

Conflicts Of Interest In Malpractice Cases

BY STEPHEN GILLERS

An intriguing question in the field of lawyer regulation is the relevance of conflict of interest rules in cases charging a lawyer with legal malpractice or breach of fiduciary duty. Complaints asserting either basis for liability (and many cite both) often reference conflict rules, explicitly or by implication, in describing actionable conduct.

Conflict rules define client matters that a lawyer (and generally those who practice with her) cannot accept because the inconsistent interests of another client, or the interests of others, including the lawyer herself, may undermine or compromise the lawyer's ability to represent the client competently. That sentence raises several questions. What counts as an interest? When are interests inconsistent? What level of inconsistency makes something a conflict? How great must the risk of incompetent representation be before the lawyer is deemed to be in a conflict situation?

Let's focus on the final question. We know there can be a conflict even if the risk is far less than 100 percent (assuming counterfactually that these things can even be measured). We also know that rarely if ever will there be a conflict if we assume a risk of one percent. Let's say a conflict exists when the risk is significant. "Significant" is a question begging analysis of course, but that's all we need to know right now.

Assume that a lawyer represents a client where, because of a conflict, the risk that the work will suffer is significant. But it turns out that the lawyer is not at all affected by the extraneous interest that created this risk. She does a good job and gets great results. We could say that the lawyer will nevertheless have acted unethically (assuming no informed consent) and on these facts we'd be right, though no discipline is likely to ensue. Is the lawyer also at risk of civil liability? Not a chance. There have been no damages. But the lawyer could be subject to fee forfeiture or disgorgement. *In re Clarke's Estate* (N.Y. 1962). Restatement of Law Governing Lawyers §49.

When The Matter Ends Badly

But let's say the matter ends badly. It it's a litigation, the client loses more or wins less than the thought he would. If it's a transaction, the deal turns out to be not as good as the client hoped. Now what? We might say that whether the lawyer is liable for malpractice (I postpone fiduciary duty for the moment) should depend on whether the lawyer messed up professionally or, in the language of the malpractice doctrine, whether the lawyer failed to exercise that degree of skill, judgment and knowledge commonly exercised by a reasonable, careful and prudent lawyer in the area of practice in the same jurisdiction.

Okay, but then doesn't that make the conflict of interest irrelevant? If the lawyer failed to exercise the requisite level of competence, she's liable whether or not she had a conflict. And if she acted competently

– if any defaults were merely errors of judgment then she should not be liable even if she did have a conflict. So why should the conflict matter?

The same analysis might be used for fiduciary duty claims. Although the categories are often confused, and are by no means scientifically defined, fiduciary duty refers not to the duty of competence (or not only to that) but, more broadly, to the duty of loyalty. The fiduciary relationship is one of “ultimate trust and confidence.” *Matter of Cooperman* (N.Y. 1994). We don’t usually say that a lawyer who makes a professional mistake has breached a fiduciary duty. We charge malpractice. But a lawyer who betrays a client (by action or inaction) or who misuses confidences certainly violates fiduciary duty.

That conduct sounds more like the evils against which conflict rules also mean to protect. And indeed, we should not be surprised to discover that conflict rules for lawyers are, for the most part, special applications of conflict rules that bind all agents. As the Restatement of Agency tells us in its very first section, agents are also fiduciaries. How then should the lawyer conflict rules operate in an action for breach of fiduciary duty? As with malpractice, we may be tempted to say that they should not matter. If the lawyer has betrayed a client, the lawyer is liable whether or not she was laboring under a conflict. If the lawyer has not betrayed the client, she should not be liable despite a conflict. In this view, the conflict rules are once again irrelevant.

