

Final Exam on Conflicts: Short Question, Long Answer

BY ROY SIMON

I recently finished grading 150 final exam papers in my course on the Ethics & Economics of Law Practice, a basic survey course on legal ethics. I gave a very short and simple conflicts scenario, but while grading the exams I was reminded of the famous Jethro Tull song entitled “Nothing Is Simple.” Even a seemingly “simple” conflict can be surprisingly complex. I therefore decided to share with you the question, my answer, and some of the insights and misconceptions that cropped up along the way. (I expect my students to apply both the ABA Model Rules of Professional Conduct and the New York Code of Professional Responsibility when answering my exam questions, so I cite to both in this article.)

The Question

Here is this year’s question about conflicts of interest:

Facts: Today, two potential new clients came in to see you. Their names are Bonnie and Clyde, and they are living together but not married. They came into your office and you interviewed them together. They told you that last month they were in a serious auto accident. The accident happened when another driver crashed into them while Bonnie was turning left at a busy intersection.

Bonnie, who was driving, suffered a broken leg and is still on crutches. This is really bad news because she is a traveling salesman and has to do a lot of walking to perform her job.

Clyde, who was the passenger in Bonnie’s car, suffered a severe concussion and just got out of the hospital last week. He is still in a lot of pain and has trouble using his hands, which is a big problem because he makes his living as a music teacher.

Bonnie exchanged insurance information with the other driver at the time of the accident and told you his name: Marvin Gardens. The name sounded familiar, so you did a quick conflicts check and found out Marvin Gardens had retained you two years ago to draft his will. You haven’t seen or heard from Marvin since you finished drafting his will.

Now comes the moment of truth. Bonnie and Clyde ask you, “Can you represent us both in a lawsuit against Marvin Gardens? We’d like to hire just one lawyer to represent us both. Will you take our case?”

Question: Analyze whether you may ethically represent (a) Bonnie, (b) Clyde, or (c) both of them. If you need anyone’s consent in order to accept either or both clients, specify whose consent you need and explain everything you would need to do to obtain a valid consent.

Sounds pretty simple, doesn't it? Before you read any further, take a minute or two to spot the key issues and formulate a very tentative answer. Better yet, sit down with a piece of paper and jot down some thoughts so you can compare your answer to mine.

My Answer

Logically, the first thing to determine is whether you can represent either client against Marvin Gardens. There's no point in struggling to determine whether you can represent Bonnie and Clyde together, with all of the potential conflicts that might entail, if at the end of the day you can't oppose Marvin anyway.

The crucial initial question is whether Marvin is a current client or merely a former client. If he is a current client, he has an absolute veto over your representation because a lawyer cannot oppose a current client in any matter, related or unrelated, without the current client's informed consent – see ABA Model Rule 1.7(a)(1) and New York's DR 5105. The purpose of these rules is to preserve your loyalty to Marvin, which is the essential foundation of an attorney client relationship. You can't tell Marvin that you are 100% devoted to his interests when you are helping him with his estate planning, and then sue him on behalf of another client while you are still representing him. But if Marvin is only a former client, then you are free to oppose him in any matter that is not "substantially related" to the work you formerly did for him. See ABA Rule 1.9(a) and New York's DR 5108 (A). The purpose of these rules is to ensure that you do not use (and are not even tempted to use) any of Marvin's confidential information against him. If clients thought you might later use their confidential information against them, they might hold back sensitive information that you need to represent them properly. So, how do we tell whether Marvin is a current client or a former client? The usual rule is that a client is a current client if the client reasonably believes he is a current client. What you believe is irrelevant. The controlling factor is the client's belief, not your belief. As long as the client's belief is reasonable, the client's belief controls, no matter what you think. This principle is not articulated in the ABA Model Rules or the New York Code of Professional Responsibility, but is well established in the case law.

Let's apply the principle to the facts of my exam question. The facts state that Marvin "retained you two years ago to draft his will" and that you "haven't seen or heard from Marvin since you finished drafting his will." Unfortunately, the facts don't say when you finished drafting Marvin's will. If you finished it yesterday (to take the extreme case), then Marvin may reasonably believe he is still a client. If you finished shortly after Marvin retained you almost two years ago, then Marvin may not believe he is still a client – and if he does believe he's still a client, the belief may not be reasonable. No matter when you finished the work, if you sent a termination letter to Marvin after you finished his will, then Marvin is almost certainly a former client, because a client who receives an unambiguous termination letter cannot reasonably believe that he is still a current client. (A termination letter would say something like, "I have now completed all of the work that you asked me to do, and our attorney client relationship is at an end. If you ever need further legal services in the future, please call me and I will determine whether I can renew our attorney client relationship at that time.") But here the facts don't say whether you sent a termination letter.

