Conflicting Interests.
The Conflict of Interest and Lawyering

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Abstract This paper makes a contribution to the understanding of the confusing concept of conflict of interest by providing a sound theoretical framework for its analysis that could also be used to foster the developing of an explicit definition of this concept in the Romanian and the European Union regulations concerning lawyering. In the first section it is developed a comprehensive typology of conflicting interests that discriminates between intrapersonal conflicting interests and interpersonal conflicting interests, on one hand, and, on the other hand, between conflicting interests that operate in the context of a fiduciary relationship and conflicting interests that arise outside such a relationship. It is equally considered the influence that intrapersonal conflicting interests could have on each other with respect to the ability of the fiduciary to undertake an action and to conduct a decision-making procedure. Some relevant perspectives on conflict of interest are considered through the lens of the elaborated typology of conflicting interests and benchmarks for a more thorough definition of conflict of interest are advanced. The paper supports the conclusion that the conflict of interest could affect the judgment of a fiduciary in undetectable ways which compromises the reliability of the professionals affected by it. We also approached specific aspects of the applicability of the concept in lawyering, also noticing the lack of a precise definition, which underlines the necessity to elaborate one in a detailed and explicit manner.

Keywords: conflict of interest, conflicting interests, agent-principal problem, decision-making procedure, fiduciary, lawyering

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Introduction
Today, the term conflict of interest is well entrenched in the ordinary language as well as in the specialized vocabulary of various professions, including lawyering, but prior to the Second World War it was not to be found in the English language. It is considered that it was

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introduced there, with a meaning relatively similar to the current one, by a decision of the U.S. District Court for the Southern District of New York from 1949 (Luebke, 1987, p. 67). It took nine years for the term to be included in the US federal legislation and another nine years to figure in the Index of the Legal Periodicals (Davis & Johnson, 2009, p. 303). In 1970, The American Bar Association made room for the term in its Model Code of Professional Responsibility (Davis, 2001, p. 17) and, one year later, the 1971 edition of the Random House Dictionary of English Language acknowledged the existence of it (Luebke, 1987, p. 67).

Already in the 1960’s, the American law scholars were already considering the conflict of interest with the reputed jurist Bayless Manning (Manning, 1964) writing in 1964 the influential essay The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation. They have been followed by philosophers who began their own analysis of it in the 1980’s which led to the pioneering articles Conflict of Interest by Michael Davis (Davis, 1982) and Conflict of Interest as a Moral Category by Neil Luebke (Luebke, 1987); before long, the conflict of interest established itself as a prominent topic in the field of applied ethics where it is often discussed in relation to professions, lawyering holding a prominent position.

The vast academic literature on conflict of interest confronts us with many different perspectives on what a conflict of interest is, while the official documents issued by Romanian and European Union institutions for the purpose of regulating the conflict of interest in lawyering fail to provide any explicit definition for it. This paper addresses the need for a conceptual framework that could be employed in the analysis of competing definitions for the conflict of interest and that could be also successfully used to formulate an official definition for the conflict of interest in lawyering. The conceptual framework developed herein is grounded on the assumption that there is a relevant connection between the conflict of interest and the conflicting interests so that a comprehensive typology of the latter could illuminate the meaning of the former.

1. A Conceptual Framework for the Analysis of the Concept of Conflict of Interest

1.1 Conflicting Interests - a Typology

The existence of conflicting interests is an all too common experience occurring in both private and professional life and with respect to both the interests of the same person and the interests of different persons. It could be assumed that two or more interests are in conflict when they simultaneously exist but cannot be fully satisfied at the same time. It is possible to distinguish between two large classes of conflicting interests, depending on whom they belong to. Thus, when someone experiences opposing interests of his own, one could speak about intrapersonal conflicting interests and when someone’s interest collides with the interest of a different person we are dealing with interpersonal conflicting interests.

