

2013

## Lawyer Conflicts of Interest and Sophisticated Clients

Kevin C. McMunigal

*Case Western Reserve University School of Law*

Follow this and additional works at: <https://dc.law.utah.edu/onlaw>

 Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

McMunigal, Kevin C. (2013) "Lawyer Conflicts of Interest and Sophisticated Clients," *Utah OnLaw: The Utah Law Review Online Supplement*: Vol. 2013, Article 20.

Available at: <https://dc.law.utah.edu/onlaw/vol2013/iss1/20>

This Article is brought to you for free and open access by Utah Law Digital Commons. It has been accepted for inclusion in Utah OnLaw: The Utah Law Review Online Supplement by an authorized editor of Utah Law Digital Commons. For more information, please contact [valeri.craigle@law.utah.edu](mailto:valeri.craigle@law.utah.edu).

# LAWYER CONFLICTS OF INTEREST AND SOPHISTICATED CLIENTS

Kevin C. McMunigal\*

## I. INTRODUCTION

I like many things about Professor Milan Markovic's article on which I have been invited to comment. He has chosen an interesting, important, and timely topic and provides a detailed and persuasive critique of the ability of sophisticated clients to understand and protect themselves from the dangers presented by attorney conflicts of interest. I found particularly interesting his examination of the psychological issues that surround a lawyer obtaining a client's consent to a conflict of interest.

I devote this commentary, though, to two aspects of Professor Markovic's article I find puzzling. The first is the modesty of the remedial measures he proposes. The second is his apparent ambivalence about whether the Sullivan lawyers acted unethically.

## II. ARE HIS REMEDIES ADEQUATE?

I agree with Professor Markovic that lawyer conflicts of interest pose serious risks to the representation of clients. I also agree that clients—both sophisticated and unsophisticated—have limited ability to evaluate and protect themselves from these risks. But Professor Markovic does not pursue the logic of his analysis to the conclusions it seems to compel.

He proposes two relatively modest language changes, one to Model Rule 1.7(b) and the other to the Comment to Model Rule 1.7.<sup>1</sup> Replacing Model Rule 1.7(b)'s "competent and diligent representation" language is a sound suggestion because that phrase is misleading. But I would not replace it with the language Professor Markovic proposes about meeting a client's objectives. Many lawyers who provide excellent representation fail to meet their client's objectives. Doesn't virtually every criminal defendant, for example, have the objective of avoiding conviction and imprisonment? Many defense lawyers fail every day to achieve this client objective while nonetheless providing effective and ethical representation to their clients.

His proposed additions to the Comment to Model Rule 1.7 state that a lawyer "shall regularly consult with the client as to the conflict of interest's effect on the representation."<sup>2</sup> This language appears—incorrectly—to assume that it is permissible for a lawyer to allow a conflict to have any effect on representation.

---

\* © 2013 Kevin C. McMunigal, Judge Ben C. Green Professor of Law, Case Western Reserve University School of Law.

<sup>1</sup> Milan Markovic, *The Sophisticates: Conflicted Representation and the Lehman Bankruptcy*, 2012 UTAH L. REV. 903, 942.

<sup>2</sup> *Id.* at 942.

Professor Markovic's proposed changes to the Comment also include clarifying that a client can revoke consent to a conflict as the representation develops.<sup>3</sup> Such clarification is a sound proposal, though it does not seem to me to add anything beyond what other Model Rules already require.

In sum, his proposals strike me as not offering much of a change from what the Model Rules already require. And both his proposals seem far too modest to remedy the scope and seriousness of the problems he vividly describes.

Lawyer conflicts of interest create perverse incentives that threaten to impair the lawyer's representation of a client. Professor Markovic points out that, for a number of reasons, lawyers are unlikely to resist these incentives.<sup>4</sup> Psychological factors such as chronic overconfidence, underestimation of the dangers conflicts pose, and the phenomenon of "moral licensing" support this pessimistic assessment.<sup>5</sup> A lawyer's economic incentive to not turn away business and lack of deterrence due to the low probability of disciplinary sanctions increase the chances of a lawyer succumbing to the perverse incentives conflicts create.<sup>6</sup> And, he explains, clients—even sophisticated clients—are not typically able to protect themselves from the risks posed by lawyer conflicts.<sup>7</sup> Clients often lack sufficient information, tend to overestimate a lawyer's ability to resist the perverse incentives conflicts create, and are likely to be misled by a lawyer understating the risks posed by conflicts.<sup>8</sup>

So, Professor Markovic tells us, conflicts pose serious risks, lawyers are unlikely to resist these risks, and clients are unable to protect themselves. Given this ominous confluence, why does Professor Markovic not propose more drastic remedies than he does?

