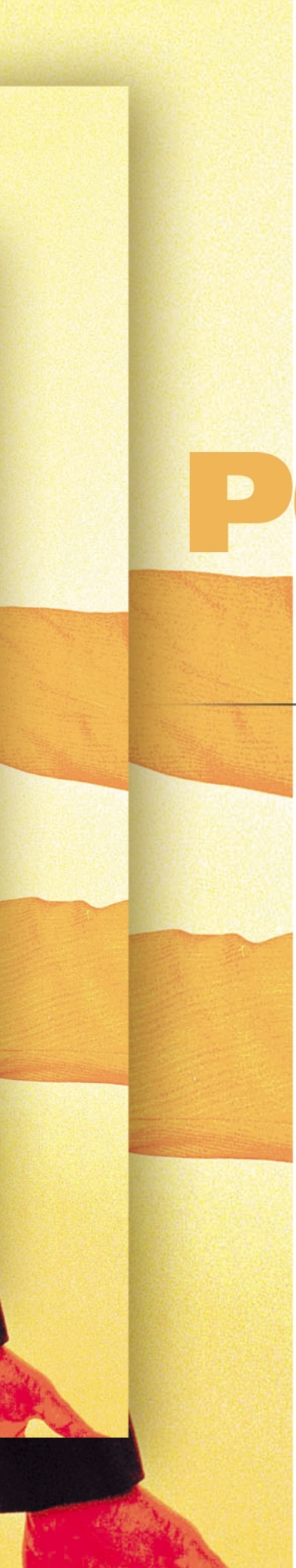

POSITIONAL CONFLICTS

Is it ethical to simultaneously represent clients with opposing legal positions?

By Noreen L. Slank

Your client is a professional liability insurer whose litigation interests are served by a restricted meaning of "professional services." Another client, a homeowner's insurer, will have coverage for a catastrophic loss unless an expansive interpretation of a "professional services" exclusion prevails. One client's needs are served by arguing that post-settlement contribution claims are dead; another's last best hope is that these claims are alive and well-insured. One client prays that spilled milk is no open or obvious danger, while another's most fervent litigation mantra asks you to compel the opposite result.

This is positional conflict. At the trial court level, these situations frequently arise and have generally been tolerated except under the most sensitive of ethical barometers. The traditional cab-rank view[1] is that a lawyer is like a taxi waiting at the stand. Hire the lawyer, and you will be driven any place the law allows. Characterized in more high-faluting terms, one of the salutary benefits of an independent bar is that attorneys are left free to serve as mouthpieces for their clients. They can speak with as many voices as there are clients with positions to advance. There have always been possible business implications if one client learns of your retention as mouthpiece in some unholy war against its favored legal position. But must a lawyer's ethics antennae now be more fine-tuned?

The lawyer-as-taxi ethical model has definitely eroded. This is particularly the case when it comes to appellate attorneys. In Michigan, the case "first out" from our court of appeals governs all later cases until a conflict resolution panel or the supreme court speaks on the question.[2] When the court of appeals case "first out" for one client will defeat another client's appeal, how can the lawyer ethically pursue both results? The ethics question is rarely so clearly framed as this, even for appellate lawyers, since case resolution is fact-influenced and even pure issues of law are often nuanced. But there is something to this notion of positional conflict. Identifying these conflicts has tied those who have studied the question into knots. So how will you know it when you see it?

Michigan Rule of Professional Conduct 1.7, which is identical to current ABA Model Rule 1.7, is not the clearest guide for conduct. MRPC 1.7(a) bars representing clients if a lawyer's representation will be "directly adverse" to another client, and 1.7(b) does the same if the lawyer's representation "may be materially limited by the lawyer's responsibilities to another client." This is so unless: "(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client" and "(2) each client consents after consultation."

When the ABA adopted 1.7, its Comment addressed the question of positional conflicts. It paraphrased the rule regarding advancing antagonistic positions and then created considerable wiggle room:

> *Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.*

In 1998, when the Model Rules were adopted in Michigan, something about this Comment made the supreme court queasy enough that it was excluded from the Michigan Comment. But only the rules are the rules, not the Comments,[3] and reasoning from the fact that our court took the scissors to the ABA Comment on positional conflicts seems risky.