The conflicting interests could be further divided into another two categories, but this time on the basis of the relationship between the persons whose interests run counter to each other. Thus, if their relationship is non-fiduciary, as when they are competitors striving for the same scarce resources, we have to do with what may be called a non-fiduciary interpersonal conflicting interests because none of them has a duty to act on behalf of the other one. If their relationship is fiduciary and consequently one, the fiduciary, has the obligation to act on behalf of the other, namely to best promote the interest of that other person that is at odds with his own interest, then we are confronted with fiduciary interpersonal conflicting interests. The fiduciary may be an agent, and in this situation he is obliged to act on behalf of a principal, who exercises control over him, or he may be a trustee and then he has the same obligation towards
a beneficiary under whose control he is not placed (Davis, 2001, p. 8). It is possible for the fiduciary relationship to be informal as, for example, when friends are involved in, or formal, as illustrated by the interaction between a professional and his client.

A fiduciary may turn the interest entrusted to him into his own interest by means of having the interest of being a good fiduciary in the context of a fiduciary relationship (Norman & Macdonald, 2010, note 4), but it is equally possible for the fiduciary to treat the interest that he is bound to best promote as an extraneous interest which he does not want to turn into his own. Having a fiduciary obligation and having the interest of being a good fiduciary do not always go together because one could formally accept a fiduciary obligation without being subjectively committed to it. Therefore one cannot agree with Stephan R. Latham (Latham, 2001, p. 282) that the mere existence of a fiduciary obligation is a sufficient condition for a fiduciary to effectively make his own the interest that is entrusted to him.

When a fiduciary has the interest of being a good fiduciary but also experiences an interest that is in conflict with this one, what he faces could be conveniently called intrapersonal fiduciary conflicting interests; the fiduciary himself becomes thus a conflicted person. In case a fiduciary has an interest that conflicts with the interest that he only formally agreed to best promote and which, consequently, is not his own, he is involved in interpersonal fiduciary conflicting interests. The latter situation underpins the well-known agent-principal problem (Norman & Macdonald, 2010, p. 444-445) and the colliding interests therein are also called adverse interests (Davies, 2012, p. 571).

It is not unusual to think that someone who experiences intrapersonal fiduciary conflicting interests is able to follow any of them in an independent manner that is without being subjected to distorting effects coming from the interest that he left aside. According to this account, it depends on that person alone to enable or disable those effects which, obviously, means that he is fully aware of them; if he enables them while pursuing his interest of being a good fiduciary, then he is prevented from best promoting the interest entrusted to him and, consequently, from being that sort of fiduciary. In order to shed more light on this problem, it is to be mentioned that the distorting effects could affect the fiduciary in two ways: 1) by affecting the decision-making procedure he employs for finding out what he has to do to advance one of the competing interests; 2) by affecting his action. This means that, by saying that a fiduciary is able to independently follow one interest that is in conflict with another one, we are in fact saying that he is capable to completely isolate the decision-making procedure he makes use of and equally his actions from any possible interference originating in that other interest. Under this hypothesis, a person that has intrapersonal fiduciary conflicting interests could advance the interest entrusted to him as good as a person that has the same fiduciary duty but experiences no interest opposed to it. Of course, it is reasonable to think that it is harder for the first fiduciary to fulfil his obligation than it is for the second one, but this is a totally different problem.

It is to be mentioned that, if the decision-making procedure is impaired, the action resulting from it is also impaired, but if an action is impaired it is not necessary for the decision-making procedure to be equally impaired. A fiduciary could know very well what he has to do for fulfilling his obligation but to ignore this and act contrary to his duty (Carson, 2004, p. 162). This does not mean that he is acting in the absence of any decision-making procedure, but only that he follows the decision-making procedure corresponding to the opposite interest. However, it has been also argued that an interest could unconsciously interfere with a decision-making procedure when the procedure is used for advancing an interest that runs counter to it. In this case, the fiduciary is unaware of the distorting effects taking place, but psychologists could help him to identify various psychological mechanisms, such as cognitive and
motivational biases, that interfere in with his effort to best promote the interest which was entrusted to him and he turned into his own (Norman & Macdonald, 2010, p. 453-456). Sometimes, this assistance is not enough for being certain that the decision-making procedure is sound, because the nature of the procedure is so that it perfectly disguises the abnormities. Following Michael Davies (Davies, 2001), a decision-making procedure may be algorithmic, which means that, in a given situation, there is only one correct solution that any trained person in that particular field cannot but arrive at, or it may be non-algorithmic, that is a judgment, so that there is not a single correct solution and, consequently, it is not unusual for equally trained people to come up with different solutions for the same problem. There is plenty of room in the judgment for creativity, talent and unexpectedness so that, as regards a particular judgment, it is impossible for the one who made it, as well as for the equally trained people, to authoritatively assess its viability. It is to be remarked that the context the fiduciary is acting in could require the use of one of these procedures or the use of both of them, be it simultaneously or in turn. Also, any of these procedures is compatible with any form of fiduciary relationship, irrespective of the type of conflicting interests encompassed by it.