Conflict Makes Liability more Probable

But the argument is wrong. In cases that go to trial, the meaning of the lawyer’s behavior will usually be ambiguous. (That’s why the case is going to trial.) The plaintiff must prove some professional default, some act or failure to act that violated a duty to him. The defendant will in turn contend that the conduct the plaintiff cites reflected a reasonable and loyal professional judgment. In sorting this out, context is crucial. If the jury believes the lawyer was beset with a conflict—was serving two masters in the biblical (and sometimes the judicial) articulation—that finding will cause “any tendency to make the existence” of actionable misconduct “more probable...than it would be without the evidence.” (This is the definition of “relevance” in Federal Rule of Evidence 401.) Or to put it another way, the conflict can rationally influence a decision about how to characterize ambiguous conduct where each side is arguing for a different interpretation.

A conflict can be relevant in this way, of course, whether or not the jury also learns that the defendant’s conduct violated a rule governing the conduct of lawyers. However, even though violation of those rules is not a basis for civil liability, violation is generally allowed as some evidence tending to establish liability. Proof of a conflict rule violation can prove violation of a standard of care if we assume that prudent lawyers conform their conduct to the disciplinary rules in their jurisdiction. *See*, generally, Restatement of Lawyers §74(2) and cases cited in the Reporter’s Notes. Plaintiff’s lawyer may then argue that the conflict explains the reasons for the defendant’s behavior and also that the defendant put herself in a situation that the standards of her profession deem to contain too great a risk of professional misconduct.

A second occasion in which a lawyer’s conflict may be relevant occurs when the client challenges a lawyer’s advice. The advice can be in connection with any sort of broader service—contract, corporate, estates, litigation. We encourage clients to believe that when a lawyer advises them, the lawyer’s sole consideration is the best result for the client. But if the lawyer is coping with an extraneous and

inconsistent interest, whatever it may be, the client may be less willing to trust the lawyer's advice. At least, the client should know about this countervailing interest so he can make up his own mind about the extent to which, if at all, the lawyer's advice should be accepted.

Ignorance Is No Excuse

If this is not daunting enough, remember, too, that a lawyer's ignorance of a conflict is almost never an excuse (though conscious violation of the conflict rules is, of course, much more serious). With minor exception, the conflict rules in the New York Code of Professional Responsibility and the ABA's Model Rules of Professional Conduct contain no *mens rea* requirement. They are absolute liability rules. You can violate them with the best of intentions. Or to put it less charitably: it is your responsibility to be aware of and avoid conflict situations. If you ignore that duty, you may not really have had the best of intentions even if you are unaware of an actual trespass. It's the failure to honor your affirmative professional obligation that makes it fair to use conflict rule violations as some evidence of liability in malpractice and fiduciary duty cases.

Let's bring this home with an actual case. Just how dangerous a violation of conflict rules can be, and just how expansively a judge may interpret them, was dramatically illustrated in Judge Sonia Sotomayor's controversial opinion in *Estate of Re v. Kornstein Veisz & Wexler* (S.D.N.Y. 1997). The estate of a former client (re) sued the Kornstein firm because it had failed to tell Re, whom it represented in an arbitration, that it received part of its business (less than five percent) from another firm (Paul, Weiss), which represented Re's opponent (Bear Stearns) on other matters. Although Paul, Weiss did not represent Bear Stearns in the arbitration, "it was directly involved in the transaction that was at the vortex of "the arbitration and a Paul, Weiss partner testified for Bear Stearns.

The Court held that it was a jury question whether the Kornstein's firm's silence violated its fiduciary duty to Re. The fact that the amount of business Paul, Weiss referred was proportionately small did not matter. Attorneys, the Court wrote, must be sensitive not only to obvious conflicts, but also to forces that might operate upon them subtly in a manner likely to diminish the quality of their work. It was "possible that defendants inadvertently relented to subtle financial pressures compromising their ability to work diligently on Mr. Re's behalf." A jury would decide. (The case later settled.)

The Court said that this result "might unsettle the assumptions of some practicing attorneys who, undoubtedly well meaning, would never think to classify defendants' arrangement with Paul, Weiss as problematic." There's an understatement. We can debate the merits of the ruling, but the Re case is a brightly blinking yellow light, proclaiming just how professionally risky ignoring the conflict rules can be.

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