In Michigan, the clearest guide for conduct is Informal Ethics Opinion RI-108, released by the State Bar Standing Committee on Professional and Judicial Ethics in 1991 after the adoption of MRPC 1.7. Formal ethics opinions are adopted by the State Bar Board of Commissioners and therefore represent the policy of the State Bar.[4] Informal opinions do not have such force. They are prepared and issued by a subcommittee of the standing committee, after its chair has resolved any conflicting views.[5]

RI-108 addressed the problem of a lawyer who represented two unrelated clients in two different domestic-relations matters that raised the same issue. Our supreme court had granted leave to appeal in one case. The lawyer anticipated that the supreme court would also grant leave in the second case and consolidate it with the first. One client would succeed, the other fail, and one lawyer was to be the architect of both results.

The panel accepted that the question of "whether the same lawyer may serve both clients loyally" is resolved by reference to a continuum of conflict responses. At one end of the continuum, lawyers may serve both clients without the consent of either. At the other end, the conflict is so intense that attorneys cannot engage in concurrent representation even if clients consent. In between, the client interests are adverse, but dual representation may continue with the consent of both clients.

The RI-108 panel accepted that conflicts can shift position in the continuum during the course of litigation. When dual representation was originally undertaken in the case before them, client consent was not required:

> *In trial courts, where the outcome has no precedential value to subsequent cases, a lawyer is not prevented from advocating to a tribunal a position contrary to that of another client, as long as that advocacy is not frivolous and the matters are not consolidated in one hearing before one adjudicator, MRPC 3.1.*

But by the time this lawyer's two clients came before the supreme court, the conflict had moved to the most extreme part of the continuum where "effective advocacy on behalf of one client would contravene the position of the other." The panel concluded that no disinterested lawyer could reasonably conclude otherwise and "client consent, therefore, would not vitiate the conflict." In keeping with how conflicts are typically resolved, the lawyer was advised to withdraw from representing *both* clients. The panel understood how this undermined the clients' right to counsel of their choosing:

> *In so holding we are aware that the clients suffer greatly by having their successful and apparently sufficiently competent legal representation removed at the supreme court level.*[6]

But the panel "could see no way that result can be ethically avoided."

The question of whether an appellate position may be argued when it is contrary to a position simultaneously being argued in a trial court is not addressed in RI-108. The ability of a client to consent to representation after full disclosure is conditioned by reference to the familiar objective test of whether a disinterested attorney would reasonably conclude that the representation of the clients would not be adversely affected. Even relatively clear ethics opinions are not always clear guides for practice.

In its 1993 opinion, 93-377,[7] the ABA did some groundbreaking work on positional conflicts. The panel parted company with the ABA's own Comment to 1.7 and "did not believe" there should be a distinction drawn between trial and appellate positional conflicts. An attorney must decline to accept the second representation or withdraw from the first whenever there exists "a substantial risk that the law firm's representation of one client will create legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client." ABA Op, 93-377 permits dual representation if both clients consent after full disclosure.

As for that less-neat package, when positional conflicts emerge after both representations are underway, 93-377 parts company with Michigan's RI-108's more strident approach. According to the ABA panel, in such cases, "The law firm must withdraw from one of them." Who receives the services of the lawyer both clients presumably want is not addressed in the ABA opinion, except in

Fast Facts

- *Michigan has a continuum approach to positional conflicts: more tolerance at the trial court level, much less at the appellate level.*
- *The ABA's proposed standard does not look to what level court is involved but to whether there is a "significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case."*

The days when positional conflicts potentially swiped deep but never wide into a lawyer's business are over.

a footnote that says: "If possible, the lawyer should determine which of the representations would suffer the least harm as a consequence of the lawyer's withdrawal and then withdraw from that matter."

