

Conflict of Interest

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Five years ago, Joseph Margolis began an important paper on conflict of interest with the observation:

The notion of a conflict of interest is singularly ignored in most attempts to examine the nature of moral and legal constraints. In attempting to supply an analysis, therefore, we will be breaking relatively fresh ground.^I

Had Margolis made that observation only yesterday, it would have been just as true. There is, of course, now much more being written about whether this or that is a conflict of interest. The practical literature of business and professional ethics is much richer than it was even five years ago. But Margolis was talking about "the notion of a conflict of interest", not about this or that particular conflict. He set out to supply an "analysis" missing from the literature. If Margolis was breaking relatively fresh ground five years ago, the ground remains relatively fresh. Margolis analyzed conflict of interest as an avoidable exploiting of conflicting roles. No one has (as far as I can tell) publicly disagreed with him.

But was Margolis breaking fresh ground? If one examines the literature of what is generally known as "business and professional ethics", it certainly seems he was. If, however, one examines instead the special literature of legal ethics, Margolis' fresh ground looks about as fresh as an Illinois corn field after harvest. Legal ethics long ago worked out an analysis of conflict of interest as a situation tending to undermine independent professional judgment. The analysis can, I think, easily be generalized to cover situations other than those lawyers face. So generalized, the analysis is both importantly different from Margolis' and significantly better. The analysis is importantly different because it connects conflict of interest with undermined judgment within a role rather than with conflict between roles; and significantly better because it does not (as Margolis admits his does) require ascribing conflicts of interest to situations commonly thought not to be conflict-of-interest situations or imposing a number of more or less *ad hoc* restrictions on the basic analysis to avoid such ascriptions. That, at least, is what I shall try to show here.

I shall first state (what I shall call) "the lawyer's analysis"; then generalize it to fit business and professional ethics generally, giving some examples of its application; and last, draw from the exercise an interesting lesson for those working in business and professional ethics.

I. The Lawyer's Analysis

The lawyer's analysis of conflict of interest is to be found in the American Bar Association's Code of Professional Responsibility as well as in numerous articles, books, court opinions, and opinions of various bar ethics committees.² The Code's statement of the analysis, while not particularly subtle, is all we need here.

The Code understands a conflict of interest to require only a) one relatively formal role (with occupants), the role of being someone's lawyer, and b) at least one interest tending to interfere with acting properly in that role. The Code understands a lawyer's role to be exercising "professional judgment..., within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."³ The emphasis is on the lawyer's judgment within that role. The lawyer's professional judgment must be "independent". The lawyer must be able to commit his legal training, knowledge, and sagacity fully to his client (within the bounds of the law and what the client wants done). Let us consider this analysis in detail.

The client is, of course, someone other than the lawyer himself. A lawyer acting for himself may well not be free of influences tending to undermine his professional judgment. His personal involvement may make him too emotional to think things through. Tender feelings may lead him to resolve doubts about the law against his own interests. And so on. That is the point of the lawyer's joke that "a lawyer who represents himself has a fool for a client". But a lawyer "representing himself" cannot have a conflict of interest however unreliable his judgment becomes. He cannot because (strictly speaking) he is not acting in his role as lawyer. He is simply acting for himself knowing what a lawyer knows. Being someone's lawyer is having someone to represent, someone in whose place one acts. To act for oneself is not to represent anyone. So, though conflict of interest is a fact about a lawyer's judgment and so, in that way, intra-personal, it is also a fact about the lawyer's judgment-in-his-role-as-lawyer-for-someone-else and so, in that way, inter-personal.

"Interest" is just short-hand for any influence, loyalty, or other concern capable of compromising a lawyer's ability to act for the benefit of his client (within the bounds of his role as a lawyer). Such concerns might include the temptation to turn the lawyer-client relation to the lawyer's advantage, the possibility of using confidence gained in one lawyer-client relation for the benefit of another client, or the necessity of sacrificing one of two clients whose interests have come in conflict. "Interest" does not, however, include any factor that might make judgment unreliable. For lawyers, all talk of conflict of interest presupposes a competent professional. Judgment made unreliable by ignorance of the law, poor training,

drunkenness, or the like is incompetent, a failing of "professional judgment" rather than of "independent judgment". Conflict of interest is a problem of professional judgment, a problem of arranging things so that competent judgment can function as it ordinarily does. The "conflict" of conflict of interest is a collision between competent judgment and something that might make that judgment unable to function as the lawyer's role requires.