#### A. *Eliminating Prospective Waivers*

I wonder, for example, why he does not recommend, as others have,<sup>9</sup> entirely eliminating prospective waivers by sophisticated clients. He criticizes such waivers and challenges the notion that sophisticated clients are able to protect themselves from the risks they pose. He warns that "Lehman's experience should . . . cast some doubt" on prospective waivers<sup>10</sup> and that critics of such waivers "may well

---

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* at 914–22, 929–32.

<sup>5</sup> *Id.* at 916 (citing Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 79 (2009)).

<sup>6</sup> *See id.* at 931–32.

<sup>7</sup> *Id.* at 923, 937.

<sup>8</sup> *Id.* at 915–16.

<sup>9</sup> *See, e.g.*, Lawrence J. Fox, *All's O.K. Between Consenting Adults: Enlightened Rule on Privacy, Obscene Rule on Ethics*, 29 HOFSTRA L. REV. 701 (2001); Lawrence J. Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012), <http://yalelawjournal.org/images/pdfs/1063.pdf>.

<sup>10</sup> Markovic, *supra* note 1, at 938.

be correct.”<sup>11</sup> But, for some reason, Professor Markovic stops short of recommending that ethics codes ban prospective waivers. He proposes, instead, additions to Model Rule 1.7’s Comment clarifying clients’ right to revoke such waivers.

Clarifying a client’s right to revocation may be a positive step. A client’s decision about revocation of a conflict consent obviously takes place further along in a representation than the initial decision to consent, so at least in theory more information should be available to the client for use in assessing the risks posed by the conflict. But other problems that Professor Markovic argues undermine a client’s ability to make a sound decision about consenting to a conflict in the first place are likely also to undermine the client’s ability to make a sound decision about revocation. A revocation right just gives a client a second crack at making a decision that Professor Markovic shows us the client is in a poor position to make.

Consider in the context of revocation the following problems. Given a lawyer’s economic incentive to not turn away business, is the lawyer likely to fully inform a client of the facts relevant to a revocation decision? Given the overconfidence of lawyers in their ability to resist the dangers conflicts pose, is a lawyer likely to adequately advise a client making a revocation decision about the dangers a conflict poses? If clients tend to overestimate the ability of their lawyers to resist the perverse incentives created by conflicts, won’t that tendency undermine the client’s ability to make a good decision about revoking consent? If the fact that a lawyer has disclosed a conflict tends to mislead a client into overestimating the chances that the lawyer will resist the incentives created by the conflict, won’t this psychological tendency lead the client to make a bad judgment about revoking a prior consent?

The costs of switching lawyers partway through a representation are also likely to undermine the effectiveness of revocation as a remedial device by discouraging clients from using it. A client is likely to resist switching lawyers because she will often have to pay to get a new lawyer up to speed. The client may also fear that switching lawyers during a representation will decrease the chances that the representation will be successful.

In sum, revocation does not seem nearly as proportionate a remedy to the many serious problems Professor Markovic points out in his article as eliminating prospective waivers altogether.

### *B. Why Allow Clients to Consent to Conflicts?*

Given, as Professor Markovic informs us, the pervasiveness and seriousness of the problems that plague clients consenting to lawyer conflicts, I also wonder why Professor Markovic does not propose that ethics codes do away entirely with allowing clients to consent to lawyer conflicts of interest. In short, why not make all conflicts that pose significant risk to a representation—conflicts that trigger Model Rule 1.7(a)(2)—unconsentable? If lawyers are unlikely to resist the risks

---

<sup>11</sup> *Id.*

conflicts pose and clients are unable to understand or prevent their lawyers from succumbing to these risks, and, as Professor Markovic argues, there is a “societal interest” in unimpaired representation of clients,<sup>12</sup> why should legal ethics codes ever allow clients to consent to conflicts of interest?

The Model Rules currently do prohibit lawyers from obtaining client consent in some conflict of interest situations. Model Rule 1.8(j), for example, barring a lawyer from having “sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced,” contains no client consent provision.<sup>13</sup> Similarly, Model Rule 1.8(c), prohibiting a lawyer from drafting an instrument, such as a will, that gives the lawyer a substantial gift, has no client consent provision.<sup>14</sup> Because these conflict situations pose such high risks and present such difficult detection and proof problems, the Model Rules do not allow clients to consent. Given the high level of risk as well as the detection and proof problems all conflicts of interest create, why not just eliminate the ability of clients to consent to lawyer conflicts?

