

# Final Conflicts Exam: There's A Will, but Is There a Way?

BY ROY SIMON

Each year in my course on the Ethics and Economics of Law Practice, I test my students on conflicts of interest. Here is my Spring 2006 final exam question on conflicts:

## FACTS

[1] You have a legal ethics consulting practice in the State of Hofstra. (Hofstra has adopted ethics rules and statutes blending the ABA Model Rules, the New York Code of Professional Responsibility, the Restatement, and variations on the rules and statutes of other jurisdictions.) All of your clients are attorneys who seek your advice on questions of ethics. Early this morning, a new client named Cleo called you with a difficult problem. Here's what Cleo told you:

[2] "I'm a partner at Glamour & Glitz, a law firm that represents celebrities," Cleo said. "Early last year, my partner Pete helped Tom Pitt and Katie Anniston (not their real names) apply for a mortgage and buy a condominium in the South Beach area. I'm not sure whom Pete represented exactly, but I guess whatever name the condo title is in - maybe Tom, maybe Katie, maybe both. Whatever. That's not really the point."

[3] "Late last year," Cleo continued, "Tom was in a contract dispute with a plumber who had installed a huge Jacuzzi whirlpool bath in the condo. When Tom refused to pay the plumber's bill, the plumber sued him. I represented Tom and negotiated a settlement with the plumber. The case was routine, except that when I tried to drive a hard bargain, the plumber's attorney said the plumber saw Tom testing out the Jacuzzi with Nicole Kid-man while Katie was in New York for fashion week. The lawyer added that the plumber needed money, and if Tom didn't pay the bill soon, the plumber might have to sell the Jacuzzi tidbit to the National Enquirer."

[4] "A few weeks ago," said Cleo, "Katie called Pete and said, 'Tom is acting like a complete jerk. I want a new will. When I married Tom, we made new wills leaving all of our money to each other, but now I want to leave my money to our little baby princess Suri, not to Tom. If I leave the money to Suri and die before she grows up, would Tom still get the money just because he would be her legal guardian? I mean, do I have to make a trust for Suri, or what? I don't want Tom to get the money.' Pete told Katie she should set up a meeting with us to discuss everything, but Katie has been so busy taking care of Suri that she hasn't come in for the meeting yet."

[5] "Last week, Tom called me with a question about possibly trademarking the name 'TomKat' (which is what the media call Tom and Katie as a couple). I don't practice intellectual property law, but I told Tom I didn't see how he could trademark a common term that was coined by the press, not by him. But Tom said there must be some way to keep the press from using TomKat because he was planning to split up

with Katie pretty soon. Then he said, 'After the split, I want custody of Suri. Can you represent me in dealing with Katie after I leave her?' I said no and told him to find a divorce lawyer."

[6] Then Cleo said, "Last night, Katie left a voice mail for Pete saying she wants to come in today to draft a new will disinheriting Tom. Can Pete advise her?"

Question: May Pete ethically advise Katie about drafting a new will? Why or why not?

I have just finished grading eighty blue books answering this question, and I have a renewed appreciation for the complexities of even garden variety conflicts questions. In this article I will analyze the question under the New York Code of Professional Responsibility, with occasional reference to the ABA Model Rules of Professional Conduct in the form proposed by the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC"). Where should the analysis begin?

### **Current client or former client?**

Before launching into our analysis, let's revisit the basic principle of imputation of conflicts, which is expressed in New York's DR 5-105(D) as follows (with emphasis added):

While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them, if practicing alone, would be prohibited from doing so under DR 5-101, DR 5-105(A) or (B), DR 5-108(A) or (B), or DR 9-101(B) ...

In other words, a law firm is treated as if all of the lawyers "associated with" the firm were aggregated into one giant multi-headed solo practitioner. If any lawyer in the firm is disqualified due to a personal interest conflict or due to a conflict of interest with a current or former client, then every lawyer in the firm is disqualified. Here, if advising Katie about drafting a new will would create a conflict of interest for any lawyer associated with Glamour & Glitz, then no lawyer in the firm may advise Katie about drafting a new will unless the conflict is cured. Some states and some courts make exceptions to this harsh rule of imputation, but a logical starting point here is to check the proposed new engagement (advising Katie about her will) for conflicts of interest with all of the firm's current and former engagements.

In New York, checking the new matter for conflicts with current and former matters is mandatory. Under DR 5-105(E), which is unique to New York, every law firm must "have a policy implementing a system by which proposed engagements are checked against current and previous engagements." Therefore, we need to check the proposed engagement with Katie against every pending and past matter that the law firm is currently handling or has previously handled for Tom.