The ABA Code of Professional Responsibility implicitly distinguishes at least three kinds of conflict of interest. Some interests are such that they are certain to affect adversely the advice given or services rendered the prospective client. These create (what we may call) "actual" conflicts of interest. Other interests create only a "reasonable probability" of such adverse effects. Such interests create (what we may call) "latent" conflicts ("latent" because the conflict is already there, requiring only a change of circumstance to become actual). Other interests are such that a lawyer can "reasonably foresee" that an actual conflict may arise (even though there is not even a latent conflict yet). Such interests create (what we may call) "potential" conflicts ("potential" because circumstances must change for such conflicts even to become latent). The boundaries of these three sorts of conflict are, of course, rather indefinite. The distinction is nevertheless useful.

Let me illustrate the distinction (and its usefulness) by an example derived from Margolis. Suppose that a lawyer is considering becoming a candidate for Congress, that among his clients is an Indian tribe with a claim against the federal government, that the lawyer can foresee the Indians some day becoming dissatisfied with the slow pace of adjudication, and that under such circumstances it might be reasonable for them to try to get Congress to act on their claim directly. Such a lawyer already has a potential conflict of interest. He can reasonably foresee that he may some day have to choose between his client and his constituency. He may already have begun to feel the tug of constituent interests. There is already some reason for his client to be wary of depending upon his advice should the question of taking the claim to Congress arise. If the lawyer were then to run for Congress and win, the potential conflict would become latent. There would now be a reasonable probability that the lawyer-Congressman would have to advise on a question in which his interests as Congressman made his judgment as lawyer unreliable. But, so long as the Indians have no reason to become dissatisfied with the pace of adjudication, he does not have an actual conflict. He is not yet in a situation in which he will have to advise on the question of taking the claim to Congress. To be in a situation requiring advice on that question is to have a conflict of interest par excellence, an actual conflict.

The Code does not treat these three sorts of conflict of interest the same. The differences are instructive (especially because the Code's treatment diverges from Margolis' in at least one important way). The Code looks with distrust upon all conflicts of interest, even those that are merely potential. For example, not only should a lawyer not accept proffered employment if his personal interests or desires will affect adversely the advice given or services rendered the prospective client, he should also not accept such employment if there is even a reasonable probability that they



will have that effect.⁴ A lawyer should not draw up a will in which he is named a beneficiary, or take a case where there is much chance that he will be called as a witness concerning any controversial point, or agree in advance to accept as payment for services any publication rights relating to the subject of employment.

The Code flatly condemns not only actual conflicts of interest but also latent conflicts. The Code sets a lower standard only for potential conflicts. A lawyer may properly accept a client even if he can reasonably foresee that an actual conflict may arise. He may accept, but only if he explains the situation to the client and the client consents to continuing the relationship with the lawyer nonetheless.⁵ Thus, if a lawyer has a financial interest in a company competing with a client's, the lawyer may agree to draft contracts for that company only after making full disclosure of the potential conflict and receiving the client's permission to go ahead nevertheless.

The Code does not then agree with Margolis that "[pursuing] a course of conduct that leads to [an actual] conflict of interest is not itself a mark of any wrongdoing on the agent's part".⁶ A lawyer who accepts a client without making full and timely disclosure of any conflict of interest that is more than merely potential, is subject to discipline under the Code.⁷ The Code can be tougher on latent (and potential) conflict of interest than Margolis is because the lawyer's analysis makes latent (and potential) conflict less likely than the Margolis analysis does. Conflict of roles, especially if "role" is given its full elasticity, is much more common than an interest tending to undermine independent professional judgment. Only a special subclass of "role-conflict" makes a lawyer's judgment less reliable.

