-guests against the defendant-streetcar company and third-party defendant owner-driver. The trial judge consequently ordered a new trial on the grounds that he had failed to properly advise the third-party defendant of his right to have independent counsel represent him as third-party defendant, and had failed to make certain that the third-party defendant knew the ramifications of his attorney's conflict of interest. The Supreme Court of Pennsylvania affirmed the order for a new trial:

No one could conscionably contend that the same attorney may represent both the plaintiff and defendant

69. 390 Pa. 231, 135 A.2d 252 (1957).

in an adversary action. Yet that is what is being done in this case. It was the attorney's duty to protect the \$10,500 verdict of his plaintiff client against the additional defendant while it was his duty at the same time to relieve from liability the additional defendant whose representation the attorney had originally undertaken for the purpose of obtaining for him a recovery from the transportation company. Obviously the attorney cannot serve the opposed interests of his two clients fully and faithfully. The ancient rule against one's attempting to serve two masters interposes.⁷⁰

The emphasis in *Jedwabny* was on the need for the client to make an intelligent waiver of his rights in this conflict of interest situation. Under the Code of Professional Responsibility the lawyer must not only obtain consent in such a situation but it must be "obvious that he can adequately represent the interest of each."⁷¹ Since it is impossible to adequately represent both the plaintiff and defendant, it would seem that under modern rules even the informed consent of the client in such circumstances would not be adequate to enable the same counsel to represent the plaintiff and a third-party defendant. Indeed, in *Jedwabny* the court even rejected the argument of the third-party defendant that he did not want a new trial.

In *Jedwabny*, the strong dissent by Justices Bell and Musmanno of the Pennsylvania Supreme Court seems to call for a "common sense" solution to third-party defendant problems of this kind. Justice Musmanno saw no conflict of interest because all plaintiffs and the third-party defendant took the same position—that only the streetcar company was responsible for the accident. Musmanno pointed out that only the streetcar company, not the losing third-party defendant, profited from the order of a new trial. Indeed, as a result of the court's reversal, the third-party defendant could find himself being held jointly liable with the streetcar company, or even singly liable, for a larger amount of damages. The dissenters questioned further whether the court should try to protect the client from his own best interest merely because of a theoretical conflict of interest on the part of his lawyer. Justice Bell used the following example to show how the majority decision could be reduced to an absurdity:

70. *Id.* at 254.

71. DR 5-105(c).

For example, a poor man owns and is a passenger in an automobile which is driven by his wife. There is some evidence that it was being driven under his direction although he denies this. A collision occurs with another automobile owned and driven under the same circumstances. Each family engages a lawyer and each is convinced that the other driver is solely at fault. Cross suits are brought and each plaintiff is joined as a defendant in each suit. The suits are tried together and each lawyer explains to his client the legal risks and possibilities. Each family tells their attorney that they cannot afford to employ more than one lawyer. Why should the law or any canon compel each claimant to employ two lawyers—a total of six or eight lawyers in this simple case? Isn't such a requirement impractical, unjust and ridiculous?⁷²

Even though the majority in *Jedwabny* may have been technically correct in pointing out the need for full disclosure of possible conflicts, the dissenters make clear how ridiculous such an approach can be. A better approach to solving conflicts problems might be to determine whether any purposes of the rule against conflicts of interest, such as keeping communications privileged, are in fact aided.

POTENTIAL ABUSE OF PRIVILEGE

One of the main reasons for avoiding attorney conflicts of interest is to prevent the potential abuse of privileged communications. Under DR 4-101(B) (2) and (3) of the Code of Professional Responsibility, an attorney may not use a confidence of his client "to the disadvantage of the client" or "for the advantage of a third person."⁷³ A lawyer may find it difficult to maintain a client's confidences in several situations. Changes of parties during the course of an action may create a privilege dilemma, as may the appearance of another client of the attorney as witness for the opposing party. Association with a law

72. 135 A.2d at 255.