The main object of examining these matters is to determine whether Tom (Katie's husband) is a current client or a former client. This distinction is crucial. If Tom is a current client, then he has virtually an absolute veto over being directly opposed by Glamour & Glitz in any matter, whether the matter is related or unrelated to any matter the firm is currently handling for him. But if Tom is only a former client, then his veto is limited to matters that are "substantially related" to the matters the firm has handled for him in the past. Since the "substantially related" test gives a former client far less veto power than a current client has, could Glamour & Glitz simply send Tom a termination letter (if he is a current client), and thereby transform him into a former client? No, that won't work. Courts will not permit a law

firm to drop a current client "like a hot potato." See, e.g., *Strategem Development Corp. v. Heron International N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1990) (disqualifying a firm that had dropped a current client in order to handle an unrelated matter against it). Thus, if Tom is a current client, Glamour & Glitz cannot drop him to take on Katie.

How do we determine whether Tom is a current client? The test for determining whether a person is a current client or a former client is whether the person *reasonably* believes that he is a current client. If Tom believes that he is a current client and that belief is objectively reasonable, then the courts will treat him as a current client even if the lawyers consider him to be a former client. If the client's belief is reasonable, the client's belief controls. Based on our facts, could Tom reasonably believe that he is a current client of Glamour & Glitz?

To determine whether Tom could reasonably believe he is a current client, we need to undertake a two part analysis. First, we need to review every matter that any lawyer in the firm has ever handled for Tom. If Tom reasonably believes any matter is still pending, then he is a current client. But if Tom could not reasonably believe any matter is still pending, then ordinarily he will be considered a former client. Second, if all of Tom's matters are fully concluded, we need to ask whether Tom has used the firm so consistently or frequently over the years that he reasonably considers himself to be a current client of Glamour & Glitz even if no particular matter is pending at this moment. In other words, even if the firm is not working on any specific matter for Tom right now, could Tom still reasonably say, based on the pattern of past work, "Glamour & Glitz is my law firm, and it represents me whenever I need a lawyer"?

Many students wasted a lot of time attempting to determine whether Katie is a current or a former client. That question is irrelevant. *Katie* wants Glamour & Glitz to advise her about a new will, so whether she is a current client on any other matter is beside the point.

### **The conflict check database**

Our conflicts-checking database discloses the five separate matters in which Tom may possibly be a client (or may have been a client) of Glamour & Glitz, and we'll review each one.

*The condo/mortgage transaction.* Early last year, Pete helped Tom and Katie "apply for a mortgage and buy a condominium," but Cleo (the one giving us the facts) isn't sure whether Pete represented Tom or Katie or both. Cleo says that's "not really the point," but good students recognized that was precisely the point, and they asked whether Tom reasonably believed he was a client in the condo/mortgage transaction. If a person seeks and receives legal advice, then an attorney-client relationship usually forms. In the famous case of *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980), a law firm was hit with a \$649,500 legal malpractice judgment for telling a woman, at the end of her initial interview, that it didn't think she had a viable medical malpractice case even though her husband had become paralyzed while staying in a hospital after surgery. Mrs. Togstad didn't find out that she had a good case until after the statute of limitations had expired because she reasonably relied on the firm's negligent, off-the-cuff advice.

If Tom was a client or co-client in the condo/mortgage deal, is the deal still pending? The facts strongly imply that the condo deal closed and is over. When a lawyer undertakes only a discrete transaction for a client and that transaction ends, the attorney-client relationship usually ends with it, and it is not

reasonable for a client to believe that he remains a current client after the discrete matter ends. Therefore, Tom probably cannot reasonably believe he is a current client of Glamour & Glitz based solely on the condo/mortgage deal unless the firm has subsequently handled problems arising out of the transaction, such as a dispute with the seller over undisclosed defects.

Many students recognized that the firm could have eliminated any ambiguity and made Tom's status crystal clear either by writing a detailed letter of engagement at the outset of the matter identifying the client (perhaps only Katie) and explaining when the attorney-client relationship would end, or by sending Tom a termination letter at the end of the deal, if he was indeed a client. Lawyers generally do not like to write termination or closing letters because they want clients to have an ongoing relationship with the firm next time a legal problem arises, but firms that do not write closing letters risk conflicts with clients who reasonably believe themselves to be current clients long after their matters end. It's a balancing act, based on each firm's business judgment, because nothing in the New York Code of Professional Responsibility requires a closing statement except in contingent fee matters.

*Plumbing dispute.* The facts explicitly state that last year Cleo "represented Tom and negotiated a settlement with the plumber," so the main question is whether the matter is completely over. If the settlement is still being finalized, then Tom remains a current client. If the settlement is signed, sealed, and delivered, then Tom cannot reasonably believe he is a current client based on that matter alone (though again the firm could have helped itself by writing a clear letter of engagement at the outset or by sending a closing letter when the matter ended).