The Code also distinguishes between (what we may call) having a conflict of interest (potential, latent, or actual) and acting in a conflict-of-interest situation. Here too the treatment is interestingly different from Margolis'. The Code expressly allows a lawyer to act in situations of potential conflict as noted above (just as Margolis would). Such action is quite proper if there is full disclosure and the client consents nonetheless. The Code's approach to acting in other conflict-of-interest situations is more complex. While it condemns most acting in situations of actual (or latent) conflict, it exempts much of it from disciplining if the lawyer makes full disclosure and his client retains him nonetheless.⁸ The Code does not (as Margolis does) treat divesting as the only permissible response to an actual (or latent) conflict. The Code sometimes permits a client to be as foolish as the lawyer who chooses to represent himself. The Code thus shows itself more sensitive than Margolis to the practicalities of divestiture.

The way the Code does that tells much about what the Code takes to be wrong with having a conflict of interest. What the Code says in effect is that while a lawyer should provide independent professional judgment, he must at least not betray the trust a client properly puts in him. If a lawyer has a conflict of interest (actual or latent), he must either refuse the proffered employment (as Margolis recommends) or let the client know that he cannot trust the lawyer to exercise his professional judgment as independently as lawyers ordinarily do (an alternative Margolis does not

consider). To have a conflict of interest is bad, but to have one without putting the client on notice is worse. To be a lawyer is (the Code seems to say) to occupy a role traditionally understood to guarantee independent (professional) judgment. That guarantee is worth preserving. A conflict of interest makes the lawyer's judgment less reliable, endangering the client's interests whether the client is willing to tolerate the danger or not. So, a lawyer should (all else equal) divest. But, if a lawyer does not at least warn his client of the conflict, he does more than weaken a guarantee worth preserving. He presents himself as having a judgment more reliable than in fact it is. He invites a trust the invitation itself betrays. No matter how well things happen to turn out, the lawyer would not have behaved as his client had a right to expect him to behave. The lawyer would have taken risks his client did not know of, risks a client has a right to decide whether or not to take. If the lawyer does not realize he has a conflict (and that certainly is possible), he has failed to perform competently. Lawyers are supposed to recognize conflicts. If, however, the lawyer knows he has a conflict and chooses not to tell the client, having the conflict becomes an intentional wrong. The best analogue is not breach of etiquette (as Margolis suggests) but lying or promise-breaking. Disclosure and consent cannot end the conflict (because they cannot make judgment more reliable). But they can prevent automatic betrayal (because they allow the client to adjust his reliance to fit the circumstances).

II. Generalizing the Lawyer's Analysis

That is enough of the lawyer's analysis for our purposes. Its main components should now be familiar: a) the role of being someone's lawyer and b) an interest tending to interfere with proper exercise of judgment required in that role. To generalize the analysis so that it covers all of business and professional ethics, we need to replace being-someone's-lawyer with the appropriate category of which being-someone's-lawyer is a special case. If we take being-someone's-lawyer to be (as seems reasonable) a special case of relationships-between-persons-requiring-one-to-exercise-judgment-in-the-other's-service, we get the following generalization of the lawyer's analysis:

- I. A person has a conflict of interest if a) he is in a relationship with another requiring him to exercise judgment in that other's service and b) he has an interest tending to interfere with the proper exercise of judgment in that relationship.

This formulation is too rough to be final. But it is good enough to start with. Let us consider it term by term to see what it entails. Having done that, we should be able to provide a fuller and (for purposes of this paper) final formulation.

The generalized analysis does not, as formulated, refer to "role" at all, only to "relationship" of a certain kind. That is no accident. Though "lawyer" is a traditionally defined role, there is no reason to limit conflict of interest to traditionally defined roles (as Margolis eventually does).

Quite informal roles, mere relationships among persons, can, it seems, involve relatively clear conflicts of interest. For example: Suppose that I have been raising black angus bulls with the intention of competing with you in the next cattle show. Suppose too that you do not know of my intention, that you ask me to look after your bulls while you are away, and that I agree. Taking care of cattle requires exercise of judgment now and then. If your bull looks a bit weak, I may have to decide whether it is better to check its temperature now or wait till morning. If the wind picks up and the sky starts to cloud over, I may have to decide whether it would be better to bring the bulls in from the field now or wait a little longer to be sure there will be a storm. And so on. Given my interest in beating you at the next cattle show, I may not be as good a judge of such things as I would otherwise be. My own interests would tend to make my judgment on such questions less reliable than it would otherwise be. I have, then, a conflict of interest as soon as I agree to put myself in your service. If it is not too likely that I will have to exercise judgment while looking after your bulls, the conflict will be potential. But, even so, it will be there, informal role or not.

