

PRESENTED AT THE
32nd Annual School Law Conference

February 23-24, 2017
AT&T Conference Center
Austin, TX

Conflicts, Ethics & Slippery Slopes

Presented By

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“Conflicts, Ethics and Slippery Slopes”

An attorney that practices school law may have many instances in which his or her personal or business relationships have the potential of creating a conflict of interest. School law attorneys play a unique role in that they are also members of the public, and they could have direct involvement with their clients or the clients of opposing counsel even after leaving the office.

For example, attorneys on either side of the bar may have children that are enrolled in school districts that their firms represent or where their clients are employed. An attorney who represents a party in a termination hearing may have a business relationship with an attorney who is randomly chosen as an Independent Hearing Examiner. The attorney for the administration may have a personal relationship with a Board member in a District where they are contracted or retained to do business.

In this paper, we will examine the various conflicts that could occur in the course of representing a school district or school employee. This will not be an exhaustive list as the potential conflicts are limitless.

I. Conflict of Interest within the Client-Lawyer Relationship

According to the Texas Disciplinary Rules of Conduct, “all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests.”¹ The purpose of the rules is to “prescribe terms for resolving such tensions” and to provide a minimum standard of conduct for attorneys with interpretive guidance available in the comments to those rules.”² It is “primarily the responsibility of the lawyer undertaking the representation to address conflicts of interest, but in litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility.”³ All “conflicts of interests can be characterized as ‘serious’ because a conflict effectively gives a disgruntled client or an adversary a kind of ‘wild card.’⁴ In some cases, clients “who suffer damages as a result of conflicts might also bring legal malpractice suits alleging breach of fiduciary duty and negligence claims.”⁵

A. Conflict of Interest: General Rule (Rule 1.06)

- (a) *A lawyer shall not represent opposing parties to the same litigation.*
- (b) *In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:*
 - (1) *involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or*

(2) 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.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

1. Opposing Parties

“Loyalty is an essential element in the lawyer’s relationship to a client.”⁶ An attorney shall not represent opposing parties in the same case.⁷ Likewise, an attorney should not represent a school district and the employee in the same grievance, nonrenewal hearing and/or termination proceeding. An attorney should also not represent a contractor and a school district or a parent and a school district if they are opposing parties in the same litigation. Under this rule, the term “opposing” would apply in “a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party.”⁸

2. Multiple Clients

An attorney has a responsibility to evaluate the potential conflicts that may arise in the course of representing a client or group of clients. The comments to the rule state that “[s]imultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants is governed by paragraph (b).”⁹ Dual representation could be “directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter.”¹⁰ A conflict may develop in the “incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement in claims or liabilities in question.”¹¹

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First appeared as part of the conference materials for the

32nd Annual School Law Conference session

"Conflicts, Ethics and Slippery Slopes"