73. For the text of an extensive proposed amendment to the Code of Professional Responsibility which would require withdrawal from a case for conflicts of interest largely related to the attorney-client privilege, see Comment, *Attorney's Conflict of Interests*, 55 B.U.L. REV. 61, 84 (1975). It is doubtful that such detailed rules are needed, since the infinite variety of conflict situations are best met by a few simple rules which allow non-rigid solutions to complex problems.

firm which represents an opposing party also raises the issue of abuse of confidences.

A change of a client's loyalties during litigation puts an attorney representing multiple parties in a dilemma. In *Universal Athletic Sales Co. v. American Gym Recreational and Athletic Equipment Corp., Inc.*,⁷⁴ an attorney represented both the defendant corporation and the defendant president of the corporation in a patent infringement action. After the suit was filed, the president of the corporation was dismissed from his position and decided to cooperate with the plaintiff. The attorney withdrew as counsel to the former president. Subsequently, plaintiffs moved to disqualify the attorney for the corporation. They argued that in undertaking to represent both the corporation and the individual officer, the attorney learned things of a confidential nature which enhanced the defendant's position and brought the attorney into conflict of interest with a former client to the plaintiff's disadvantage. The court rejected this argument, finding that no confidential information was in fact learned as a result of the former representation.⁷⁵ The court warned, however, that if in the future a problem of privileged communications arose which would be used to the detriment of the former president, the court might disqualify corporate counsel.⁷⁶

The appearance of a client as a witness for the opposing party also creates a privilege dilemma for the attorney. In a New York case,⁷⁷ the plaintiff's principal witness stated during cross-examination that the defendant's attorney was also his lawyer. In that bench trial, the court immediately recessed the proceedings and held a hearing on whether it was necessary to disqualify defendant's lawyer for conflict of interest. The defense attorney argued against disqualification on the ground that the defendant and witness had consented to the arrangement. The court rejected this argument, however, noting that under the Code of Professional Responsibility the consent exception is not viable where there is a direct clash of conflicting interests.⁷⁸

74. 357 F. Supp. 905 (W.D. Pa. 1973).

75. *Id.* at 907.

76. *Id.* at 908.

77. *In re Estate of Trench*, 76 Misc. 2d 180, 349 N.Y.S.2d 265 (1973).

78. DR 5-105(A) and (B) absolutely prohibit a lawyer from representing conflicting interests. Under DR 5-105(C), the client can consent to a lawyer representing conflicting interests only if he can "adequately represent

In examining the facts, the court determined that the defense attorney was unable to represent both interests of the defendant and the witness, since the witness's testimony on cross-examination might have implicated him in a crime. While no party had moved to disqualify the defendant's attorney for conflict of interest, the court felt that it had to do so on its own motion in order to maintain public confidence in the legal profession.

There is a strong policy against an attorney appearing in a position adverse to that of even a former client. If an attorney who finds himself in an adverse position to a former client possesses confidential information, learned in representing the former client, which is advantageous to his present client in the civil litigation, the attorney should withdraw. If he does not withdraw, the former client may move to have him disqualified on the grounds that he had access to client confidences which might prove useful in his present adversary position. This policy is so guarded that on occasion courts have reversed judgments solely because of the conflict.⁷⁹ The rule was laid down in *P.C. Theater Corporation v. Warner Brothers*:⁸⁰

The former client need show no more than the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him—only in this manner can the lawyer's duty of absolute fidelity be enforced in the spirit of the rule relating to policed communications be maintained.⁸¹

Some courts have gone so far as to suggest that if the current civil litigation is substantially related to the previous representation, then an "irrebuttable presumption" of imputed knowledge of confidences arises, and the attorney must be disqualified.⁸²

The more difficult case arises when an attorney once worked for a firm which represented his present adversary and may have had access to confidential information useful in the present

the interests of each" and only after "full disclosure of the possible effect of such representation."

79. *United States v. Bishop*, 90 F.2d 65 (6th Cir. 1937).