Though the generalized analysis does not refer to "role", the analysis does imply role if "role" is allowed its full elasticity. "Role" can be allowed its full elasticity here (as it could not in the Margolis analysis) because our concern is not roles as such but a certain sort of role, that is, relationships requiring the exercise of judgment in the service of another. "Judgment", not "role", is the crucial term.

What is judgment? Judgment must, of course, be something that lawyers exercise, but something too that not only lawyers exercise. For our purposes, judgment may be thought of as the capacity to make correctly decisions not as likely to be made correctly by a simple clerk with a book of rules and access to all the facts (and only the facts) the actual decision-maker has. Judgment implies discretion. A policeman does not need judgment (in this sense) to decide whether to issue me a speeding ticket once I have been clocked well over the limit, pulled over, and found to have no valid excuse. A bank president does not need judgment to decide whether she (as president) should embezzle the bank's money. And so on. For questions such as these, such persons cannot have a conflict of interest, however hard the question may be for them. In contrast, a critic needs judgment to decide how good a play or actor is. A member of Congress needs judgment to decide how to vote on a certain bill. And so on. Such persons can be subject to a conflict of interest in any situation where they are charged with deciding such questions.

Judgment is, of course, always judgment relative to certain questions, not judgment in the abstract. A conflict of interest is always a situation where someone is charged with deciding something or other. Acting in a situation of conflict is always deciding that something or other. For example: A bank president should exercise judgment in deciding to whom the bank should make loans. She can, then, have a conflict of interest when deciding such questions even if she cannot have a conflict when deciding whether to embezzle or not.

There will be borderline cases. A relationship can be defined by tradition, rule, or express agreement. Such relationships are likely to be relatively well-defined. But relationships can also grow up more or less haphazardly. Much can be left unsaid and ill-defined. Such relationships, not the well-defined ones, are the ones likely to turn up near the border. If we allow "role" its full elasticity, we will allow for relationships in which it may be impossible to know whether the role requires judgment and so, impossible to say whether a situation involving that role constitutes a conflict of interest. Such inchoate relationships are, however, not common. Even most informal roles are not that informal.

The more common reason for doubt about whether a particular situation constitutes a conflict of interest is lack of information. Some of Margolis' business examples are of this sort. For example, he asks, "Is it a conflict of interest to recommend to one's own company a contract with another firm in which one holds substantial stock?"⁹ The answer depends in part on whether the recommendation requires judgment. Many such recommendations may be so routine that making them could be left to any clerk. Deciding to make such recommendations, like deciding whether or not to embezzle, would involve no exercise of judgment and so, would not involve a conflict of interest. Margolis must tell us more about what is being decided before we can answer intelligently.

He must also tell us what is "proper" in the role. If it were not part of serving the company to forego serving oneself where one cannot serve both, an executive could not have a conflict of interest even when faced with deciding whether to recommend a contract disadvantageous to the company but beneficial to himself. The term "proper" is relatively well-defined for lawyers. The Code specifies that role in detail, amplifying what tradition leads us to expect anyway. For most roles, however, there is no such code and tradition is not so settled. Still, insofar as a role is defined at all, it justifies certain expectations just as surely as does being a lawyer. For our purposes, what is proper in a role is just what is ordinarily expected of persons in that role, those expectations themselves being justified by express agreement, ongoing practice, rule, or the like. Even so informal a role as looking after someone's bulls while the owner is away justifies certain expectations, for example, that I will act for your benefit while looking after your bulls. We may then identify what is proper in the role of recommending contracts by asking people who know about such things what they would expect of a person in such a role, what they generally rely on people in that role to be and do.