It is now appropriate to consider in detail the influence that the types of conflicting interests have on the decision-making procedures employed by a fiduciary, and equally to consider the ability of the fiduciary and of equally trained people to take notice of it. When an algorithmic procedure is conducted, the fiduciary could intentionally diverge from it if he allows for his own interest to take precedence over the interest entrusted to him. The failure to respect the procedure is relatively easy to be detected by trained people and, at the price of more or less effort, by the principal or the beneficiary himself. In case the algorithmic procedure is employed by a good-willed fiduciary, he will not deliberately deviate from it and, due to its strictness, he cannot diverge from it without being aware, that is as a result of unconscious forces; the existence of pure error is not denied but it is conceived as not being the mark of such forces. However, even when such an error occurs, it is easy for the good-willed fiduciary, as well as for other trained people, to realize that he has erred.

There is a different situation when a judgment is carried out by a fiduciary against the background of conflicting interests. If we are talking about interpersonal fiduciary conflicting interests, then the fiduciary favours his own interest and intentionally compromises his judgment. If well disguised, other equally trained people could not detect the flaws of the judgment, given that there is no objective standards against which it has to be evaluated. When the judgment is pursued while there are intrapersonal fiduciary conflicting interests, the fiduciary could also intentionally disrupt his judgment, but, even if he is a good-willed fiduciary, it is possible for his own interest, operating unconsciously; to corrupt the judgment without him being aware of what is going on. In such a case, no one is able to know that the judgment is negatively influenced and thus that it is not as good as it could have been if the conflicting interests were absent. One could admit the existence of pure error as long as it is understood as not resulting from unconscious forces.

It becomes now apparent that a good-willed fiduciary - a fiduciary who does his best to be a good fiduciary despite having an interest that is in conflict with this interest – could fail being a good fiduciary for reasons that escape his conscience and, also, that in such a case it is impossible to know when a conflicted but good-willed fiduciary is really a good fiduciary. The description of judgment developed by Michael Davies is considered by Thomas L. Carson (Carson, 2004, p. 162) to correspond to just one type of judgment which exists alongside another type that allows the fiduciary to know for certain that he is a good or a bad fiduciary. The fiduciary, as pointed out by Carson, could make use of the good judgment or could choose to ignore it in discharging his fiduciary obligation, depending on which interest from two or
more conflicting ones he decides to follow. No unconscious distortion is to be supposed in relation to the type of judgment depicted by Carson, so that, when exercising it, the good-willed fiduciary is able to become a good fiduciary.

1.2 Conflicting Interests and the Conflict of Interest

We are now in the position to use the conceptual framework developed in the previous section to analyse through the lens of the typology of conflicting interests some definitions provided for the conflict of interest.

In the early 1970’s, the political philosopher John Rawls argued in his much celebrated book *A Theory of Justice*, that a conflict of interest arises between the members of a society because each one has the interest of acquiring a larger part from the benefits created within that society (Norman & Macdonald, 2010, note 4). Rawls seems to refer here to the interpersonal non-fiduciary and fiduciary conflicting interests.

Equally, in the field of political science, it was developed the idea that the conflict of interest means a conflict between the private interest of public officials and the public interest, the former having the power to interfere with their algorithmic decision-making procedures (Davies, 2001, p. 17). In other words, the conflict of interest was understood in this context as designating interpersonal fiduciary conflicting interests which could be independently followed.