As his title suggests, one of Professor Markovic’s primary points is that *sophisticated* clients have limited ability to understand and protect themselves from the risks posed by lawyer conflicts of interest. He makes this point persuasively. But the problems that hamper sophisticated clients in making sound decisions regarding lawyer conflicts of interest also hamper unsophisticated clients. Each of the problems he describes applies equally, or with greater force, to unsophisticated clients when dealing with lawyer conflicts. As Professor Markovic acknowledges, “*all clients*, regardless of their level of sophistication, may have difficulty assessing the significance of attorney’s conflicts”<sup>15</sup> and “[c]lients of *all levels of sophistication* deserve to be represented by attorneys who are entirely devoted to protecting their clients’ interests.”<sup>16</sup>

If sophisticated clients—repeat players who are often advised by in-house lawyers about conflicts—are unable to evaluate and protect themselves from the dangers posed by lawyer conflicts, does it not then follow that clients who are *not* repeat players and *lack* the advice of an independent lawyer are even less able to evaluate and protect themselves from lawyer conflicts than sophisticated clients? Thus, unsophisticated clients need and deserve an even greater level of protection. Is it not the logical conclusion to Professor Markovic’s critique, then, that Model Rule 1.7 and Model Rule 1.9 should be modified to eliminate any provision that allows clients—whether sophisticated or unsophisticated—to consent to lawyer conflicts of interest?

### III. DID THE SULLIVAN LAWYERS ACT UNETHICALLY?

---

<sup>12</sup> *Id.* at 944.

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2009).

<sup>14</sup> *Id.* R. 1.8(c).

<sup>15</sup> Markovic, *supra* note 1, at 904 (emphasis added).

<sup>16</sup> *Id.* at 945 (emphasis added).

Professor Markovic appears conflicted at many points in his article about whether to fault the Sullivan lawyers. The overall thrust and tone of Professor Markovic's article strike me as clearly critical of the Sullivan lawyers. Indeed, he presents their representation of Lehman as "a cautionary tale for both attorneys and their clients,"<sup>17</sup> illustrating the need for modification of legal ethics codes. But he seems ambivalent about (1) whether conflicts impaired the Sullivan lawyers' representation of Lehman and (2) whether the Sullivan lawyers violated any ethics rules.

#### A. *An Impaired Representation?*

Professor Markovic concludes at several points that the Sullivan lawyers allowed conflicting interests to impair their representation of Lehman. He states, for example, at one point that "there is strong reason to believe that" conflicts of interest "*undermined the representation.*"<sup>18</sup> He devotes a section of his article to discussing "three specific conflicts of interest *that impacted the representation* that Sullivan provided to Lehman."<sup>19</sup> In the next paragraph, he writes that these conflicts "*compromised the representation* that Sullivan could provide to Lehman."<sup>20</sup> At another point in his article, he states, "Sullivan had a conflict of interest that *materially limited the representation* of Lehman."<sup>21</sup>

Professor Markovic, though, at other places in his article, expresses a more guarded and qualified position about whether conflicts impaired the Lehman representation. Here he writes that the Sullivan lawyers' conflicts *may* have or *appeared* to have impaired the representation. For example, he tells us that "three conflicts of interest . . . *may have interfered* with Sullivan's representation of Lehman"<sup>22</sup> and "*may have impacted* the representation."<sup>23</sup> At other points he states, "Sullivan's relationship with Lehman's competitors, as well as Lehman acquirers, *appeared* to compromise its representation"<sup>24</sup> and "*appeared* to affect Sullivan's representation."<sup>25</sup> In a similar vein, he writes that "[t]here is some evidence to suggest that Sullivan failed to fully protect Lehman."<sup>26</sup>

So Professor Markovic leaves me wondering: Does he believe that the Sullivan conflicts actually impaired the Lehman representation? Or does he think the conflicts may have or appeared to have impaired the representation? In my opinion, the facts recounted in Professor Markovic's article are insufficient to demonstrate that Sullivan's representation was impaired and thus unethical. More

---

<sup>17</sup> *Id.* at 906.

<sup>18</sup> *Id.* at 905 (emphasis added).

<sup>19</sup> *Id.* at 916 (emphasis added).

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> *Id.* at 920 (emphasis added).

<sup>22</sup> *Id.* at 905 (emphasis added).

<sup>23</sup> *Id.* at 929 (emphasis added).

<sup>24</sup> *Id.* at 905 (emphasis added).

<sup>25</sup> *Id.* at 910 (emphasis added).

<sup>26</sup> *Id.* at 925.

information would be needed from both Lehman and the Sullivan lawyers to resolve these questions.