Because of the importance assigned "judgment", we need not be much concerned by the term "interest". "Interest" should be interpreted broadly to include all those influences, loyalties, concerns, emotions, or the like that can make (competent) judgment less reliable than it might otherwise be (without making it incompetent). Thus, even moral constraints, though not ordinarily considered mere interests, may be interests for the purposes of this analysis. Such constraints may be, because they too can reduce the reliability of someone's judgment in a particular role. For example, a conscience-stricken Machiavelli might have to refuse to advise his superior on a particular question (in part) because his conscience makes his judgment

about how to proceed unreliable. He can no longer be trusted to tell his superior how not to be good. Moral constraints can create conflicts of interest. But, in general, they do not. They do not because in general we do not define roles to require judgments about whether or not to behave immorally and conflict of interest is always relative to judgment within a role.

We may now summarize these observations in the following fuller statement of the generalized analysis ("role" having its full elasticity):

II. A person P_1 has a conflict of interest in role R if, and only if:

- a. P_1 occupies R ;
- b. R requires exercise of (competent) judgment with regard to certain questions Q ;
- c. A person's occupying R justifies another person relying on the occupant's judgment being exercised in the other's service with regard to Q ;
- d. Person P_2 is justified in relying on P_1 's judgment in R with regard to Q (in part at least) because P_1 occupies R ; and
- e. P_1 is (actually, latently, or potentially) subject to influences, loyalties, temptations, or other interests tending to make P_1 's (competent) judgment in R with regard to Q less likely to benefit P_2 than P_1 's occupying R justifies P_2 in expecting.

Conditions a-d define the relevant role. Condition e introduces the conflict (the parenthetical terms making it clear that even "potential conflicts of interest" are conflicts of interest).

The restatement is not yet perfect. For example, formulation II does not plainly include conflicts in which P_2 relies on P_1 but some P_3 benefits (as occurs, for example, when a bank administers a trust parent P_2 established for child P_3). Such imperfections are, however, minor enough for us to ignore them here. They do not seem likely to affect three important (and related) consequences to be drawn from this formulation of the generalized analysis.

First, under formulation II (as under the original lawyer's analysis), conflict of interest may continue even after full disclosure and consent of P_2 . Whether it does or not will depend upon how the role is defined. Not P_2 's actual expectations of P_1 but what P_2 is justified in expecting of P_1 because of the role P_1 occupies, is what determines whether a conflict exists. P_1 cannot change what R justifies P_2 in expecting simply by disclosing the conflict and getting consent (even though he can change P_2 's actual expectations in that way). P_1 must actually change roles to escape

the conflict. Consent after full disclosure might be a way of changing one role into another. That depends on the role itself. For lawyers, consent after full disclosure does not have that effect. But it might for roles which (unlike being-someone's-lawyer) are entirely defined by those party to it.

Second, formulation II does not expressly require that a conflict of interest be avoidable. It does not because some conflicts do not seem to be avoidable. A conflict can be upon us before we know what is happening. If, for example, a Senator's son applies for a job in her office, the Senator has a conflict of interest as soon as her son hands in the application (supposing the decision to hire would require some exercise of judgment). She does not have to do anything to have the conflict (though she would have to do something to end it). She need not even know that her son has applied. Her role as Senator is to pick the best person for the job; her duty as parent, to look after her son. Her being a parent makes her judgment as Senator unreliable for the question of whether to hire her son or someone else. For her even to consider his application is to act in a situation of actual conflict. It is, of course, always possible in retrospect to see how one might have prevented such a conflict. But, short of suicide, there does not seem to be any strategy for preventing all. Being born may be enough to guarantee some (potential) conflicts. Hence, there is no reason to require (as Margolis does) that all conflicts of interest be avoidable.

Third, formulation II also does not expressly require that a conflict of interest be escapable. But escapability is probably implied. A conflict of interest is always a conflict relative to deciding certain questions. If we can always refuse to decide those questions, we can always escape the conflict. We cannot, of course, always escape deciding something. Not to decide is to decide (at least once we know that we are not deciding). But refusing to decide a question is not to decide precisely the same question. It is a "second-order" decision. Refusing to decide does not answer a question like whom the Senator should hire. Refusing to decide only answers a question like whether the Senator should make any hiring decisions at all while her son is an applicant. The second-order decision need not involve a conflict of interest just because the corresponding first-order decision would. Once the Senator recognizes the conflict, she knows all a clerk would need to know to decide that she should not decide whom to hire. The second-order question need not require judgment just because the corresponding first-order question does. Indeed, I have been unable to imagine a case in which conflict of interest cannot be escaped in this way (though I have been able to imagine cases in which such escape is perhaps too costly). The generalized analysis thus seems (partially) to confirm Margolis. Conflict of interest entails the possibility of divesting (even if not the possibility of avoiding).

