

How to Identify and Avoid Conflicts of Interest

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One of the most fundamental concepts in a client-lawyer relationship is the lawyer's loyalty to the client. Hand in hand with loyalty is the notion that communications with the client are and will remain confidential, so that the client is free to share any and all information necessary to the lawyer's understanding of the client's circumstances, desires, and goals in the representation and the lawyer can, in return, provide advice and counsel for the client's ears alone in order to facilitate the client's informed decisionmaking.

The purpose of the conflicts of interest rules is to assure that both loyalty and confidentiality are protected by steering the lawyer clear of circumstances that would give even an appearance that the sanctity of the relationship with a client is jeopardized by potential fealty to others – including the lawyer's *own* differing interests.

1. Identifying the client and the status of the client

Although the Michigan Rules of Professional Conduct (MRPC) are replete with usage of the word "client", it is a term that is undefined, which means that it has been left to case law to sort out what constitutes a "client" and, more particularly, what establishes a client-lawyer relationship, the existence of which triggers obligations for the lawyer that are mandated by the MRPC.

Some light is shed on the creation of the client-lawyer relationship in the commentary to Rule 1.0, which notes, "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."

Stated in its simplest terms, **where the client has requested the lawyer to render legal services and the lawyer has agreed to do so, a client-lawyer relationship is established.** The payment of fees is not dispositive of whether a relationship has been established. A lawyer may, by agreement with the client, limit the scope and objectives of the representation. Rule 1.2(b) and commentary. And where someone other than the client is paying the lawyer's fees, the lawyer can only accept payment by the nonclient where the client consents after consultation, the paying party does not interfere in the lawyer's exercise of professional judgment or with the client-lawyer relationship, and the lawyer maintains the client's confidences and secrets. Rule 1.8(f).

Even where no client-lawyer relationship is established, however, if the person imparts information that would qualify as a "confidence" or "secret" were a client-lawyer relationship to exist – which may include the provision of such information to a legal

assistant under circumstances where the “client” reasonably believes the communication is being given confidentially – the lawyer has an obligation to maintain confidentiality about the information, in the absence of permission from the client to impart the information to third parties. RI-48. Rule 1.6(b).

Beyond identification of whether someone is a client, for purposes of conflict of interest analysis, it must be determined whether the client is a *current* or *former* client. Ideally, that status is readily determinable from a review of the client-lawyer agreement setting forth the subject matter of the representation and goals the attainment of which will mark the conclusion of the matter – such as execution of a settlement agreement or entry of a judgment. In the absence of clearly identifying criteria in a contract, the lawyer should consider what a reasonable person would believe as to whether the representation were ongoing or completed in deciding whether the client is current or former. More challenging is the situation where the lawyer has represented the client over a period of years on a number of related or unrelated matters such that the client’s perspective may be that the lawyer is his or her lawyer on an ongoing basis. The reasonableness of taking such a viewpoint may be dependent upon the length of the association and the frequency of representation.

2. Current Client and Prospective Client Conflicts

The basic rule addressing conflicts between current and prospective clients delineates circumstances where the respective interests are “directly adverse”¹ and situations where the representation of the existing client is “materially limited”² by the lawyer’s responsibilities to another client, a third person, or the lawyer’s own interests. Rule 1.7(a) and (b). The rule as worded proscribes representation in both circumstances but provides an ability to consent around the conflict. Notwithstanding an articulated ability to obtain client consent, the commentary to the rule makes it clear that there are times when a prudent lawyer would not seek to do so.

For example, the commentary notes, “Paragraph (a) [of Rule 1.7] *prohibits* representation of opposing parties in litigation.” [Emphasis added.] Making this consistent with the rule as worded, a lawyer simply could not “reasonably believe” that the representation of one party would not adversely affect the relationship with the other client who is the opposing party.

¹ (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

² (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Paragraph (b) governs representation of parties in litigation whose interests may conflict, such as coplaintiffs and codefendants. The commentary notes, “An impermissible conflict may exist by reason of substantial discrepancy in the parties’ testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.” These same considerations can occur in both civil and criminal cases. Representation of persons “having similar interests” is only advisable “if the risk of adverse effect is minimal” and “the requirements of paragraph (b) are met”. Commentary to Rule 1.7.

Of course, would-be clients may have potentially competing interests beyond situations that involve litigation. For example, where the individuals are in effect vying for the same limited resource – such as beneficiaries in a probate matter, passengers with varying degrees of injury seeking damages from an underinsured defendant, or co-owners of property negotiating a sale – the lawyer may have to weigh such factors as “the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise.” The commentary goes on to note that “common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.” Commentary to Rule 1.7.

