

## ETHICS

## "Thrust Upon" Conflicts

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A number of years ago I represented a man in a divorce, whom I will call Tom. It was a very substantial case, with complex property issues. Shortly after I began my representation of Tom, I was retained to represent George. George's issues were not quite so complex, but he was distraught over losing his wife of many years. These emotional issues were making resolution of the property issues very difficult, and George's therapy did not seem to help. Some time later I happened to meet Tom on the street with a woman, whom he introduced me to as his "significant other." She happened to be George's soon to be ex-wife. She recognized me as George's lawyer, but I did not know whether she had passed this information on to Tom. I instinctively felt that I had a conflict of interest. At the very least, the situation threatened to cause George to doubt my loyalty to him. I was unsure at to what my obligations or options were.

Corporate lawyers have long been familiar with the concept of "Thrust Upon" conflicts of interests. This type of conflict can plague Family Lawyers as well, but little has been written to help lawyers resolve these conflicts. A "thrust upon" conflict is an unforeseen conflict between two clients. It is a conflict that

did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients. It is most common in corporate matters when one entity, represented by a corporate law firm, acquires another which has an entity in an adverse position with the original law firm. Family law matters, however, present factual situations that existing rules do not seem to deal with.

## ABA RULES

ABA Model Rule 1.7, comment 4, provided "If a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation, unless the lawyer has obtained the informed consent of the client . . ." This, of course, would require the consent of both clients. However, the conflict can't be discussed with George without first getting the consent of Tom to reveal to George his relationship with George's soon to be ex-wife. And what if Tom does not want George to know about the relationship; or doubts my loyalty to him, for suggesting the disclosure. And if such consents cannot be obtained, must the lawyer withdraw from both representations? And if not, which client should be dumped. There is something a little crass about

dumping the less pecunious client, only because the lawyer does not want to lose the better case. The criterion probably should be determined by which client would be less prejudiced by the withdrawal, but prejudice in a corporate setting is a good deal different than in a domestic relations setting.

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*The Restatement of the Law Governing Lawyers, section 132, comment j provides that "A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients."*

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A new comment, to the ABA Ethic 2000 revisions to the Rules of Professional Responsibility provides, in Rule 1.7, comment 5:

Unforeseeable developments, such as changes in corporate and other organizations affiliations or the additions or realignments of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. In these circumstances, the lawyer may withdraw from one of the representations in order to avoid conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. *See* Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. *See* Rule 1.9 (c).

Although this comment would allow a lawyer to dump a client, if the criteria in the rule are met, there is little guidance as to when, or whether, a lawyer must withdraw, from one,

or both cases. And the caution that the lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn may be problematic if knowledge of that confidential information is relevant to the case in which the lawyer has not withdrawn. The rule may prevent disclosure, but it cannot erase the facts from the lawyer's mind.

Although many states are considering adopting these Ethic 2000 amendments to their rules, these amendments have not yet been universally accepted. There is little common law developed in dealing with these situations. The Restatement of the Law Governing Lawyers, section 132, comment j provides that "A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients." However, the comment continues that if the conflict was reasonably foreseeable, withdrawal will not cure the conflict. Thus withdrawal from Tom's case would be allowed, because he precipitated the conflict by dating George's wife. And then the lawyer, continuing to represent George, would be required to keep confidential the new relationship that George's wife has with Tom.

However, is it not foreseeable that two soon to-be-single adults in a small town might find each other. The Restatement cites a number of cases to support its position, but none of them are in a family law context.

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I resolved my conflict in the following fashion, assuming that George's wife had told Tom that I represented George, I approached Tom with the conflict and asked him to waive the conflict, which he readily did. I then approached George, with alternative of a waiver or withdrawal. Because his case was close to the end, and he did not relish hiring another lawyer, he consented to the conflict. I did not feel good about this resolution, and found it to be somewhat manipulative.

## CONCLUSION

These situation are probably not unusual, especially in smaller communities. Perhaps this area of the law is ripe for development.