Even if you didn't send a termination letter, however, Marvin probably could not form a reasonable belief that you are still his lawyer. The facts do not suggest that Marvin retained you repeatedly over the years and thought of you as his regular lawyer. Rather, you worked on only one discrete project for Marvin, his will. Some authorities say that if you are asked to do a discrete project and you finish it, then the client

cannot reasonably believe that he is still a current client. But estate planning – including drafting a will – may be an exception. The client may reasonably expect that you will continue to monitor the tax laws and let the client know if he needs to revise or add to his will as they years go by. This concept has outer limits, of course – A T & E lawyer isn't signing up for lifetime representation of every estate planning client – but you finished Marvin's will within the last two years, and that isn't such a long period of time. One case has held that a client may reasonably believe he is still a current client four years after the client last requested any legal services (see, *Manoir Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D.N.J. 1989)). That's extreme, but the risk is there.

Opposing Marvin

If Marvin reasonably believes that he is a current client, then he is a current client and you cannot oppose him in litigation unless you meet the standards of the rule governing concurrent conflicts, such as ABA Rule 1.7 or New York's DR 5105. Of course, rather than seeking Marvin's consent to a concurrent conflict, you might try to withdraw from representing Marvin pursuant to ABA Rule 1.16(b) or New York's DR 2-110(C), and thus turn him into a former client. Under both rules, you may withdraw if your withdrawal "can be accomplished without material adverse effect on the interests of the client," which seems to be true here – but there's a hitch. Under the so called "hot potato" doctrine, you can't drop a current client "like a hot potato" just for the purpose of suing him on behalf of another client. See, e.g., *Stategem Development Corp. v. Heron International, N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1991). Dropping a client like a hot potato to pursue a more lucrative conflicting representation would seriously undermine the concept of client loyalty. But you can withdraw from representing Marvin if he "knowingly and freely assents to termination of the employment" – see New York's DR 2110(C)(5). (Remarkably, ABA Rule 1.16 has no comparable provision, and does not even mention client consent, but I think informed consent is a sufficient ground for withdrawal under the ABA Rules despite this omission.)

If Marvin is a former client, then you may oppose him in litigation if the matter is not "substantially related" to the work you did for him during the former representation, which consisted only of drafting his will sometime within the past two years. (The facts say that he retained you two years ago but, as mentioned earlier, we don't know how long the representation lasted or when it ended.) It's tempting to say that the two matters are not "substantially related" because the new matter is a personal injury suit and the former matter was drafting a will, so the matters involve completely different areas of law. (Many of the weaker students said just that and did not analyze the matter any further.) But the substantially related test is not that simple. The test for determining whether two matters are substantially related is whether "the lawyer could have obtained confidential information in the first representation that would have been relevant in the second." *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983) (Posner, J.). Applying that test here, the question is whether you would ordinarily have had the opportunity to learn information about Marvin while drafting his will that is likely to be useful against him in a personal injury suit. Very likely so. At a minimum, you probably learned about Marvin's assets and insurance, so you can gauge whether a threat to sue him for more than his policy limits would scare him into settlement. You may also have learned about any medical conditions that might have contributed to the accident. If the matters are substantially related, then you cannot oppose Marvin without his consent "after full disclosure" – see DR 5108(A)(1). ABA Rule 1.9(a) is almost the same – it demands the client's "informed consent, confirmed in writing."

If you are personally prohibited from opposing Marvin for any reason, can another lawyer in your firm take on the representation as long as you screen yourself off from the representation? Very doubtful. Neither the ABA Model Rules nor the New York Code of Professional Responsibility recognizes screens as a way to overcome a lack of client consent. Some states have adopted rules that permit screens to overcome a client's lack of consent, but those rules apply only when a lawyer moves laterally from one firm to another. Screens are basically ineffective when attempting to cure a conflict with a present or former client of the firm (as opposed to a client of a lateral's former firm). Maybe Marvin would be more likely to consent if your firm screened you off from the personal injury suit, but a screen without his consent won't cure this conflict.