*Trademarking "TomKat."* Tom's recent question about trademarking the term "TomKat" is more troubling. When Tom posed the question, Cleo responded that she did not practice intellectual property law, but she nevertheless gave Tom her insta-pundit opinion that Tom could not trademark a term coined by the press. That arguably created an attorney-client relationship, analogous to the Togstad case, because Tom sought legal advice and Cleo gave him legal advice. An attorney-client relationship can be created in a nanosecond, and does not easily end. Even if the trademark matter is totally over, Tom would appear to be at least a former client regarding this matter. But Tom may instead be a current client because when Tom said there "must be some way to keep the press from using TomKat," Cleo did not refuse to look into the matter further. If Cleo was not willing to explore the question further, she should have said, "Tom, I cannot answer your question. If you want to pursue this, call a trademark lawyer." Since Cleo didn't say anything like that, Tom may very well reasonably believe Cleo is still studying the trademark question, which would make Tom a current client. At a minimum, Tom is (or was) a prospective client regarding the trademark matter, which would bar Cleo from using any confidential information that Tom gave Cleo during the initial conversation (like Tom's intention to split up with Katie) unless DR 4-101(C) provides an exception or the information becomes "generally known."

*Custody of Suri.* In the trademark conversation, Tom also asked if Glamour & Glitz could represent him in dealing with Katie after he left her. Cleo clearly said no and told him to find a divorce lawyer. Cleo did not give Tom any legal advice, and Tom could not reasonably believe himself to be a client of the firm for purposes of the divorce or for custody issues. This matter is largely a red herring, except that Tom retains the confidentiality rights of a former prospective client. *Tom's existing will.* Finally, Katie mentioned in her conversation with Pete that when she married Tom, they both made new wills leaving their money to each other. The facts do not say whether Glamour & Glitz drafted Tom's will, but a careful lawyer would

certainly pursue that question. If Glamour & Glitz drafted the existing wills, it may have promised Tom and Katie that it would not later change either will without notice to the other.

*Pattern of representation.* Finally, even if all of the above matters are closed and Tom cannot reasonably believe himself to be a current client in any of them, he may nevertheless be a current client based on a pattern of representation over time. He has called Glamour & Glitz regarding at least three different matters (plumbing dispute, trademark question, custody question) within the past year, most recently only a week ago, so he may reasonably believe that Glamour & Glitz represents him generally even though the firm is not handling any specific matter for him at the moment. In the classic case of *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978), the court disqualified a law firm from opposing IBM in an antitrust matter, even though the firm "had no specific assignment from IBM on hand on the day the antitrust complaint was filed," because "the pattern of repeated retainers ... supports the finding of a continuous relationship." *Accord, Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (Becton held to be current client of firm that had represented it on and off for twelve years even though firm had not done any work for the client in about a year).

### **Consent after full disclosure**

If Tom is indeed a current client, then the firm may not represent any client directly adverse to him in any matter, related or unrelated, without his consent after full disclosure. That was lesson of the Second Circuit's landmark holding in *Cinema 5 v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976), and it is the essence of DR 5-105(A) and (C). This may pose a difficult problem for Glamour & Glitz. Unless Tom and Katie agree that Tom should be cut out of Katie's will for tax reasons or other estate planning reasons (which is unlikely here), representing Katie in drafting a will that disinherits Tom seems directly adverse to Tom's interests. Almost every student assumed that helping Katie to cut Tom out of her will would be directly adverse to Tom. Surprisingly, however, the ABA recently opined that unless a testator has a "legal duty" to make a bequest that is to be revoked, "there is no direct adversity" (and therefore no conflict) when a lawyer revises a client's will to disinherit another client that the lawyer represents in unrelated matters - see ABA Formal Op. 04-434 (2004).

But if advising Katie would be "directly adverse" to Tom, Glamour & Glitz must decline to represent Katie unless it obtains Tom's consent after "full disclosure." In making "full disclosure" to Tom, however, Glamour & Glitz must not disclose confidential information received from Katie unless she consents. As EC 4-1 states, the principles of confidentiality apply both to those who have retained a lawyer and to those who have merely "sought to employ the lawyer." If we assume that Katie did not become a former client by participating in the condo/mortgage transaction, she is at least a former "prospective client," and the confidences and secrets of a prospective client are treated as the confidences of a former client would be treated under DR 5-108(A)(2), which provides that a lawyer shall not "[u]se any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known." As COSAC-proposed New York Rule 1.18(b) would make clear, "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 [equivalent to DR 5-108(A)(2)] would permit with respect to information of a former client."

