



Lawyer Ethics- Conflicts of Interest

By Daniel P. Bestul

We are sometimes asked to represent both sides in matters such as real estate transactions and divorces as a way of keeping down costs. Everyone wants their legal matter to be resolved quickly and easily, with very little conflict, so it is not unreasonable for clients to make this kind of request. In every case, the people making the request are acting with the best of intentions, but we will not represent both sides. To do so would violate the Wisconsin Supreme Court Rules for Professional Responsibility prohibition against conflicts of interest, and more importantly, prevent us from doing the job we should be doing. This article will briefly examine what the rule is, and why your interests may best be served when the lawyer you want declines to represent you.

The Wisconsin Supreme Court Rules governing lawyer conduct say a lawyer *shall* not represent a client if the representation will either be directly adverse to another client, or if the representation “may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests.” Use of the word “shall” makes it clear: this is a mandatory rule, not the lawyer’s choice. And it means that lawyers are prohibited from representing both sides in a legal matter.

The reasons for the prohibition are simple: when you come to an attorney, you discuss confidential information. The more involved the case, the more detailed that information. The conflict of interest rules protect you by making sure that your attorney could never use that information against you. You can be completely open and forthcoming in discussing all the details of your legal matter. A lawyer who has all the facts –both good and bad–can do a much better job of advising and planing a strategy than a lawyer whose information is incomplete.

A lawyer is put in an impossible situation when he or she is receiving confidential information from –and is expected to protect he interests of– both sides in a legal matter.

The conflict rules provide for very few exceptions. For example, if the lawyer “reasonably” believes that there is no adverse effect, *and* if the lawyer obtains all parties’ written consent to the representation, after consultation, a conflict may be waived. However, the Wisconsin Supreme Court has told lawyers it is improper for a lawyer even to ask for such consent if a disinterested, objective third lawyer would advise the client against agreeing to such representation. The Supreme Court has also told lawyers that it is always better to err on the side of declining representation.

The conflict rule covers more than the individual clients of individual lawyers. When you hire one lawyer you really hire the whole firm; as a result, the rule says that each lawyer in the firm has the same conflict of interest that any other lawyer in the firm has. In other words, if you have hired one attorney, no other attorney in the firm may take a position in a related matter adverse to your interests.

The rule protects former clients, as well as current clients, and prevents us from taking on the representation of someone if the representation would be 1) materially adverse to a former client and 2) in a matter that is the same or substantially related to the matter where we previously provided representation.





People have a reasonable desire to save money by having one attorney represent both sides of a simple transaction. For example, most real estate closings, especially those involving personal residences, are without much active conflict between the buyer and seller. Nevertheless, each such transaction inherently hold the seeds for conflicts. There are differing interests on issues like the price of the property, and you will likely tell your lawyer either your top or bottom dollar, depending on whether you are buying or selling. Disputes can also arise as to what contingencies should be included in an offer or counter offer. If the lawyer is not involved until after the parties have reached an accepted offer, disputes can arise at or even after closing on the interpretation and satisfaction of contingencies. Each party will have doubts as to whether that attorney truly acted out of complete and undivided loyalty.

Lawyers are in the business of helping people, and all of us are tempted from time to time to overlook this rule as a favor to someone. In one recent case, *In the Matter of the Guardianship and Protective Placement of Lilian P.*, an experienced elder law attorney tried to represent a woman in contesting her placement under a guardianship, while simultaneously representing her son, who wanted to buy his mother's house a below market value. The appellate court directed the attorney to withdraw from representing the mother due to conflicting interests.

From time to time, we decline to represent current or former clients, citing a conflict of interest under these rules. This leaves the clients unhappy, because they cannot have the lawyer of their choice, and disappoints us as well, because we are unable to help people who have placed their trust in us. In the long run, though, we know our clients are best served by having the advice and counsel of a lawyer who is free of any actual or perceived conflict, who can give the client his or her undivided loyalty. We value each of our clients, and we are truly grateful to have the opportunity to serve them, but at times the best thing we can do for a client is to decline representation, and to help them find another lawyer who can represent them.

The complete Wisconsin Supreme Court Rules and commentary related to Attorney Conduct (SCR Chap. 20) as well as the Ethics Opinions of the State Bar's Standing Committee on Professional Ethics are available at the State Bar website, www.wisbar.org.