80. 113 F. Supp. 263 (S.D.N.Y. 1953).

81. *Id.* at 268-69.

82. *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973);

Fleisatz v. A.A.P., 163 F. Supp. 548 (S.D.N.Y. 1958).

litigation. In a Second Circuit case,⁸³ a lawyer was disqualified when the court imputed knowledge of confidences to him because he was once a salaried clerk in a law firm which had represented his present opponent in similar litigation. This rule would seem particularly applicable when the subject matter of the present litigation involves closely held trade secrets. But it would not apply merely because a lawyer once worked for a firm that represented a present opponent in any capacity.

In another federal case,⁸⁴ the court refused to disqualify a lawyer who once had worked for a major law firm which represented Chrysler Motors. While associated with the firm, the attorney had handled some small real estate matters involving property owned by Chrysler Motors. Several years later he represented a franchise of Chrysler Motors in a restitution action in which his client claimed that Chrysler Motors had used unfair business practices to get him to sign a lease. The court indicated that there was no reasonable relationship between the subject matter of the present litigation and the prior representation which would preclude the attorney from participating. It stressed that the decision to disqualify a lawyer for conflict of interest in such circumstances turns on whether, "in the course of the former representation, the associate acquired information reasonably related to the particular subject matter of the subsequent litigation."⁸⁵ The court added that if all lawyers were disqualified in such circumstances, "young lawyers will necessarily become over-committed to their initial employer."⁸⁶

Personal relationships, as well as business relationships, also raise the issue of potential abuse of confidences. Lawyers have traditionally recognized that certain personal relationships create problems which are best avoided if possible. It was widely recognized as appropriate that Associate Justice Tom Clark of the United States Supreme Court retire from the court when his son, Ramsey Clark, was nominated by President Johnson to serve as the Attorney General of the United States. The Canons of Judicial Ethics require a judge to disqualify himself if the judge's spouse, or a person (or his spouse) within the third degree of relationship to either of them, acts as a lawyer in the pro-

83. *Consolidated Theaters v. Warner Bros.*, 261 F.2d 920 (2d Cir. 1954).

84. *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors, Inc.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

85. 370 F. Supp. at 586-87.

86. *Id.* at 589.

ceeding.⁸⁷ While this rule is not *per se* binding on non-judges, it provides a good standard. Similarly, an attorney who represents a judge should not appear before that judge or accept appointments from him,⁸⁸ and a defense lawyer should not employ in a confidential capacity the spouse of a police detective.⁸⁹ Such employment would not be consistent with a lawyer's duty to take reasonable care to protect the confidences of his clients.⁹⁰

A situation not very common in the past, involving husband and wife lawyers, promises to appear more frequently in the future. When husband and wife are not practicing together, there does not seem to be any direct prohibition against their representation of adverse interests. Of course, since laymen may in some cases question the propriety of representing opposing parties, lawyers should try to avoid that situation. Unlike adversaries who are mere friends or relatives, husband and wife have their own confidential relationship and thus must be careful to avoid inadvertent breach of a confidence. Client calls or messages left at an attorney's home only aggravate the danger. In addition, the financial interest involved in winning or losing a case in such circumstances should cause husband and wife attorneys to question seriously their positions under DR 5-101, which prohibits an attorney from accepting employment if his own financial interests may be affected by such employment.⁹¹

REMEDIES FOR CONFLICTS OF INTEREST

Various solutions exist for an attorney when he is in a conflict of interest situation. The lawyer's sense of duty and his ethics should prompt him to avoid conflict situations or to withdraw when such a situation develops. Courts may disqualify an attorney from appearing in conflicting roles or may refuse to enforce the attorney's fees against an aggrieved client. Perhaps the strongest judicial remedy is reversal of a case tainted by a conflict of interest. None of these severe remedies are necessary, however, if an attorney follows his ethical duty.