Wayne Norman and Chris Macdonald (Norman & Macdonald, 2010) hold the view that a conflict of interest appears when a professional or a quasi-professional experiences a conflict between the interest entrusted to him and another of his interests and this conflict is possible to affect his judgment in ways unknown to him. For the two authors, the conflict of interest is an intrapersonal fiduciary conflicting interest that cannot be independently pursued.

Michael Davies (Davies, 2001) argues that a conflict of interest arises in case a person has an interest that is opposed to the interest entrusted to him and which tends to compromise his judgment in an unconscious manner. Here, the concept of judgment is obviously understood in the special sense attributed to it by Davies. Based on the examples he constructs, it is possible to consider that, for a person to have a conflict of interest, it is also required that he is committed to the best advancement of the interest entrusted to him. Based on these ideas one could maintain that, for Davies, the conflict of interest refers to intrapersonal fiduciary conflicting interests which cannot be independently pursued.

Finally, Muel Kaptein (Kaptein, 1998) reads the conflict of interest as a conflict between a private interest of a person working for a company and the interest of that company, conflict that interferes with his judgment. If we consider the criteria that he developed for the ethical qualities model, we could conclude that Kaptein, most probably, refers to both types of judgment, the one advanced by Davies and the one emphasized by Carson. It follows that Kaptein’s concept of conflict of interest corresponds to the interpersonal fiduciary conflicting interests that, depending of the nature of judgment employed, could be or could not be independently followed.

Confronted with a variety of perspectives on the concept of conflict of interest, one has to consider them having in mind its history that, as already mentioned, began shortly after the Second World War. One could then reasonably assume that the concept was devised to designate something different from the old and well-known conflicting interests among the members of a society, or from the equally old reality of conflicted individuals which was reflected upon since Antiquity. Also, the fiduciary relationship did not appear just sixty years ago. Moreover, the reflection on the conflict of interest largely ran parallel to the reflection on the agent-principal problem. What is then a conflict of interest? One could argue that it refers to a special type of fiduciary relationship where the fiduciary turns into his own interest the
interest that was entrusted to him. Consequently, when this interest collides with another interest that he equally has, he becomes a peculiar type of conflicted person. Such a person is not involved in an agent-principal problem because he has already subjectively taken over the interest of the principal. What is really at stake in a conflict of interest is how to enable a fiduciary to pursue the foreign interest that he made his own without being impaired by an interest which runs counter to it and which interferes in an unconscious or in a conscious manner with his decision-making procedures and actions that are used to pursue that interest.

2. Specific Legal Aspects relative to the Conflict of Interest in Lawyering
From economic perspective, lawyering itself is regarded as a business matter; like in any other business, professional ethics should prevail, as it is unconceivable for a law professional to exercise his/her duties without complying with precise conduct rules enabling full observance of the principles generally governing all legal professions. The business field involves, above all, a legal component, bearing in mind the fact that the relationships established between the economic competitors or actors is often marked by the non-respect of the obligations undertaken, the abusive exercise of rights or by incorrect or illegal practices which may engage the legal responsibility of the ones found guilty thereof.

The necessity of disciplining lawyers’ behaviour towards their clients required the elaboration of certain deontological codes, laws or statutory rules aimed at creating an efficient normative framework in which professional ethics plays a key-role, both for the consolidation of the lawyers’ position in the society, as well as for the prevention of causing damages to the clients, through immoral or even unlawful means or methods.

In this background, knowing the deontological standards imposed to lawyers becomes an issue of high priority, not only for those taking part in the litigations brought before different courts, but also for persons seeking for special legal advising or counselling services, in cases they have opposite interests. In our opinion, among the main obligations of lawyers, one can find the one of preventing, avoiding or ceasing the conflict of interest incurred, either between different assisted or represented clients, or between clients and lawyers, considering that keeping a good reputation equally involves keeping the professional secret and the confidentiality of the information entrusted, as well as the loyalty towards the clients.

Following a detailed examination of the international normative acts adopted in lawyering field, we can easily notice that there is not a clear and uniform definition of the conflict of interest, the sphere of this concept being deduced from precise obligations or interdictions.