Professor Markovic's apparent ambivalence here may be a product of the limitations on the information available to him. He acknowledges as much when he says at the outset that it is "impossible to know all of the particulars" of the representation.<sup>27</sup> Despite his impressively detailed account of the Lehman bankruptcy and his familiarity with what has been written about it, Professor Markovic appears to encounter in his case study precisely the sort of monitoring problems that clients and the bar face in detecting and proving whether a conflict of interest impaired a representation.

Such monitoring difficulties are a primary reason we have conflict of interest rules. We do not want lawyers to operate in situations that pose high risks of impaired representation when the client and the bar have limited ability to detect and prove whether such impairment actually occurs. These monitoring problems provide a powerful reason to curtail the ability of lawyers to seek client consent to conflicts of interest.

#### *B. Did the Sullivan Lawyers Act Unethically?*

Professor Markovic's numerous statements that conflicting interests "undermined," "compromised," and "materially limited" Sullivan's representation of Lehman, if accurate, would indicate that Sullivan failed to adhere to its ethical obligations. But despite these pejorative assessments, Professor Markovic goes out of his way elsewhere in the article to avoid giving a negative conclusion about the Sullivan lawyers' ethics. He writes that "Sullivan undoubtedly endeavored to represent Lehman to the best of its ability, and the purpose of this Article is not to determine whether Sullivan violated professional standards with regard to attorney conflicts of interest."<sup>28</sup> Elsewhere he writes, "there is no reason to believe that Sullivan did not, on the whole, represent Lehman competently and diligently."<sup>29</sup>

As I stated above, I think the facts recounted by Professor Markovic are not sufficient to demonstrate whether Sullivan's representation was impaired and thus unethical. What I find troubling, though, is Professor Markovic's apparent view that an impaired representation is not necessarily an unethical representation. In other words, if he thinks the representation of Lehman was "undermined," "compromised," and "materially limited" by Sullivan's conflicts of interest, I am at a loss to see how he can conclude that the Sullivan lawyers adhered to their ethical obligations and represented Lehman "competently and diligently." Even his more qualified statements—that the conflicts *may* have impaired or *appear* to have impaired the representation—are at odds with his statement that "there is no reason to believe that Sullivan did not, on the whole, represent Lehman competently and

---

<sup>27</sup> *Id.* at 905.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 917 (emphasis added).

diligently.”<sup>30</sup> If the conflicts appear to have impaired the representation, does that not provide reason to believe that Sullivan failed to represent Lehman competently and diligently?

The only way I can see that Professor Markovic could conclude that representation impaired by conflicts of interest is not unethical would be to view Lehman as having consented to such impaired representation. Professor Markovic tells his readers quite candidly that he does not know what sort of consent Lehman gave, but that he assumes Sullivan obtained from Lehman a prospective conflicts waiver.<sup>31</sup> The incongruity between describing a representation as impaired but nonetheless ethical—as well as some other passages in Professor Markovic’s article—suggest to me that he believes that a client’s consent to a conflict of interest necessarily entails the client consenting to impaired representation. For example, his proposed language for the Comment to Model Rule 1.7, requiring lawyers to “regularly consult with their clients as to a conflict of interest’s effect on a representation,” appears to assume that it is permissible for a lawyer to allow a conflict to have an effect on a representation.<sup>32</sup>

If this is in fact Professor Markovic’s view, he is, in my estimation, mistaken. When a client consents to a concurrent conflict of interest, the client gives up the protections afforded by Model Rule 1.7, but not the protections afforded by other ethics rules, such as Model Rules 1.1, 1.2, 1.3, 1.4, and 1.6. So if, for example, Sullivan obtained critical information from Merrill that was not protected by a confidentiality obligation to Merrill, Model Rule 1.4 on client communication would have required the Sullivan lawyers to disclose that information to Lehman notwithstanding any conflict consent given by Lehman.<sup>33</sup> And if the Sullivan lawyers failed to diligently investigate Barclays as a potential Lehman buyer, they would have violated both Model Rule 1.1 on competence and Model Rule 1.3 on diligence, again notwithstanding any conflict consent by Lehman.<sup>34</sup>

#### IV. CONCLUSION

Notwithstanding the questions raised above, Professor Markovic’s article makes an important contribution to the ongoing debate about prospective waivers, conflicts of interest, and how ethics codes should treat both sophisticated and unsophisticated clients. It should also stimulate public conversation and concern about the dangers conflicts of interest pose to the health and integrity of our financial system.

---

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 905.

<sup>32</sup> *Id.* at 943.

<sup>33</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.4 (2009).

<sup>34</sup> See *id.* R. 1.1; *id.* R. 1.3.