87. ABA CANONS OF PROFESSIONAL ETHICS No. 3C (1) (d) (ii).

88. The Supreme Judicial Court of Massachusetts has termed "highly improper" the conduct of two attorneys who rendered private legal services to a judge without fee, while appearing before the judge in private cases and in court appointments to represent indigent criminal defendants *In re Troy*, 306 N.E.2d 203, 224 (Mass. 1973).

89. ABA OPINIONS, No. 692 (1964).

90. See DR 4-10(D).

91. ABA OPINIONS, No. 340 (1975). See 61 A.B.A.J. 1542 (1975).

The Code of Professional Responsibility provides guidelines for the attorney when a conflict of interest develops. The Code expressly requires that a lawyer refuse employment when his personal interests conflict with those of the client;⁹² it also sets guidelines when he becomes a witness in a case.⁹³ Under the Code, an attorney must avoid acquiring interest in litigation and must limit business relationships with his client. A lawyer has an affirmative duty to refuse to accept or to continue employment if the interests of another client may impair his independent professional judgment.⁹⁴ The Code also requires a lawyer to avoid influence by others that would adversely affect the client.⁹⁵

The rules of the Code concerning the preservation of attorney-client confidences,⁹⁶ if carefully followed, will also eliminate some conflict of interest problems.⁹⁷ Once he has accepted employment and a prohibited conflict arises, the attorney is required by the Code to seek leave to withdraw from the matter.⁹⁸ If he declines employment or withdraws as required by the Code, his partners or associates are also disqualified from the case.⁹⁹ These rules of the Code are enforceable in proceedings before the disciplinary board or commission of the state bar.¹⁰⁰ Violations can result in disbarment, suspension or censure by the court.¹⁰¹

92. DR 5-101.

93. DR 5-102.

94. DR 5-103, 5-104.

95. DR 5-105.

96. DR 5-107.

97. DR 4-101.

98. DR 2-110, titled "Mandatory Withdrawal," requires the lawyer to withdraw if "he knows or it is obvious that his continued employment will result in the violation of a Disciplinary Rule."

99. DR 5-105.

100. *See, e.g.*, MASS. SUP. JUD. CT. RULE 4:01. Section 3 of Rule 4:01 provides that:

each act or omission by an attorney . . . which violates any of the Canons of Ethics and Disciplinary Rules . . . shall constitute misconduct and shall be grounds for appropriate discipline.

Section 5 creates the Board of Bar Overseers and gives it jurisdiction over the investigation of lawyers, with power to make recommendations to the court regarding discipline.

101. The following cases provide example of attorneys being disciplined for violation of conflict of interest rules: *Lavin v. Civil Service Comm'n*, 18 Ill. App. 3d 982, 310 N.E.2d 858 (1974) (attorney's conduct condemned by court in judicial opinion on the merits of the case); *Kansas v. Kopke*, 210 Kan. 330, 502 P.2d 813 (1972) (attorney censured); *Cowley v. O'Connell*, 174 Mass. 253, 54 N.E. 558 (1899) (attorney disbarred for representing both plaintiff and defendants in actions which involved the same issue);

An attorney whose conduct in a conflict of interest situation is grossly improper may be deprived of other offices he holds. A Massachusetts judge was enjoined from sitting for several reasons, including his act of appointing his own private attorney, whom he did not pay, to defend indigent criminal defendants.¹⁰² The Supreme Judicial Court of Massachusetts also removed an elected district attorney from office because of his conflict of interest with a charitable trust for which he was trustee.¹⁰³

Another remedy arises from the power of the court to disqualify an attorney from appearing in a representative capacity which involves a conflict of interest.¹⁰⁴ Although the motion to disqualify normally is made by the opposing party, the court has the power to disqualify counsel on its own motion¹⁰⁵ if the administration of justice requires. Courts, however, are reluctant to disqualify a lawyer, since clients are then deprived of the services of the attorney of their choice; for this same reason, a party should not be permitted to disqualify the opposing attorney unless he is able to show real prejudice.¹⁰⁶

Prejudice can be shown if the party now represented by the attorney gains some undue advantage because of a potential conflict of interest between a former client and the attorney,¹⁰⁷ espe-

Toledo Bar Assn. v. Miller, 22 Ohio St. 2d 7, 257 N.E.2d 376 (1970) (attorney suspended from practice for one year); Columbus Bar Ass'n v. Grelle, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968) (attorney censured); Matter of Hall, 73 Wash. 2d 401, 438 P.2d 874 (1968) (attorney disbarred for failure to reveal a conflict of interest and for breach of trust).