Thus, according to the Principle (c) of the Charter of the Core Principles of the European Legal Profession for European lawyers adopted on November 25th, 2006 by the Council of Bars and Law Societies of Europe (CCBE), lawyers may not represent two clients finding themselves in a conflict of interest or clients between which there is a risk to occur a conflict of interest; we advise that this obligation represents a guarantee of the principle of loyalty to the client and remains compulsory in all those situations in which two or more persons oppose mutual different claims one to each other or accuse one another of committing of acts or deeds having damaging results from legal point of view.

The same charter stipulates the prohibition imposed to lawyers to accept representing new clients, in the event that they have already confidential data from other clients or from their own former clients.

We strongly believe that such exigency is justified by the need to confer effectiveness to the principle of confidentiality established for the protection of the legitimate rights and interests of individuals confessing to lawyers, as in the course of the ongoing legal assistance and
consultancy relationships, lawyers are entrusted with personal data and information belonging to the private life or space of those involved, which requires stronger protection measures able to prevent those persons from being placed into a vulnerable and inequitable position. Last but not least, it is prohibited for lawyers to represent clients in cases when there is a conflict of interest between them and lawyers or to continue representing such clients, in cases when the said conflict would incur during an ongoing litigation. We argue that the interdiction set up for this type of cases, is in fact, an efficient way to guarantee the principle of the independence of lawyers, indispensable for the maintenance of their credibility towards third parties, courts or any other bodies or entities.

However, the concept of conflict of interest seems to be more developed under Article 3.2 of the Code of Conduct for the European Lawyers dated 28 October 1998 adopted by CCBE, as modified subsequently in 2002 and 2006, in which there are expressly provided three types of specific obligations in lawyers’ charge, also applicable to those being members of associative lawyering bodies. The said Code was also implemented in the domestic regulations by the Decision no. 1486 of 27 October 2007 issued by the Permanent Commission within the National Union of Romanian Bars Association.

Firstly, it is generically prohibited for lawyers to advise, represent or act on behalf of more clients in the event that there is already a conflict of interest or a risk to incur such conflict between them; the normative regulation previously referred to, regards only parties having opposite positions, but not cases in which lawyers assist or represent different persons having a common interest, as in this situation, the power of attorney is in full compliance with the code of conduct, taking into consideration that all those advised or assisted will have equal benefit from the effects of the collective demarche.

Secondly, there is the obligation to cease representing different clients in the event that a conflict of interest has incurred between them, there is a risk to violate the professional secret or to affect the lawyers’ independence; we consider those three abovementioned hypothesis as finding themselves in an interdependence relation, being that upon occurrence of a conflict of interest, it will be impossible for lawyers to keep the confidentiality of the information obtained from one of their clients or to maintain the defences strategies or tactics agreed on together with one client to the disadvantage of other clients.

Thirdly, it is prohibited for lawyers to engage new clients in cases when there is a risk to violate the secret of the information entrusted by other clients or in cases when the information given by former clients would bring unjustified advantages for the new clients. We are of the opinion that this prohibition represents a guarantee for the principles of confidentiality and loyalty evoked above, based on the rigors inherent to lawyering which has to be exercised with good faith, honesty and verticality, in respect of rule of law, good mores and social cohabitation rules.

Imposing such prohibitions and obligations aims at ensuring the professional integrity, promoting ethical behaviours and discouraging the practices deprived of honesty or probity, but also aims at strengthening a legality climate in the business and institutional field in which lawyers conduct different business transactions.

At national level, the collocation conflict of interest has been explained only with regard to persons exercising public dignities or functions under Article 70 of the Law no. 161/2013 relative to certain measures for ensuring transparency in the exercise of public dignities and functions and in the business field, being comprehended as a situation involving a personal interest of patrimonial nature which might affect the objectiveness during the fulfilment of the prerogatives (the law was published in the Official Gazette of Romania, part I, no. 279 of 21 April 2003). Article 71 of the same normative act regulates as principles for the prevention of
conflicts of interest in public dignities or functions matters, the impartiality, the integrity, the transparency of the decision and the supremacy of the public interest.