The truth is that, in all cases other than opposing parties, where would-be clients have aligning but yet potentially differing interests, the lawyer must look at the facts and circumstances of the specific situation to determine whether it is reasonable to believe that the representation of one would not adversely affect representation of the other. If the answer is “no” the lawyer should not represent both parties.

When the lawyer believes the potential conflict is one that the clients can waive without jeopardizing the ability to competently and ethically represent each, the lawyer must explain to each client the implications of the common representation and the advantages and risks involved. Rule 1.7(b)(2). While the rule does not require that either the explanation or the consent be in writing, a prudent lawyer would document what is communicated and the act of client consent in writing.

3. Former Client and Prospective Client Conflicts

Once a client becomes a former client, the lawyer has a continuing obligation not to take on representation of someone else in “the same or a substantially related matter” in which the prospective client’s interests are “materially adverse” to the former client’s unless the former client consents after consultation. Rule 1.9 (a). What constitutes a “substantially related” matter can be very factually driven, including a consideration of such things as whether information obtained from the client during the first representation, if revealed, would be potentially harmful or embarrassing to the first client or helpful to the would-be client in taking a position counter to the first client’s interests.

4. Conflicts Related to the Lawyer's Interests

A. Personal interests

A lawyer's ability to be a loyal advocate and render competent and ethical legal service to his or her client may be significantly impacted at times by personal considerations – such as pecuniary interests, familial loyalty or pre-existing close relationships to persons with interests adverse to the would-be client, or a repugnancy to a client or cause. A lawyer who identifies that financial considerations or family or personal loyalties render the lawyer's own interests directly adverse to the would-be client is well advised to simply decline the representation. The alternative requires explaining the source of potential conflict sufficiently to permit the client to make an informed consent to waive the potential conflict. Rule 1.7(b). Envisioning the level of discomfort such a conversation is likely to engender for both lawyer and client may be a good indicator of whether the potential conflict is genuinely surmountable from the lawyer's standpoint.

In the third posed circumstance, a court-appointed lawyer must determine whether that emotional reaction in fact impairs the client-lawyer relationship and impacts the lawyer's ability to represent the client. If the answer is affirmative, the lawyer should consider seeking a withdrawal for good cause. Rule 6.2(c).³

Where the lawyer has a parent, child, sibling, or spouse who is also a lawyer, the lawyer cannot represent the party opposing the person represented by the lawyer relative unless the lawyer first obtains consent from the prospective client after advising of the family relationship. Rule 1.8(i).

B. Transactional

Certain types of business dealings with a client might be totally appropriate for a lawyer to enter into with someone to whom no fiduciary duties are owed. Those very same transactions are proscribed as between lawyers and their clients. Other types of arrangements may be entered into with appropriate disclosures and consents.

1. Proscribed Transactions (nonconsentable):

- Preparation of instruments giving a substantial gift – including a testamentary gift – to the lawyer, his or her

³ In real world situations, seeking withdrawal on this basis is something that should be used quite sparingly and with a recognition that a successful withdrawal – most especially for a court-appointed lawyer – is rare. Courts will consider it the lawyer's duty to simply handle whatever personal repugnancy he or she may have based upon the gruesomeness of the conduct or the unsavoriness of the client. Moreover, any lawyer who files such a motion that is **not** granted has without question created a wedge between him or herself and the client that will have to be addressed even if it cannot be completely overcome during the remainder of the representation.

parent, child, sibling, or spouse, except where the client is related to the donee⁴. Rule 1.8(c).

- Making or negotiating an agreement for literary or media rights to a portrayal or account based in substantial part on information relating to the representation prior to the conclusion of the representation. Rule 1.8(d)

2. Proscribed Transactions (with exceptions):

- Entering into a business transaction with a client where the lawyer knowingly acquires an ownership, possessory, security, or other pecuniary interest adverse to the client **unless:**

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and,

(3) the client consents in writing thereto. Rule 1.8(a).

- Providing financial assistance to a client in connection with pending or contemplated litigation **except:**

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client; and,

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Rule 1.8(e).

- Entering into an agreement to prospectively limit the lawyer's liability for malpractice **unless:**

it is permitted by law and the client is independently represented in making the agreement. Rule 1.8(h)(1).