102. *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973).

103. *Attorney General v. Flynn*, 331 Mass. 413, 120 N.E.2d 296 (1954). The District Attorney, acting as trustee of a testamentary charitable trust, had sold trust land to himself through a strawman. The court ordered his removal under MASS. GEN. LAW ch. 211, § 4 (1958).

104. It is not clear if the grant or denial of a motion to disqualify counsel is appealable prior to a final adjudication on the merits. In *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), the court ruled that an order disqualifying a lawyer on grounds of conflict of interest was not appealable, but treated the "appeal" as a petition for a writ under 28 U.S.C. § 1651 (1966). An appeal from a denial of a motion to disqualify was allowed in *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. 1971). *Accord*, *Cermaco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975); *Fullmer v. Harper*, 517 F.2d 20 (10th Cir. 1975).

105. *See*, *Estate of Trench*, 76 Misc. 2d 180, 349 N.Y.S.2d 265 (Sup. Ct. Suffolk County, 1973).

106. *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors, Inc.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

107. Normally a party moving to disqualify an opposing lawyer on grounds of access to confidential communication must show the existence of

cially if it consists of information learned in a confidential communication.¹⁰⁸ If the conflict of interest exists between an attorney and his present client, the court should make every effort to protect the client's interests. The court of its own motion should disqualify counsel if his appearance in the case makes it difficult for him to exercise independent professional judgment. The administration of justice requires true adversaries on each side, regardless of one client's hardship.

However, the Code of Professional Responsibility provides two exceptions where an attorney can continue to act with the full and informed consent of the client. DR 5-105(c) allows an attorney to represent multiple clients if he can "adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Under DR 5-106, lawyers representing multiple clients against whom claims are asserted may participate in an "aggregate settlement of the claims" if each client consents to the settlement after being advised of the existence and nature of all the claims invoked in the proposed settlement, of the total amount of the settlement, and of each person's participation in the settlement.

Other potential remedies for conflicts of interest include the court's refusal to enforce attorney fees and the institution of a malpractice suit by the aggrieved client. In *Gesellschaft Für Drahtlose Telegraphie M.B.H. v. Brown*,¹⁰⁹ the court reversed a \$250,000 judgment for the attorney for legal services because the attorney's

a prior attorney-client relationship. See *Hicks v. Drew*, 117 Cal. 305, 49 P. 189 (1897). But if the client has divulged confidential communications to a lawyer in order for the lawyer to decide if he will take the case, the communication is protected:

[I]f an attorney has discussed the case with his client or proposed client, or voluntarily listens to his statement of the case preparatory to the defense, he is thereby disqualified to accept employment on the other side.

State v. Leigh, 178 Kan. 549, 289 P.2d 777, 778 (1955).

The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek legal assistance.

EC 4-1.

108. *P.C. Theater Corp. v. Warner Bros.*, 113 F. Supp. 265 (S.D.N.Y. 1953).

