

The Hazard: Conflicts of Interest

BY EMILY J. EICHENHORN

Many lawyers do not recognize the full extent of the complexity in the matters they undertake on behalf of multiple parties and may not have the time—or take the time—to distinguish between all of the interests that must be considered during the course of representation.

Moreover, even when the various interests are acknowledged and monitored, duties that arise often are misunderstood by both the lawyer and the parties.

Failing to recognize the conflicts that may arise, for instance, from business relationships, such as corporations and partnerships, may cause you to face malpractice claims based on breaches of duties of loyalty to the various parties involved in the matter.

In seeking to avoid that scenario, it is most important to remember that professional duties can arise by implication. The key is the putative client's perception: If he or she reasonably believes that you are representing his or her interests and you later act adversely to them, you may have a conflicts problem.

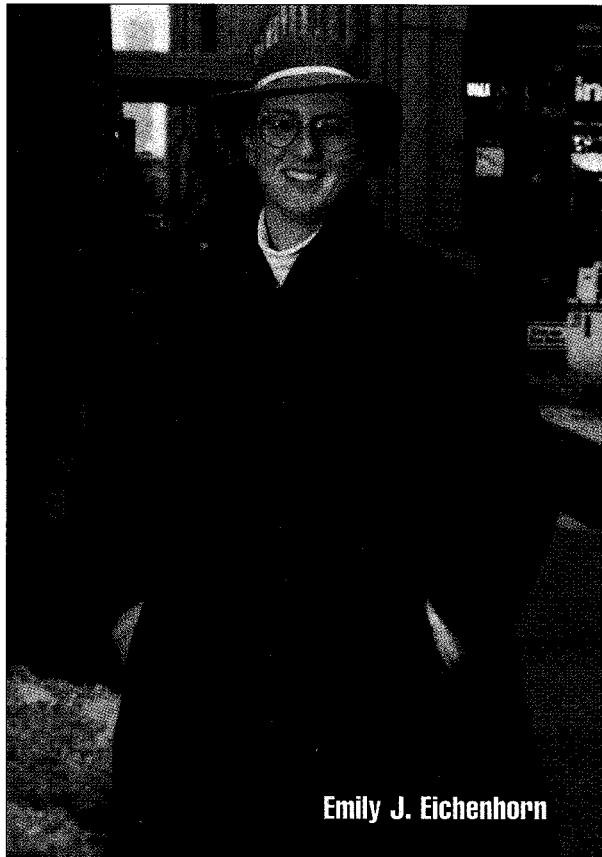
That is why it is so important for a lawyer to establish the parameters of his or her relationship with the participants in the very first meeting with them. You should:

- Communicate orally and in writing what you will and will not

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do, and who you will and will not represent.

- Anticipate misunderstandings about your relationship and address them proactively.



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- Be sure to include explanations of how the various participants' interests may diverge and point out that they may wish to retain separate counsel accordingly.

- Act consistently. No matter what you say, it is what you do that will ultimately define who your client is.

In no other legal setting is it truer that actions speak louder than words. If you state at the outset that you will represent only the

corporation or partnership, but then act like the lawyer for one of the participants, that is exactly how you are likely to be treated by the other parties in claiming that you breached a duty of loyalty to them.

With proper, informed consent—which means you have adequately explained all the potential complications of the situation—you may represent all the participants. But be careful to attend to your professional responsibilities with respect to conflicts and confidentiality in that setting.

For instance, every client has a right to receive all material information relating to that client's representation. Consequently, there is no right of confidentiality among joint clients.

In this context secrets constitute conflicts of interest.

If you are obligated to keep secret any information from one participant that is material to your representation of the endeavor, you probably can no longer ethically continue with the multiple representation.

Remember that relationships among the parties are dynamic and, as counsel, you cannot ignore signs that interests are beginning to diverge.

When conflicts develop among the multiple parties you represent, you have an obligation to counsel them that joint representation may no longer be appropriate and, if necessary, withdraw from the matter altogether.

Louis Brandeis propounded the concept of a "lawyer for the transaction" who serves no individual master but instead operates as a sort of parental protector of fundamental fairness.

That is a myth. All lawyers, including those involved in transactions matters, must act on behalf of identifiable masters.

It is the lawyer's duty to recognize the appropriate loyalties and act accordingly.