- Settling a claim for malpractice with an unrepresented client or former client **without:**

⁴ This is placed in the “nonconsentable” category because there is no way to have a client consent to the lawyer’s preparation of an instrument by which the client gives a substantial gift to the lawyer or a close relative of the lawyer’s. The exception – familial relationship between the client and the lawyer – takes preparation of such a document out of what’s proscribed by the rule.

first advising the person in writing that independent representation is appropriate in connection with the proposed settlement. Rule 1.8(h)(2).

- Acquiring a proprietary interest in the cause of action or subject matter of the litigation **except** that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and,

(2) contract with a client for a reasonable contingent fee in a civil case, as permitted by Rule 1.5 and MCR 8.121. Rule 1.8(j).

- Participate in an aggregate settlement of claims of or against clients or, in a criminal case, an aggregate agreement as to guilty or nolo contendere pleas **unless**:

each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

5. Loyalty to Client

MRPC 1.6 articulates a lawyer's obligation to maintain confidences and secrets, except under very narrow circumstances delineated in the rule. MRPC 3.3, amended January 1, 2011, discusses in part circumstances where a lawyer's obligations of candor to the court trump the duty to maintain the client's confidences and secrets, requiring the lawyer in those circumstances to take steps to rectify matters. MRPC 1.8 contains a more generalized statement about the lawyer's obligation not to harm a client by the use of information. Paragraph (b) says, "A lawyer shall not use information *relating to* the representation of a client *to the disadvantage of the client* unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3." [Emphasis added.] There is no language in the commentary explaining what is meant by either phrase.

Another provision in MRPC 1.8 addresses the circumstance where someone other than the client pays for the lawyer's services. Paragraph (f) prohibits the lawyer from accepting compensation for representation from someone other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected as required by Rule 1.6.

6. Imputed Conflicts

The entire concept of conflicts of interest moves from linear to multidirectional once lawyers are practicing in law firms, moving between firms, going from government service to private practice, and going from the bench to the bar. Some disqualifications arising from those circumstances are imputed to the entire firm. Others can be addressed by screening the affected lawyer from participation in the work and in the fee generated by the work.

A. Absolute – firm disqualified

Each member of a firm is disqualified⁵ where any one of them *presently in the firm* would be disqualified due to the applicability of:

the general conflict of interest rule pertaining to direct adversity of the would-be clients (Rule 1.7);

the prohibition against drafting wills or instruments conveying gifts where the lawyer or a close relative is the recipient (Rule 1.8(c));

the former client general conflict of interest rule (Rule 1.9(a)); or

the requirement to withdraw as an intermediary. (Rule 2.2)

Rule 1.10.

B. Screening and notice can remedy disqualification under limited circumstances⁶

Where a lawyer joins a firm, the newly-joined firm is disqualified from knowingly representing a person in the same or a substantially related matter in which the new lawyer or the new lawyer's former firm was disqualified under Rule 1.9(b)⁷ **unless** the disqualified lawyer is:

⁵ While it should be noted that Rule 1.10(d) provides that disqualifications prescribed in that Rule may be waived under the conditions set forth in Rule 1.7, there are circumstances where a lawyer would not be reasonable in believing that the contemplated representation would not adversely affect the relationship with the other client – such as representing opposing parties. In those situations, obtaining a waiver might not be a sufficient way of immunizing against the perceived conflict.

⁶ The fact that the rules provide for screening and notice as a means of diffusing the impact of a conflict should not be viewed as a green light to utilize that methodology except in rare instances, because if anything goes awry during the entirety of the representation from the client's standpoint, the fact that a conflict ever existed will loom largely at the end of the day and may prompt the filing of a grievance or pursuit of a malpractice action, both of which could have been avoided had the lawyer not gone forward with the representation.

⁷ (b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client

- (1) whose interests are materially adverse to that person, and

(1) screened from any participation in the matter and apportioned no part of the fee; and

(2) written notice is promptly given to the appropriate tribunal in order to enable it to ascertain whether there has been compliance with the provisions of the rule (Rule 1.10(b)).

When a lawyer leaves a firm, the firm that has been left is **not** thereafter prohibited from representing a person with interests materially adverse to a client represented by the former member of the firm **unless**:

(1) the matter is the same or substantially related to the matter in which the former member of the firm represented the client; and

(2) any lawyer remaining in the firm has information protected by the confidentiality of information rule (Rule 1.6) and the rule prohibiting subsequent usage or revealing of client information (Rule 1.9(c)) that is material to the matter. Rule 1.10(c).

