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# The Ethics and Economics of Multiple Client Representation

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## I. Introduction

The problems that attach to representing more than one client often draw upon the New Testament exhortation that "No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to one and despise the other. You cannot serve God and wealth."[1] This represents one helpful viewpoint, limited by the shortcoming assumption that hate and love are the only resulting feelings and behaviors available to the servant.

In reality, problems arise from efforts not to love, maybe not even like, but often to render basic services to clients with conflicting interests.

Let's try a different framework for thinking about this problem: principles of economics. Specifically, we will think out loud in a framework of non-math economics, which will mean either the study of decisions and choice, or the tedious elaboration of the obvious. Maybe we will get to a different vantage point, or simply find another way of saying the same thing.

## II. The Economic Pressures of Multiple Client Representation

Economic forces pressed upon delivery of legal services to multiple clients long before the Great Recession, the Techno-Bubble Burst, or Stagflation. These realities, which are the ancestors of problems, include:

- **Scarcity.** One of the first assumptions of economics is that everything we deem desirable is scarce, in the sense that no one can acquire and enjoy everything that is desirable to possess – which may include the unconflicted loyalty of one's own lawyer.

- **Too many clients chasing too few lawyers.** In some practice areas, there is a natural imbalance between the number of clients (demand) and the number of skilled lawyers available to deliver the required service (supply). Put another way, there aren't enough qualified people to go around. A demand higher than supply is a market-based explanation for why lawyers in narrow practice areas can charge higher fees.

- **Fear of where the next file is coming from.** Demand for professional services, like all other things economic, moves in cycles. Up and down markets inspire different mixtures of market behavior, both by clients and lawyers. When concerns about continued demand increase, pressure to engage in suboptimal behavior can follow more easily.

[1] Matthew 6:24, New American Standard Bible 1995; *see also,* Luke 16:13

## III. The Rules

The conflict of interest rules are found in the first paragraph of the Texas Rules of Disciplinary Professional Conduct. Three of the rules deserve attention when considering potential conflicts in a multiple representation situation.

Rule 1.06 is the general conflict of interest rule. It is the first place to look when considering any conflict of interest question. In pertinent part, this rule forbids representation of a client if doing so:

- Involves a substantially related matter in which that (client's) interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

- Reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person, or by the lawyer's or law firm's own interests.[2]

Economic analysis frames this as a resource allocation issue. Time on task, attention, best efforts and loyalty are scarce. The Rules recognize that representing clients with directly adverse interests; taking on a client whose needs would over-burden a lawyer's existing obligations to other clients or people; or attempting representation that is limited by the lawyer's/firm's obligations, is not appropriate. Expressed in economic terms, multiple party representation risks a distorted, inappropriate allocation of resources.

Rule 1.07 is phrased as the conflict rule that applies to an "intermediary" situation. Given the evolution of the term "intermediary" since the Rules were last revised, it is now a misnomer, and a much-debated aspect of recent efforts to revise the Rules.[3] Whatever the label, this Rule requires two vantage points of thinking, and one task:

- Beliefs that the "matter" of the representation will be resolved without litigation; that if the planned "resolution" is unsuccessful, there is little risk to either client; and that each client can make an adequately informed decision about the joint representation.

- Belief that the representation can be executed impartially, and without improper effect on the responsibilities owed to any client.

- Consultation with each client about the specific aspects of the joint representation: advantages and risks; effect on the attorney-client privilege; and a clear written consent to common representation.[4]

The economic analysis of this rule extends the basic resource allocation question, adding the requirement of cost-benefit analysis. A simple equation for this cost-benefit analysis

[2] Texas Disciplinary Rules of Professional Conduct (hereinafter "the Rules" or "Rule ___"), Rule 1.06 (b).
[3] That debate will not be revived here. "Let's keep this party polite." F. Loesser, *Luck Be A Lady Tonight* (1950)
[4] Rule 107 (a) (1)-(3).

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Ethics of Representing Multiple Parties in the Same Matter

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