Inside Oregon Ethics: Morals of the Marketplace
Peter R. Jarvis, Esq
June 2002

In every American jurisdiction except Texas, a single lawyer or firm that represents a client in a single matter cannot, without that client's consent, represent another party directly adverse to that client in any other matter. This broad duty of loyalty applies even if the matters are factually and legally unrelated and even if different lawyers in different offices are involved.

In fact, this same duty will at times apply to corporate conglomerates with multiple related entities. On the other hand, many (if not most) current-client conflicts and future-client conflicts can be waived. In fact, a number of law firms have begun to make blanket or future conflicts waivers a regular part of their engagement process. If, in other words, Client A wants to hire Firm B to represent it on Matter C, Client A must agree up front that Firm B is at liberty to represent Clients D through Z adversely to Client A, so long as Matter C is not involved. Leaving aside for the moment the question whether such waivers will always be enforceable, their intent is clear: to replace a duty of loyalty to current clients that is as broad as possible with one that is, by consent, as narrow as possible.

The emotional and economic logic behind the positions taken by lawyers in such circumstances is also clear. The lawyers believe that they are trustworthy, that the quality of their advice in a particular matter will not be adversely affected by conflicts relating to other matters and that any attempts by clients to limit lawyers' freedom of representation will harm the clients by limiting the ability of clients to choose lawyers on a matter-by-matter basis.

Many lawyers will also assert that the modern era, in which clients show reduced loyalty to individual firms, requires a well-developed and frequently implemented system of conflicts waivers. The logic of clients who oppose such waivers and who want more control over what their law firms do is clear as well. Such clients often believe that the lawyers want to have their cake and eat it too: to represent everyone against everyone in a world in which the lines are periodically redrawn at the lawyers' convenience. Such clients also believe that lawyers ought to spend more time being grateful for the work the lawyers have than being ungrateful for the work they lack.

When lawyers and clients clash over conflicts, there is no one-size-fits-all answer. Some clients will not waive any conflicts, while others will more or less readily give blanket waivers. Some will give waivers if, but only if, certain criteria are met. For example, adverse business negotiations may be acceptable but adverse litigation may be unacceptable. Similarly, a client may be willing to agree to an adverse relationship if, but only if, the lawyers who work for that client are not allowed to work adversely to it.

In the real world in which the decision to waive or not to waive (or to ask or not ask for waivers) is commonplace, how are these decisions made? The answer is simple: In those situations (presumably the majority) in which both lawyers and clients understand what they are doing, the ultimate decisions will depend on relative bargaining power. In other words, actual or perceived leverage is likely to prove more important than bare legal principles or abstract legal duties.

Justice Cardozo's famed comments about fiduciaries notwithstanding, the mere "morals of the market place" are likely to prevail over "the punctilio of an honor the most sensitive." If, for example, Client A believes that Firm B really does have the best lawyer in the world to represent it on Matter C, Client A will be more likely to give Firm B a conflicts waiver for unrelated matters than if Client A were convinced that dozens of other firms could do just as good a job. And if Firm B sees work for Client A as critical to the firm's long-term success and not just as a one-shot representation, Firm B is more likely to work for Client A without significant waivers-perhaps without any waivers at all.

This outcome should surprise no one. In the modern-day market for legal services, market prices and market practices should be expected to prevail. This does not mean, however, that unbridled market forces must always prevail in the conflicts-waiver context any more than they always do in other contexts. For example, courts can and should be prepared to hold sufficiently extreme waivers in sufficiently extreme circumstances to be unconscionable, just as they do under Article 2 of the Uniform Commercial Code (the "UCC"). Similarly, courts can and should be prepared to hold that specific waiver provisions are voidable on the ground that their presence or meaning was not sufficiently clear and conspicuous to the client, just as under the UCC. And some waivers may simply be declared void on public policy grounds, just as personal-injury damage waivers may be void.

One might also consider whether, in particular circumstances, conflicts waivers could be deemed to fail of their essential purpose. In fact, one could probably classify most, if not all, conflicts waiver/disqualification cases along these kinds of market-oriented lines. An approach to modern conflicts waivers that expressly recognizes the market forces at work would have great potential benefit. If nothing else, it would be free of some of the unnecessary sanctimony that sometimes affects conflicts analysis. And an express recognition of the fact that we are operating in a marketplace should allow lawyers, clients and courts to focus on the critical, ultimate questions: whether the bargains struck by the parties are fair and are fairly understood.

Nevertheless, two final points are worth noting. First, and like all markets, the legal-services market has imperfections. Due to imperfect information, many clients-even relatively sophisticated ones-may believe, for example, that the available regional or national supply of competent and willing counsel is much less deep than it is. These clients may therefore be more willing to grant waivers than they would be if they were more aware of other viable market alternatives. At the end of the day, however, the appropriate remedy for problems caused by imperfect information should be for interested lawyers to do what they can to raise client awareness of potential choices and for interested clients to do the same.

Here, as elsewhere in our economy, our bias should be toward pro-competitive solutions that improve the marketplace and not toward artificial limitations. If an increased flow of information leads to increased competition between lawyers on price or nonprice terms, clients and the economy are likely to be the better for it. Second, there is much anecdotal evidence to support the view that bar disciplinarians in a number of states no longer pursue discipline for garden-variety conflicts on the grounds that they must conserve resources in order to pursue trust-account converters and the like.

The worst of all possible worlds is for lawyers to be nominally governed by a set of rules that they openly ignore. This breeds cynicism and disregard for the law. One way or the other, conflicts rules and conflicts realities must be brought into alignment.

End of article../
**Footnotes to this article were not reprinted here due to space limitations. Contact the author for authority cited.

About the author: Peter R. Jarvis, Stoel Rives LLP- (503) 294-9456,
e-mail: prjarvis@stoel.com ; B.A., Harvard University (1972); M.A. (economics), J.D., Yale University (1976); member of the Oregon State Bar since 1976 and the Washington State Bar since 1981; partner, Stoel Rives LLP, Portland; former member, Oregon State Bar Legal Ethics Committee, Washington State Bar Rules of Professional Conduct Committee; Chair of the Stoel Rives Professional Responsibility practice group. Mr. Jarvis is a frequent writer and speaker on legal ethics issues, and his practice includes advising attorneys with legal ethics questions and defending attorneys accused of legal ethics violations. He is a member of the American Law Institute and is also this year's Chair of the ABA Center for Professional Responsibility Conference Planning Committee. In 1993, Mr. Jarvis received the Harrison Tweed Special Merit Award from ALI-ABA for his ethics CLE work.

If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

An ethics article by attorney Peter R. Jarvis appears each month in the Oregon Law Journal . Peter gives advice to and represents lawyers who have matters of discipline before the Oregon State Bar.
E-mail your questions directly to Peter R. Jarvis. Prior articles by Peter can be seen by going to the Archives navigation button on the left, above.