109. 78 F.2d 410 (D.C. Cir.), cert. denied, 296 U.S. 618 (1935).

employment contract required him to take a position hostile to his former client in the same matter. The court noted:

[p]laintiff's claim for attorney's fees is void and unenforceable, since it is in conflict with the well-established rule of public policy that where an attorney has acted for a client he cannot thereafter assume a position hostile to the client concerning the same matter, or use against the client knowledge or information obtained from him while the relation existed.¹¹⁰

Calling the contract for legal services void as against public policy, the court even refused to allow attorney's fees on a *quantum meruit* theory. Similarly, if a client is in fact injured by the conflict of interest of his attorney, he may sue in tort for malpractice.¹¹¹

Perhaps the strongest remedy for conflicts of interest is reversal of a judgment tainted by the conflict. Due to its severity, however, it should not be used unless the appellant in a criminal or civil case was arguably injured by the conflict. But the courts are prone to reverse without an actual conflict of interest to avoid even the appearance of impropriety, especially in criminal cases. Such was the situation in a Massachusetts criminal case when the defense counsel's law firm had represented several key prosecution witnesses in unrelated matters. The criminal defendant made several inquiries about the conflict of interest prior to the trial. The Supreme Judicial Court of Massachusetts reversed the conviction even though the court felt that the trial had been "otherwise faultless," that there was strong evidence of the defendant's guilt, and that the lawyer had conducted the defense with "competence and vigor."¹¹² Courts have reversed criminal convictions when the lawyer for the appellant represented multiple defendants, and was thus placed in a position of favoring one client over the appellant.¹¹³ Presumably the same position could be adopted in civil matters.

110. *Id.* at 412.

111. *See, e.g.*, MASS. GEN. LAWS ch. 221, § 40 (1958): "An attorney may be removed . . . for malpractice . . . and shall also be liable in damages to the person injured thereby."

112. *Commonwealth v. Geraway*, 73 Mass. Adv. Sh. 1281, 301 N.E.2d 814, 818 (1973).

113. *Glasser v. United States*, 315 U.S. 60 (1942); *Lollar v. United States*, 376 F.2d 243 (D.C. Cir. 1967); *Naiz v. United States*, 217 F.2d 355 (6th Cir. 1954).

CONCLUSION

Conflicts of interest may arise in many situations. The most obvious is where an attorney himself has a financial or personal stake in the outcome of a client's problem. Except for fee collection cases, a lawyer must ensure that his client's interests come before his own, especially in contingency fee arrangements. Perhaps a more subtle conflict arises when an attorney acts in capacities which conflict with his role as lawyer, such as a witness in litigation, administrator of an estate, guardian of an incompetent, or public official. In such cases, great care must be taken to avoid acting as attorney if he will thereby prejudice those to whom he owes a fiduciary duty.

Similarly, in civil litigation, a lawyer may find himself involved in representing conflicting interests of multiple clients whose claims are realigned so as to make them adverse. As the United Mine Workers cases and husband and wife lawyers situations illustrate, attorneys must avoid both potential and real conflicts, even where they result from later pleadings in the case. One reason for avoiding conflicts is the potential abuse of the attorney-client privilege; but many other reasons may also dictate strong sanctions against the attorney who represents conflicting interests.

Perhaps as important as the outcome of actual conflicts is the public's perception of potential abuses. Bar authorities believe that lawyers are commonly criticized by clients for real or alleged conflicts of interest. Sometimes a client simply feels that the attorney has not asserted his case with sufficient vigor because the attorney wants to spend more time working on better-paying cases. Sometimes the client perceives the lawyer only as a selfish businessman who will sell short those whom he serves for reasons of expediency or self-interest. Less frequently, the client actually believes that the lawyer is working against his own best interests because of selfish reasons or influences by other parties. It is certainly true that these grievances of clients are frequently unjustified and unfair; evidence indicates that the number of formal disciplinary proceedings against attorneys for conflict of interest is relatively small.

However, the public's reaction to apparent improprieties by the legal profession is obviously important. Thus, lawyers should take seriously the requirements of the Code of Professional Responsibility and interpreting cases if they expect the public to continue to accept them. Individual lawyers can help prevent

multiplying misperceptions in their clients by clear and frank communications about the reasons for their courses of action. If an apparent conflict of interest arises, the lawyer should contact the client and explain clearly and precisely what he proposes to do. Communication can help to eliminate false conflict of interest problems. The real problems can only be resolved by the conscience of the lawyer and the vigilance of the profession.