Representing Bonnie and Clyde Jointly

Let's turn the tables around. What if Marvin either doesn't present a conflict or validly consents to the conflict. May you ethically represent both Bonnie and Clyde against him? ABA Rule 1.7(a)(1) says that you have a concurrent conflict if a representation of one client will be "directly adverse" to another client. If Marvin Gardens is a current client, Rule 1.7(a)(1) applies here, and many students stopped at this point, mistakenly believing that you may never oppose a current client. The better students recognized that you may never oppose a current client without consent, but that you may oppose a current client if you meet the criteria in Rule 1.7(b) (discussed below), which include consent. ABA Rule 1.7(a) (2) says that a concurrent conflict exists if there is a "significant risk" that your responsibilities to one client will be "materially limited" by your responsibilities to another client. New York DR 5105 (A) expresses a similar concept in very different language – you may not accept an engagement if your exercise of "independent professional judgment" on behalf of one client "will be or is likely to be adversely affected" by accepting the new engagement, or is likely to involve you in representing "differing interests," unless you can obtain valid consent from the affected clients.

In my view, every joint representation poses a potential conflict of interest, and a joint driver passenger representation provides a vivid illustration. On one hand, you will have a duty to zealously represent Bonnie, who was driving the car. For example, if she sues Marvin and Marvin files a counterclaim alleging that the accident was her fault, you'll have to do everything you can legitimately do to show that Bonnie was not at fault. On the other hand, you will have a duty to zealously represent Clyde, who was Bonnie's passenger. That means you'll need to advise Clyde that if Bonnie was at fault, he'll have the right to sue Bonnie for his damages. Clyde may be reluctant to sue her because they live together, but Clyde has suffered big damages – the facts say that Clyde "suffered a severe concussion and just got out of the hospital last week" and "is still in a lot of pain and has trouble using his hands, which is a big problem because he makes his living as a music teacher." Clyde may be reluctant to sue Bonnie right now, but he may well change his mind if his pain persists, or if he breaks up with Bonnie during the litigation, or if he discovers that Marvin is uninsured or underinsured and that his only hope of recovery is by suing Bonnie.

Under Rule 1.7(b), you may oppose a current client if you meet four criteria. Rule 1.7(b) (2) is easy – it just asks if the representation is "prohibited by law," and nothing suggests that it is. But Rule 1.7(b) (1) poses a serious hurdle. It says you may not get into a concurrent conflict unless you "reasonably" believe (which is the objective, "reasonable lawyer" standard) that you "will be able to provide competent and diligent representation to each affected client," meaning both Bonnie and Clyde. Can you reasonably believe that? It's doubtful. You will have to investigate the cause of the accident thoroughly to serve

Clyde's interests, but if you represent Bonnie then it will be difficult or impossible for you to investigate her properly. You will obviously need to interview Bonnie in depth about the causes of the accident, but will you be doing so as her trusted advisor (seeking to establish that she was not comparatively negligent) or as her potential adversary (seeking to establish that she was partly or totally at fault)? That would put you in an impossible dilemma, which suggests that the conflict is nonconsentable. New York's DR 5105(C) would probably lead to the same conclusion, because a "disinterested lawyer" would be unlikely to believe that you can "competently represent" the interest of "each" client in the joint representation.

Even if you can meet the objective tests of "reasonable belief" or "a disinterested lawyer," Rule 1.7(b)(3) poses another potentially insurmountable obstacle. It prohibits a lawyer from undertaking a representation that "involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation ... before a tribunal." (New York prohibits you from representing "differing interests," which is less specific but amounts to the same thing.) In other words, the ABA imposes a per se prohibition against representing clients on both sides of the "v" in litigation. You can't represent both the plaintiff and the defendant in the same lawsuit. That situation will come about if Clyde decides to sue Bonnie.

Finally, both the ABA and New York require each client's consent to the potential conflict. ABA Rule 1.7(b)(4) requires that "each affected client give[s] informed consent, confirmed in writing," and New York's DR 5105(C) requires each joint client's consent after "full disclosure of the implications of the simultaneous representation and the advantages and risks involved." What are the advantages to Bonnie and Clyde of having you represent them both instead of having each get his or her own independent lawyer? The advantages probably include: (i) better coordination between Bonnie and Clyde in their suit against Marvin Gardens (e.g., avoiding discrepancies in their testimony about how the accident happened); (ii) faster scheduling, because there is one less lawyer's schedule to worry about; and (iii) a united front in seeking to pin the blame on Marvin. The disadvantages (which are largely on Clyde's side) include: (i) it will be impossible for Clyde to sue Bonnie as long as she is represented by the same lawyer; (ii) it will be difficult for you to investigate Bonnie's role in the accident; (iii) if a conflict arises during the representation for any reason, either Bonnie or Clyde or both may have to retain new lawyers, which could delay the suit; and (iv) neither client will be able to claim the attorney client privilege for communications made during the joint representation, which could harm Bonnie if Clyde later decides to sue her. Moreover, one typical advantage of joint representation may be missing. Usually, parties can save legal fees and expenses by hiring one lawyer instead of two, but in contingent fee cases the lawyer typically charges each joint client a full fee. If so, the savings will be limited to savings on expenses (e.g., only one lawyer will have to make copies of the relevant documents instead of two lawyers), and this won't amount to much.

