

Navigating the “Minefields of Conflict Dilemmas”

Here is a good number to know: (800) 235-8619. It is the toll free number for The Florida Bar Ethics Hotline. Now that you have it written down and securely taped to your computer monitor, use it freely, confidentially, and anonymously to answer that troubling ethical question that seems to surface in your practice every so often: Is this a conflict of interest and, if so, how do I avoid it? According to the Ethics Hotline webpage, this member service exists, in part, to “help guide lawyers through the minefields of conflict dilemmas....” The term, “minefield,” is certainly fitting. Often not easily recognized by even the most experienced practitioner, conflicts of interest are embedded in every area of the law. A lawyer may find himself subject to disciplinary sanctions even when he did not know of or appreciate the existence of a later revealed conflict.

Ken Marvin, Director of Lawyer Regulation for The Florida Bar, advises that “grievances stemming from conflict issues represent only a small portion of all grievances filed against lawyers each year.” Of those conflict-based complaints that reach the grievance committee level, however, Marvin identifies a recurrent theme. “Most often the conflict arises out of a prior joint representation. For instance, a lawyer who represented a husband and wife family business years ago is visited by the wife who now wants to hire the lawyer to file for divorce. The lawyer fails to take the prior joint representation into consideration and represents the wife. To avoid this scenario, every lawyer really needs to maintain and use a reliable conflict check system.”

An element common to all conflicts of interest is the lawyer’s violation, knowingly or unknowingly, of his duty of undivided loyalty to past and present clients. Can a lawyer pursue a proposed course of action and remain truly loyal to her existing client base as well as to those clients that are now “closed files,” gathering dust in the back of the office? This is an essential question that the attorney must answer when confronted with any conflict scenario. The everyday pressures of practicing law make it easy to overlook the need to examine the potential for hidden conflicts in our cases. Attorneys are wise, then, to make conflict avoidance part of their daily habit as they have done with timekeeping and billing practices. Getting into the habit of conflict avoidance might include the following practices:

- Review the Rules of Professional Conduct 4-1.7, 4-1.8, and 4-1.9 at least once a year;
- Screen every potential new client against existing and past clients for conflicts;
- Incorporate a conflict check procedure into your initial client interview;
- Avoid relying on conflict waivers; not every conflict can be successfully waived;
- Ask yourself whether a proposed action passes the client loyalty test;
- Avoid conducting business with or becoming romantically involved with a client;
- Do not provide financial assistance to clients other than the advance of costs;
- Inform clients in writing of any perceived or potential conflict and consider the need to withdraw;
- Consider whether newly hired lawyers present a conflict under Rule 4-1.10;
- Avoid using contractual limitations on liability for legal malpractice; and,
- Call the Ethics Hotline to resolve any perceived questions of conflict.

Obtaining a client’s consent and a waiver of a perceived conflict will not allow a lawyer to avoid a conflict of interest in every situation. Even though a client might consent and agree to representation despite an apparent or potential conflict, if an objective, disinterested lawyer would conclude that the client should not consent under the circumstances, the use of a waiver will not eliminate the ethical violation. In fact, using a waiver could make matters worse since the penalties for lawyers who

“knowingly” engage in legal representation notwithstanding the existence of a conflict of interest are typically heightened and include suspension from the practice of law and even disbarment. The latter, most extreme form of punishment, however, is usually reserved for instances where the lawyer knowingly undertakes legal representation despite the existence of a conflict and to the detriment of the client for the lawyer’s own pecuniary gain.

Unfortunately, conflicts of interest are an inherent part of the practice of law. They are not always easily recognized or avoided. Together, making positive conflict avoidance habits part of your daily practice, seeking out the advice of a mentor or Ethics Hotline counsel, and limiting the use of conflict waivers will all go a long way toward ensuring that you and your firm sidestep the pressing danger that conflicts represent in the practice of law.

James E. Keim focuses his practice on handling cases of nursing home neglect and abuse in Sarasota, Manatee, and Charlotte Counties. He is available to discuss conflict issues and other ethical dilemmas with SCBA members at (941) 492-5333.