But, it may seem, Margolis' chief example of mere "conflicting interests" is, under the generalized analysis, itself the inescapable conflict of interest I have been unable to imagine. Antigone is caught between two roles, her judgment in each role made unreliable by her duty in the other. Yet, she cannot escape either role. Here, it may seem, is a conflict of interest inescapable under the generalized analysis.

That may be how it seems, but in fact Antigone has no conflict of interest under our analysis any more than under Margolis'. Antigone is, it is true, caught between her duty to her brother and her duty to her city. But in this example neither duty requires judgment (though resolving the conflict between them does). Any clerk would know what Antigone should do as her brother's sister. She should bury his corpse. Any clerk would also know what she should do as citizen of Thebes. She should obey Creon and not bury the corpse. What is hard to know is what Antigone should do as a moral agent who is both her brother's sister and citizen of Thebes. The conflict of duty is inescapable, but it is not a conflict of interest under the generalized analysis. Resolving such conflicts is part of what moral agents are supposed to do in that role, not something compromising judgment in that role. Antigone is another illustration of how important focusing on judgment-in-a-role is to understanding conflict of interest.

III. Conclusion

I began this paper by describing Margolis' "Conflict of Interest and Conflicting Interests" as an "important paper". By now you may be wondering why I described in that way a paper I obviously consider seriously flawed. The reason makes a good conclusion.

Margolis' paper reveals that "business and professional ethics" is today a field which (for study of conflict of interest at least and no doubt for study of much else too) does not include legal ethics. Though Margolis uses some examples from legal ethics, his analysis owes nothing to that field. Apparently he did not think to read the relevant legal literature. His readers seem to have behaved exactly as he did. How else explain the silence with which so flawed a paper has been received in a field where the opportunity to criticize a respected writer is usually briskly seized by many? The collection in which the paper appeared has not gone unread.

Margolis' paper is important because it is the first in business and professional ethics (as actually constituted) to raise the theoretical problem of conflict of interest; important because the absence of subsequent alternatives to the Margolis analysis shows the theoretical weakness of business and professional ethics today; and important too because the existence of an alternative in (what is unfortunately only) the neighboring field of legal ethics shows a weakness as well in the way business and professional ethics is developing. There is a lesson here beyond that of how to analyze conflict of interest. The lesson is that those interested in problems of business and professional ethics should check the literature of legal ethics as part of their normal research procedure.¹⁰ They may be surprised by what they find. Pleasantly surprised.

NOTES

1. Joseph Margolis, "Conflict of Interest and Conflicting Interests", in Ethical Theory and Business, ed. by Tom L. Beauchamp and Norman B. Bowie (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1979), p. 361. I should like to thank my colleague Louis Andrade for calling my attention to this paper.
2. For a recent general discussion, see Geoffrey C. Hazard, Jr., Ethics in the Practice of Law (New Haven, CT: Yale University Press, 1978), especially Chapter 5. For a recent survey of the literature, see Robert H. Aronson, "Conflict of Interest", Washington Law Review, vol. 58 (1977), pp. 807-858.
3. American Bar Association, Code of Professional Responsibility (Chicago: National Center for Professional Responsibility, 1980), EC 5-1.
4. Ibid., EC 5-2.
5. Ibid., EC 5-3.
6. Margolis, p. 363.
7. See, for example, Code, DR 5-101(A), DR 5-104(A), or DR 5-105(A).
8. Ibid., DR 5-101(A) and DR 5-105(A).
9. Margolis, p. 365.
10. For someone who has learned this lesson, see Michael D. Bayles, Professional Ethics (Belmont, CA: Wadsworth Publishing Company, 1981), especially pp. 77-83 where he discusses conflict of interest in the professions under the heading "Loyalty".