Katie is unlikely to consent to revealing her confidences to Tom. To obtain Tom's informed consent, the firm would need to say to Tom something like, "Katie has asked us to draft a new will for her leaving all

of her money to Suri rather than to you. Instead of receiving millions of dollars upon Katie's demise, you would receive nothing. May we have your consent to advise her regarding a new will?" I doubt Katie wants to tell Tom that she plans to cut him out of the will.

When a lawyer cannot obtain consent from one client (here, Katie) to reveal information necessary to make "full disclosure" to another client (Tom), then the conflict is nonconsentable and cannot be cured. As recognized in the second paragraph of EC 5-16, which addresses nonconsentable conflicts, "there may be circumstances in which it is impossible to make the disclosure necessary to obtain consent, such as when the lawyer represents different interests in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision."

### **What if Tom is only a former client?**

If Tom is only a former client, then the law firm has more leeway. Under DR 5-108(A), "a lawyer who has [formerly] represented a client in a matter shall not, without the consent of the former client after full disclosure: (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." If advising Katie to cut Tom out of the will would be materially adverse to Tom's interests (and we're assuming it would be even though ABA Formal Op. 04-434, *supra*, suggests otherwise), then the only remaining question is whether drafting Katie's will is "substantially related" to the matters that the firm has handled in the past for Tom.

The most common test for whether matters are substantially related is whether the lawyer learned or would normally have been expected to learn information while representing the former client that would be useful against the former client in the present matter. Here, if Glamour & Glitz represented Tom in the condo/mortgage transaction, it would ordinarily have learned about his financial assets. That might influence the firm to advise Katie to disinherit Tom. In the Jacuzzi matter, the firm actually learned that Tom allegedly tested out the Jacuzzi with Nicole Kidman while Katie was in New York for fashion week. (Some students realized that if this information ever did hit the tabloids, it would probably be "generally known," entitling the firm to use it against Tom without his consent.) The Kidman tidbit might also cause Glamour & Glitz to advise Katie to disinherit Tom. In the trademark conversation, Tom revealed that he plans to leave Katie and seek custody of their baby, Suri. If disclosed to Katie, that would be likely to enrage Katie and fuel her desire to cut Tom out of the will. Therefore, the mortgage, Jacuzzi, and custody matters appear to be "substantially related" to Katie's will, and the firm cannot advise Katie about a new will without Tom's consent.

But now another problem arises. Even if Tom consents to let the firm advise Katie in drafting a new will, Glamour & Glitz still needs *Katie's* consent as well. It needs her consent because the firm's ability to zealously represent Katie may be dampened by its inability to use Tom's confidential information (Tom's finances, the Kidman incident, Tom's desire to split and take the baby) while advising Katie. Moreover, because the firm either currently represents Tom or formerly represented him, the firm may be reluctant to help Katie disinherit him. Therefore, in the words of proposed Rule 1.7(a)(2), a conflict exists because "there is a significant risk that the representation [of Katie] will be materially limited, or the lawyer's independent professional judgment on behalf of a client will be adversely affected, by the lawyer's responsibilities to another client, [or] a former client" (Tom). Here, the firm may be unable to advise Katie objectively because (a) it cannot use Tom's confidential information, and (b) it may pull its punches in order to protect Tom.

For all of these reasons, both Cleo and Pete should be disqualified from advising Katie about drafting a new will, unless Katie and Tom both consent to share their confidences and secrets with each other to the extent necessary to make full disclosure to each of them. Fat chance.

But let's try one more avenue. Suppose the firm assigns Katie's will to another lawyer at Glamour & Glitz (not to Cleo or Pete) and screens off Cleo and Pete completely. Will that work? That depends on whether Tom is a current client or a former client. If he's a current client, a screen won't work. Some states allow a conflict screen to overcome a former client's objections to being opposed in a substantially related matter, but no state permits screens to overcome a current client's objections to being opposed in any matter, related or unrelated. Since current clients have absolute veto power over directly adverse representations by their own lawyers, a screen could not cure the conflict unless Tom is a former client. *But see Hempstead Video, Inc. v. Incorporated Village Of Valley Stream*, 409 F.3d 127 2d Cir. 2005) (allowing screen to cure conflict between current clients of firm and "of counsel" lawyer).

### **Conclusion: A long and winding road**

Almost every conflict analysis reminds me of the Beatles hit, "A Long and Winding Road." Even run-of-the-mill conflict questions typically pose many issues and require a long and winding analysis. The best advice is to create a good map of where you are going, and make sure you read every signpost along the way.

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