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CONFLICT OF INTEREST

Most people understand the basic concept of Conflict of Interest, but it's more complex than it may at first seem.

COMPETING INTERESTS

In its simplest form, a Conflict of Interest arises when an attorney represents a client who is taking action against another of the attorney's clients: If I represent the defendant, I cannot also represent the plaintiff, because I am unable to protect and further both of their interests at the same time.

An attorney, in acting on behalf of a client, assumes what is known as a "fiduciary" role or duty. This means, on the one hand, that the attorney has been engaged "to attorn for" (act on behalf of) the client. More importantly, however, the attorney assumes a duty *to act in the client's best interest*. Because that obligation is taken *very* seriously, in order to fully grasp Conflict of Interest, you must understand that the attorney not only assumes responsibility for the client's best interest, but *the attorney is actually obligated, under the fiduciary duty, to put the client's interests above his own*.

JOINT REPRESENTATION AND POTENTIAL FUTURE CONFLICT

Another common Conflict arises when an attorney seeks to represent multiple parties in a joint venture, such as a husband and wife who are doing estate planning together. While it may not be immediately obvious that this represents a conflict (because it's certainly in their *collective* interest to coordinate their estate planning), it may not be in their best *individual* interest to make sacrifices for the sake of the other's planning advantages, and we must also look forward to the possibility of separation, divorce, infidelity, etc., and recognize that any of those events would put the parties at odds, and the information they shared when planning together would then become a disadvantage to them individually. In such a case, we weigh the *collective advantage* of coordinated planning against the *potential individual disadvantage* of disclosure, compromise, and sacrifice. We explain the potential benefits and risks. The client typically chooses, in such a case, to "waive the conflict." That is, the client knowingly assumes the risk of conflict, for the benefit she believes outweighs the risk. A written agreement is executed acknowledging the risks and benefits, and excusing the attorney from future liability for those risks, should they arise. (It often requires an acknowledgment that, if a conflict does arise in the future, the attorney may not represent *either* party, because "she knows too much." That is an added disadvantage to both parties, since they must both now get a new attorney.)

AMBIGUOUS REPRESENTATION

A conflict of interest may arise when it is not entirely clear who the client is. A common example of this arises when a few partners come to an attorney for assistance in setting up a company. If the company doesn't exist, it would seem apparent at the outset that the individuals must be the clients. More often, however, the intent is that the company is to be the client (but since it doesn't exist yet, someone has to make the call). In that case, because the company will be owned by several people, there could arise conflicts between the best interests

of the company (to stay in business and be profitable overall) and its individual employees, owners, or managers. Here, we resolve the conflict by pointing out who the client is (or will be), and set out examples of how conflict might arise, and address how it will be resolved. In these cases, we may advise the individuals to secure advice from another attorney to ensure that what's being done with/for/to the company is in the individual interests, so "the people parties" can resolve any disagreements about where the company should go.

Similarly, someone may come to us with a concern about a minor child, or an elderly parent. We must establish very quickly who will be the client, because we may discover, for instance, that the "concerned" child is actually trying to manipulate the elderly parent and gain an advantage with respect to siblings, to change an estate plan, etc. Because what the parent wants, and what the child wants, may not be the same thing (and in fact, may be incompatible), the attorney must have a clear idea, before moving forward, whether he's protecting the elder's interests, or the child's, and must act (and protect information) accordingly.

The Lawyer's Interests

Being a lawyer is a profession. As a profession, it is also a business. A lawyer practices law to make a living, in addition to providing a public service. Because a lawyer is a service provider, reputation is important. Thus, two of a lawyer's key "interests" in operating a practice are 1) to ensure she can make a fair living, and 2) to protect his reputation. It is when these interests become complicated in the representation that some of the most challenging conflicts of interest arise. The most common conflicts are well recognized, and most lawyers wisely do all they can to ensure that those conflicts do not arise in the first place. The reputational interests are best protected by the lawyer always striving to act with integrity and professionalism, and strictly following the Rules of Professional Conduct.