In the spring of 2000, the American Law Institute released its long-awaited, *Restatement of the Law Governing Lawyers (3d).* For resolution of positional conflicts, lawyers are to consult Section 128. Its core language tweaks the ABA's 1.7 language somewhat:

> *Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:*
>
> *(1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter.*

The Restatement view on positional conflicts in civil cases is tolerant of a lawyer taking inconsistent positions "in different courts at different times.... If the rule were otherwise, law firms would have to specialize in a single side of legal issues."[8] But different courts at different times is not the typically encountered question. Determining whether representation would be materially and adversely affected in other cases is a function of a number of factors, including the following:

- whether the issue is before a trial court or an appellate court
- whether the issue is substantive or procedural
- the temporal relationship between the matters
- the practical significance of the issue to the immediate and long-run interests of the clients involved
- the clients' reasonable expectations in retaining the lawyer

A lawyer's comfort level should rise as the laundry list of considerations begins to form.

The Restatement Illustrations for positional conflicts accept a trial court/appellate court distinction. Under Illustration 5, a lawyer may take inconsistent positions on an evidentiary question in two trial-level federal courts "even if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding" and may "proceed with both representations without obtaining the consent of the clients' involved." But under Illustration 6, once the U.S. Supreme Court grants certiorari to consider the common evidentiary question of whether "any position that lawyer would assert on behalf of either client would have a material and adverse impact on the interests of the other client." Even informed consent "would be insufficient to permit [that] lawyer to represent each before the Supreme Court."

The ABA recently revisited 1.7 in its Ethics 2000 Commission study and gave 1.7 a major overhaul. The commission's recommended revision was approved at the August, 2001 meeting of the ABA House of Delegates. Final approval must await final consideration of the entire commission report in 2002.[9] The proposed rule re-titles 1.7 to make it clear that only "current" clients are affected and speaks in terms of barring "concurrent" conflicts of interest. A concurrent conflict exists when one client's representation "will be directly adverse to another client" or when "there is a significant risk" that the client's representation "will be materially limited by the lawyer's responsibilities to another client, a former client," or essentially, to any other competing interest. If such a conflict exists, a lawyer may still represent the client so long as:

- The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client
- The representation is not prohibited by law
- The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal
- Each affected client gives informed consent, confirmed in writing.[10]

The proposed ABA Comment to revised 1.7 rejects an explicit conflict rule: "The mere fact that advocating a legal position on behalf of one client may create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest." The Comment then turns its attention beyond whatever "mere facts" "might create" to the more menacing scenarios—those with more power to harm one client while helping another.

The proposed ABA Comment to 1.7 says that a conflict is created "when a decision favoring one client will create precedent likely to seriously weaken the position taken on behalf of the other client." This is the one specific, or at least fairly specific, example the proposed Comment offers to illustrate when positional conflict exists. It speaks most directly, but not exclusively, to appellate lawyers. In more general terms, a lawyer is conflicted "[i]f there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case."

The ABA proposed Comment then adopts the Restatement list of factors, except one—factors relevant to whether the client needs to be advised of the risk. The ABA eliminates the factor listed first in the Restatement approach, whether the issue is before a trial court or an appellate court. Instead, the ABA directs consideration to whether "the cases are pending."

The Ethics 2000 Commission's Reporter's Explanation of Changes to the 1.7 Comment explains that the lack of differentiation between trial and appellate level positional conflicts is deliberate. The commission reacted to the fact that the current 1.7 Comment on positional conflicts had been "uniformly criticized for making too much of the distinction between trial and appellate courts."[11]

The Ethics 2000 reporter's Final Report[12] sums up the positional conflict revision. The reporter supplies an informal definition of "positional conflicts" as those existing when "a lawyer takes inconsistent positions in different tribunals on behalf of different clients." These "may in some circumstances constitute a 'material limitation' conflict."

The only Michigan authority directly on point, RI-108, adopts a continuum view of positional conflicts. Some states have been more resistant than Michigan to giving credence to positional conflicts. For example, California has valued a client's right to be represented by counsel of their own choosing, even in an "almost" worst-case scenario where an attorney argued opposing views to the same federal district court judge.[13]

Arizona permitted dual representation, with client consent and waiver, when lawyers from the same firm simultaneously argued opposing legal issues before the Ninth Circuit.[14] The panel considered how counsel would handle questions from the bench about their partner's argument and labeled such questions as "somewhat uncomfortable" for the lawyers but not "prejudicial" for the clients.