If Bonnie and Clyde both consent – and you can't represent them both unless they both give their informed consent – then the ABA requires that the consent be "confirmed in writing." (New York does not have this requirement, but confirming the consent is still a good practice because it will protect you against a later claim by the clients that they did not consent.) This "confirmed in writing" language is ambiguous because it doesn't say who has to do the confirming, the lawyer or the client. But the Comment to Rule 1.7 makes clear that the phrase "confirmed in writing" does not require a client's signature. Rather, it simply requires the lawyer to write a letter to the clients saying, in essence, "This letter confirms that you have consented to the conflicts that may arise if I represent both of you in your

proposed suit against Marvin Gardens seeking damages for the injuries he caused you in your recent auto accident.” The letter does not have to repeat the disclosures that you made in order to obtain their informed consent, but it’s a good idea to describe those disclosures for your own protection in case the clients later claim they didn’t know about certain aspects of the conflict.

Can You Represent Either Bonnie or Clyde Alone?

Since it looks pretty doubtful that you can pass the “disinterested lawyer” test to represent both Bonnie and Clyde at the same time, can you represent either Bonnie or Clyde alone? Possibly, but you still have a big problem – either one will be treated like a former client, which means you cannot oppose either one without informed consent. ABA Rule 1.18, which was added to the ABA Model Rules in 2002, governs this situation. Rule 1.18(a) says: “A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.” Even when a prospective client has not retained you, Rule 1.18(b) generally prohibits you from using or revealing confidential information that you learned from the prospective client. Moreover, Rule 1.18(c) prohibits you personally from opposing a prospective client that didn’t hire you in the same matter if you “received information from the prospective client that could be significantly harmful to that person in the matter” unless the prospective client consents. Here, it’s not clear whether you received information from Bonnie or Clyde that could be “significantly harmful” to them. For example, did Bonnie ever say, “The accident was really my fault”? Did she provide information about Clyde’s injuries? If you represent only Clyde and you sue Bonnie (as well as Marvin), that information could be significantly harmful to Bonnie. Nevertheless, Rule 1.18(d) will permit another lawyer in your firm to oppose Bonnie if she gives her informed consent, or if you “took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent” her, and you are timely screened and apportioned no part of the fee. The facts don’t suggest that you took any measures to avoid receiving “disqualifying information” from Bonnie at the initial interview. For example, you never warned her to limit her disclosures to you because you might end up rejecting her as a client and representing Clyde against her.

New York does not yet have a rule comparable to ABA Rule 1.18, but the case law in New York may well prohibit you from representing Clyde alone unless he waives his right to sue Bonnie. (See Roy Simon, *When Prospective Clients Raise Conflicts of Interest*, NYPRR May 2003.)

Representing Bonnie alone probably presents the same problems. She is unlikely to sue Clyde (unless he was tickling her while she was driving, or otherwise caused Bonnie to have the accident), but you will still have to defend her against Clyde if he sues her. In that case, you will have confidential information from Clyde about his injuries, and your use of that information could be significantly harmful to him. For example, maybe during the interview he said, “I’ll be fine. It just hurts a little bit, and I’m sure I can still teach music.”

If you had interviewed only Clyde, you could have represented him against Bonnie, and if you had interviewed only Bonnie you could have represented her. But after your joint interview, you probably know too much. Next time, you’ll avoid joint interviews in situations that are likely to raise serious potential conflicts. This time, it’s probably already too late to save the day.

Conclusion: Nothing Is Simple

Dwight Eisenhower once said, "Every war will surprise you." I say the same thing about conflicts. Every conflict will surprise you. Even the simplest conflict scenarios present complex problems that require deep and detailed analysis. Here, I wouldn't touch the joint representation with a ten foot pole.

Everything may seem hunky dory between Bonnie and Clyde right now, but people can change their minds. And since you have apparently never sent a termination letter to Marvin, he may well move to disqualify you even if you decide to represent only Bonnie or only Clyde – and either Bonnie or Clyde (whichever one you reject) may well join in that disqualification motion.

One last point: my exam question arose in the context of personal injury litigation. But the same kinds of issues, often with even greater complexity, arise in the corporate and commercial context. Conflicts lurk everywhere, especially in a joint representation or in a suit against a current or former client. Take the time to analyze these conflicts carefully. Otherwise, you may be facing a motion to disqualify that you cannot win.

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