However, we could not identify a precise definition of the conflict of interest applicable to relationships between lawyers and their clients in the specific laws regulating lawyering, but its meaning derives from the analysis of the limitations expressly provided under the legal assistance contracts, such as the one specified under Article 46, par. 1 of Law no. 51/1995 regarding the organisation and exercise of lawyering, republished in the Romanian Official Gazette, part. I, no. 98 of 7 February 2011 according to which lawyers shall not assist or represent parties having opposite interests in the same case or in interconnected cases and shall not plead against parties having asked them previously their advice on the practical aspects of the actions brought before the courts.

At the same time, Article 242 of the Statutory Act of Lawyers published in the Romanian Official Gazette no. 898 of 19 December 2011 provides that lawyers shall refrain from exercising any professional activities, if conflicts of interest already exist or may incur, or otherwise, their non-compliance with respect of such duty would represent a severe disciplinary infringement. Anyhow, Article 4 of the said Statutory Act contains an explanation of the conflict of interest only as regards persons having leading positions within the local Bar Associations, the Romanian National Union of Bar Associations, and the Social Securities Department of Romanian Lawyers and its branches having the interdiction to take part in the settlement of requests, taking of the decisions or elaboration of the legal acts which might bring a material benefit for them or for the members of their families.

We notice that, unlike the public dignities or positions, the prevention of the conflict of interest is based on the principles of the confidentiality, independence and loyalty to the client, as lawyers are not decision-making bodies, but advisers of persons seeking for their services. On the other hand, in our view, the lawyers’ obligation to avoid a conflict of interest is not strictly limited to the need to prevent from obtaining personal material advantages, but it is justified by the need to protect the attributes of a noble profession conducted in the spirit of law, morality and truth in the exercise of which dignity, humanism and honour are considered fundamental social values.

Severe sanctioning of actions eluding the prohibitions regarding conflicts of interest proves both the seriousness of their committing for the legal professions field, as well as the importance of protecting the prestige and honour of the entire lawyers’ craft, absolutely necessary for maintaining the respect of the rule of law that every democratic society is built on.

It is to be underlined that the objective of consolidating the role of lawyers in the public space was also had in mind upon adoption of the Resolution dated 7 June 2015 issued by the Congress of Romanian lawyers organised in 6-7 of June 2015, stipulating, inter alia, the Principles of Integrity in the activities conducted by Lawyers, among which there is the principle of prevention of conflict of interest provided under Article 3 of the said decision. In the new normative act, the conflict of interest has a larger meaning, namely such a conflict could equally incur between the interests of the lawyers’ clients and the interests of the clients of professionals contacted during their collaboration, as well as between the interests of the clients represented in their capacity as lawyers and the ones of the clients represented during the exercise of other professions compatible with lawyering. Under the framework of this regulation, the concept of conflict of interest is also correlated with the gain of certain advantages, but it is not clearly therein defined.
Conclusion
The analysis of the history of the concept of conflict of interest and also of the typology of conflicting interests in the context of a fiduciary relationship proved to be fruitful for the understanding of the concept of conflicting interest, especially because they could be used to frame the various definitions provided for the concept of conflict of interest. It also became apparent that the existence of a conflict of interest against the background of a fiduciary relationship, irrespective of their type, has a significant potential to corrupt both the actions and the judgments of the fiduciary, and, equally, that the negative impact which it could have on the reliability of the fiduciary is the more so as it is compatible with his good intention. We are then led to the anxious conclusion that there is no invulnerable defence against the dangerous effects of conflicting interests on the judgment of a fiduciary who experiences them.

From legal perspective, we can draw the conclusion that in the lack of a uniform definition, unanimously accepted, as regards the conflict of interest in the field of the relationships between lawyers and their clients, the applicable legal standards could be violated, for reasons of misinterpretation of exclusively subjective nature. The violation of the principle of prevention of conflict of interest would not only affect the deontological rules of lawyering, but it would also cause a huge damage on the judiciary procedure itself, in which the prejudiced client would become the victim of his own lawyer, this fact not being tolerated in a State based on the rule of law. Therefore, the decision-making bodies having jurisdiction on such issues should elaborate an international clear and precise definition, also undertaken at domestic level, able to eliminate arbitrary conclusions and contribute to the saving of the social values promoted by the justice system itself, through all possible means.

References
[15] Resolution of 7 June 2015 issued by the Congress of Romanian lawyers organised in 6-7 of June 2015