Economic Interests

The lawyer's economic issues are addressed primarily by striving to ensure that, in structuring the engagement with the client, the lawyer's interests are aligned with the client's. In a contingency arrangement, a lawyer's compensation is structured to maximize the lawyer's return when the client's return is maximized: The more *you* get, the more *I* get, so I'm motivated to get you the most I can. In an hourly engagement, the lawyer provides detailed, transparent billing so the client can assess what value was given for the time spent on a matter.

While it may not be obvious to a client who struggles to come up with a retainer, the very fact that a lawyer requires a retainer up-front is actually an effort to protect the client's interests.

Think of it this way:

- Do you like calls from bill collectors? Do you consider them to be friends, someone "on your team"?
- Would you be happy with your boss if your boss told you your paycheck would be late?
- Would you rather your employer gave you an expense allowance (or company credit card) for a business trip, or required you to pay for the trip out-of-pocket and get reimbursed?

A lawyer asks for a retainer because he recognizes that, down the road, things may not always appear to be going your way, or you may be distracted by other matters that come up in your life. In litigation, the road can be long. Your circumstances may change. When things may not look promising, a client might be reluctant to continue paying to move forward (even

when the lawyer points out that this is just part of the process). If a client stops paying, the lawyer is no longer getting paid for his work, and has to become a bill collector. This puts you and the lawyer on different teams, because the lawyer is now trying to protect *his* interest – his income for the work he's performing – while trying to protect *your* interests by keeping the case moving, doing the job right, and not taking shortcuts to try to fit a project or plan into a newer, smaller budget. ***This is conflict.*** In the worst of cases, the lawyer may decide he just wants out, because he doesn't want to continue working if he doesn't think you're going to pay (or you're only going to pay if you win, which we can never promise).

By asking for a retainer that is sufficient to cover the anticipated cost, based on a set of negotiated objectives and goals, the lawyer is assured that he can focus on doing the job, and not worry about having to work for free at some point down the road. While it is often possible - even necessary - to tailor the work we undertake to your needs *and* your budget, working out the balance between them is best done up-front. If we have to make changes to a plan, it's easier to integrate those changes into a meaningful plan if we haven't already done extensive work heading down a different road. Forcing the lawyer to try to fit a new plan into a smaller budget, especially when a good deal of work has already been done, can lead to cutting corners, making ineffective compromises, or in the worst of cases, doing work that isn't thorough or effective - and *nobody* wants a malpractice situation.

By coming to an agreement on the overall plan of representation, and ensuring that the funds are set aside to carry out that plan, the lawyer can be assured that you and he will always be on the same team. After all, if the case reaches a point where you truly feel it's not worth it, you can almost always pull the plug (or settle) and get back the balance of what has not yet been spent.

Reputational Interests

When a lawyer takes a case, he represents that he believes there is a legitimate legal claim. In fact, there are both Rules of Civil Procedure and Rules of Professional Conduct that expressly state that a lawyer can't knowingly bring a frivolous claim, and creating an obligation of due diligence before bringing a claim. This is one of the few areas where, if a judge issues sanctions in a case, the lawyer can be held personally responsible for court costs, the costs of the other party's attorney, or even fines. A lawyer must sign court documents, and it is understood that, by signing those documents, the lawyer is making a sworn statement that he believes the claims are legitimate, and he has gone to some measure of trouble to ensure this. This is the highest reputation issue – the lawyer's reputation before the court.

Even when a claim may be legally valid, what we call a "colorable claim," it may be widely accepted that the claim is not worth the trouble and creates a burden on the court, or seeks to do nothing more than generate fees for the attorney. In the best of cases, the lawyer who does this often gets a reputation before the bar as selfish and unethical; over time, he gets a reputation for being a shyster and wasting the court's time. In the worst of cases, he might actually be charged with a crime known as *barratry*, which is drumming up cases for the sole purpose of profiting from them.

Beyond the lawyer's reputation with the Bar, he is a local businessman. He has to deal regularly with investigators, court reporters, process servers, sheriffs, and local merchants in order to operate. Like any business person, he is expected to pay his bills on time, to pay what he owes, and to provide value for the money he charges. This is yet another reason a lawyer tries to ensure that funds are set aside in trust to cover anticipated costs.