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# Ethics and the Law: Trying to Love Two Women - By Robert Pelton

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*Trying to love two women is like a ball and chain.  
Trying to love two women is like a ball and chain.  
Sometimes the pleasure ain't worth the strain.  
It's a long old grind and it tires your mind.*

??Trying to Love Two Women,? Sonny Throckmorton

Here are some examples of calls to the Hotline. Be cautious when you are contemplating cases with a potential conflict of interest. Like the songs says, ?It's a long old grind and it tires your mind.?

## Conflict Issue 1

Lawyer X has several criminal cases pending in which law enforcement officer Y is one of the witnesses against his clients. Law enforcement officer Y has been arrested on an unrelated case and has retained Lawyer X to represent him. What ethical obligations, if any, does Lawyer X have to his other clients in which law enforcement officer Y is a witness against them?

In lawyer X's opinion, there is no conflict of interest, as the case against law enforcement officer Y does not involve moral turpitude, and he has not learned anything about any of his clients from law enforcement officer Y.

What, if anything, must Lawyer X disclose to his clients?

Other than conflict of interest, what other ethical considerations should Lawyer X consider?

## Answer 1

I have been in this very boat more than once. I believe it creates a conflict because the info about the officer's pending charge is relevant to the other cases. I always notify all clients of the potential conflict.

If one of the cases where the officer is a witness is set for trial, I withdraw.

Yet I always send the DA a letter advising that my client will plead the 5th in any case where they are called to testify. Never had a judge not back me up.

## Answer 2

Lawyer X has too narrow a view of conflict-of-interest law. It is about the right to conflict-free counsel. Will he go a bit easy on the cop when he cross-examines his current client? Won't a vigorous cross hurt his cop client? What if the cop did something dirty in one of his other cases? Ethically, under the rules (plural) regarding conflict of interest, he must seek consent from his clients. He should put himself in the client's position and see the world from that point of view. Maybe, depending on the facts of his cases, he would evade disciplinary action, as the attached opinion might suggest. But there is a future writ with Lawyer X's name on it. Here is the constitutional law from a recent memorandum I wrote for a judge:

The Sixth Amendment guarantees an accused person the right to the effective assistance of counsel, a right that must be "untrammelled and unimpaired" by any conflict of interest. *Glasser v. United States*, 315 U.S. 60, 70 (1942). Conflict of interest jurisprudence is meant "to assure vindication of the defendant's Sixth Amendment right to [conflict free] counsel." *Acosta v. State*, 233 S.W.3d 349, 356 (Tex.Crim.App. 2007). Accordingly, it reaches any conflict of interest, including those involving former clients and third parties. *Id.* See, e.g., *United States v. Soto Hernandez*, 849 F.2d 1325, 1328 (10th Cir. 1988)(Sixth Amendment right "extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person?); *People v. Peters*, 951 P.2d 926, 928 (Colo. 1998)(disqualifying two defense attorneys because one of them had previously represented a person the defense identified as an alternate suspect). Courts do not hesitate to find an attorney's trial performance for his client was compromised due to a previous attorney-client relationship. See, e.g., *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003); *Brink v. State*, 78 S.W.3d 478 (Tex.App. Houston [1st] 2001, pet. ref'd).

An actual conflict of interest exists where "counsel is required to make a choice between advancing his client's interests in a fair trial or advancing other interests . . . to the detriment of his client's interest." *Acosta*, 233 S.W.3d at 355 (quoting *Monreal v. State*, 947 S.W.2d 559, 564 (Tex.Crim.App. 1997)). Once a conflict of interest is shown, prejudice is presumed. *Banda v. State*, 890 S.W.2d 42, 60 (Tex.Crim.App. 1994). Courts presume prejudice because "the evil [of representing conflicting interests] is in what the advocate finds himself compelled to refrain from doing? at any stage of representation. *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978)(?It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain . . . tasks?); *Cuyler v. Sullivan*, 446 U.S. 335, 349?50 (1980). As the Fifth Circuit recognized:

When there is a conflict of interest . . . the prejudice may be subtle, even unconscious. It may elude detection on review. A reviewing court deals with a cold record, capable, perhaps, of exposing gross instances of incompetence but often giving no clue to the erosion of zeal which may ensue from divided loyalty. Accordingly, where the conflict is real . . . a denial of the right to effective representation exists, without a showing of specific prejudice.

*Castillo v. Estelle*, 504 F.2d 1243, 1245 (5th Cir. 1974).

Keith S. Hampton

## Conflict Issue 2

The defendant that is charged with killing former client (Capital Murder?non-death) wants to retain me. Can I do it? Since former client is now deceased, is there no longer attorney-client privilege?

## Answer 1

Privilege survives death. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (this is the infamous Vince Foster case).

Keith S. Hampton

## Answer 2

Depending on what the defense is, there is likely a conflict. If the lawyer has to attack the actions or character of the deceased former client, then he cannot represent the new potential client. If the defense is alibi, and the potential client was in another state at the time, it could be a closer question. I agree with everything Professor Hampton said.

Jack Zimmermann

If you do decide to represent co-defendants, make it clear to clients and advise the Prosecutor and Judge. The love you get from representing co-defendants may turn in to a major dilemma when you end up sued?whether it be a grievance, malpractice suit, fee dispute, or writ?and you will feel like you are wearing a ball and chain.

Thanks for the help from Keith Hampton, Larry McDougal, Jack Zimmermann, Joseph Connors, Chuck Lanehart, and members of the Ethics Committee.

Remember, the **Ethics Hotline** is like Las Vegas: We never close. Call if you have an issue, and you will get a response within 24 hours or sooner?(512)646-2734.

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