Ethics panel interpretations closer to Michigan's RI-108 exist, as well. Maine faced the issue of one attorney representing two clients with adverse legal positions, in separate lawsuits, at the trial court level.[15] The panel would not "require the bar to adopt screening procedures for issue conflicts, which experience tells us are, in any event, extremely rare." However, this did not rule out the possibility that "contemporaneously arguing opposite sides of the same issue before the same judge or panel of judges" could impair the lawyer's effectiveness and violate the conflict rule.

The District of Columbia accepts that the "paradigm" positional conflict case is arguing opposing positions for two different clients at the same appellate court, but it resisted the view that the ethics analysis should necessarily turn on the nature of the court.[16] This panel favored what it dubbed "a functional approach," one closer to the Restatement and Ethics 2000 view than the original ABA view, identifying factors to be considered regardless of what courts are under consideration.

The New York Bar has also favored the functional Restatement view over the current ABA Comment to 1.7.[17] At issue was pro bono representation before the City Commission on Human Rights. Some of the attorneys who volunteered their time to represent complainants also represented respondents in unrelated matters. This was not viewed as necessarily creating any conflict.

Ethics authors on positional conflicts[18] have tended to be somewhat ivory-towered. Even the now-evolving functional approach of the Restatement view, which seems to be a matured version of Michigan's "continuum" approach in RI-108, is very difficult to apply in practice.

Law firm administration questions that arise in trying to track potential positional conflicts, especially in larger firms that speak with many voices on a myriad of client issues, are sometimes acknowledged in the literature and ethics opinions, but they are not adequately addressed. How will firms track initial issues in cases and then maintain information on those issues over the lifetime of the litigation? Current conflict-checking software is not amenable to such tracking.

When lawyers may appropriately seek informed consent for conflict waiver is uniformly subject to the objective standard of a disinterested lawyer. But with so many views on positional conflict, even among the most learned, those disinterested lawyers may mostly be left scratching their heads. Simultaneously representing clients with adverse legal positions in the same appellate court is the paradigm conflict case on positional conflicts, for reasons that are easily seen. But the days when positional conflicts potentially swiped deep but never wide into a lawyer's business are over. The evolving functional approach to positional conflicts and the significant reform movements currently underway suggest that all lawyers will sometimes have to stop talking out of both sides of their mouths. ✦

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Footnotes

1. Hazard & Hodes, *The Law of Lawyering* (3d), § 10.10, p 10–26.
2. MCR 7.215(H)(1).
3. MRPC 1.0(c) and its Comment.
4. State Bar Standing Committee on Professional and Judicial Ethics, Rule 8(B).
5. State Bar Standing Committee on Professional and Judicial Ethics, Rule 8(A).
6. Mi Eth Op, RI-108.
7. Released October 16, 1993.
8. Restatement, supra at § 128 (f).
9. http://www.abanet.org/cpr/ethics2k.html.
10. Model Code of Professional Conduct Rule 1.7(b) (Proposed Rule 2001), http://www.abanet.org.cpr/e2k-rule17.html.
11. http://www.abanet.org/cpr/e2k-final_rules2.html.
12. http://www.abanet.org/cpr/e2k-mlove_article.html.
13. State Bar of Cal Standing Committee on Professional Responsibility and Conduct, Formal Op. 1989-108 (1989).
14. Professional Responsibility Committee of the Bar of Arizona, Formal Op (1987).
15. Professional Ethics Commission of the Board of Overseers of the Bar of Main, Op 155 (1997).
16. DC Op 265 (1996).
17. NYC Eth Op, 1990-4.
18. J. Michael Medina, "Ethical Concerns in Civil Appellate Advocacy," 43 Southwestern L.J 677 (1989); John Dzienkowski, "Positional Conflicts of Interest," 71 Tex L Rev 457 (1993); Douglas R. Richmond, "Choosing Sides: Issue or Positional Conflicts of Interest," 51 Fla L Rev 383 (1999).