The commentary to the imputed disqualification rule provides a useful discussion about the concept of the term “firm”, noting that beyond the classic law firm model, a legal department or a legal services organization may qualify as a firm for purposes of conflicts of interest analysis. Interestingly, the commentary posits that legal service lawyers working in “separate units” might not necessarily be considered a single firm. No similar point is made with regard to multiple locations of a law firm – only a statement that acknowledges the factually-driven nature of conflicts analysis: “As in the case of independent practitioners, whether the lawyers should be treated as being associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.” Commentary to Rule 1.10.

6. Conflicts Pertaining to Moving Between Private Employment and Government Service

Like the general conflicts of interest rule, there are circumstances that are couched in absolute terms and other situations where screening and notice can facilitate a representation that would otherwise be proscribed.

A lawyer who participates personally and substantially as a public officer or employee in a matter cannot thereafter representing a private client in the same matter **unless** the government agency consents after consultation. Rule 1.11(a). Where that lawyer joins a firm that either contemplates or is already representing the private client involved in the same manner in which the lawyer participated as a public officer or employee, the law firm cannot undertake or continue the representation **unless** the disqualified lawyer is:

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(1) screened from any participation in the matter and apportioned no part of the fee; and

(2) written notice is promptly given to the appropriate tribunal in order to enable it to ascertain whether there has been compliance with the provisions of the rule (Rule 1.11(a)).

A lawyer having information about a person that he or she knows is “confidential government information”⁸, which was acquired while the lawyer was a public officer or employee may not represent a person whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of the person. A firm by which the lawyer is employed may undertake or continue representation the matter **only** if the lawyer is screen from any participation in the matter and apportioned no part of the fee. Rule 1.11(b).

A lawyer moving from private practice to government employment cannot participate in a matter as a government lawyer where the lawyer previously participated personally and substantially in private practice **unless** under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer’s stead on the matter. Rule 1.11(c)(1).

A lawyer moving from government employment to private practice other than a law clerk to a judge, other adjudicative officer or arbitrator⁹ cannot negotiate for private employment with any person who is either a party or attorney for a party in a matter in which the lawyer has participated personally and substantially while serving as a public officer or employee. Rule 1.11(2). Similarly, a judge, other adjudicative officer or arbitrator cannot negotiate for employment with any person who is a party or attorney for a party in a matter in which the judge, other adjudicative officer, or arbitrator is serving. Rule 1.12(b).

Where a judge, other adjudicative officer or arbitrator moves to private practice, he or she cannot represent anyone in connection with a matter in which the lawyer participated personally or substantially as a judge, other adjudicative officer or arbitrator **unless** all parties to the proceeding consent after consultation. Rule 1.12(a). Under those circumstances, the lawyer’s firm cannot knowingly undertake or continue representation **unless** the disqualified lawyer is:

(1) screened from any participation in the matter and apportioned no part of the fee; and

⁸ As used in Rule 1.11, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time Rule 1.11 is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. Rule 1.11(e).

⁹ Rule 1.12(b) permits a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator to negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially **only** after the lawyer has notified the judge, other adjudicative officer, or arbitrator.

(2) written notice is promptly given to the appropriate tribunal in order to enable it to ascertain whether there has been compliance with the provisions of the rule (Rule 1.12(c)).

7. Addressing a Discovered Conflict

Depending upon the nature of the conflict and timing of its discovery, a lawyer may have the ability to cure a conflict by obtaining appropriate consents from the affected persons after making a complete disclosure of the nature and extent of the conflict. In other circumstances, the conflict will be such that a representation should not be undertaken. If the representation has commenced, the lawyer may be required to withdraw as required by Rule 1.16(a)¹⁰. In doing so, the lawyer must take reasonable steps to insure protection of the client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advanced payment of fee that has not been earned. Rule 1.16(d).

8. Preventative Measures to Avoid Conflicts

The importance of implementing policies designed to identify conflicts *before* a representation commences – and, most especially, before the lawyer has been made privy to confidences and secrets that may impact the ability to proceed with pre-existing representations – cannot be overemphasized. Where conflicts are discovered after more than one client with adverse interests exists within the same firm or practice, the lawyer's ability to extricate him or herself from the situation in a way that neither adversely impacts either client nor places him or herself in jeopardy of malpractice or professional responsibility exposure is very limited.

A few simple steps at the front end of the process can help the lawyer avoid conflicts:

First, **establish a protocol that buffers the lawyer from engaging in any conversation that is arguably attorney-client privileged until a conflicts check has been made.** This means utilizing support staff for initial contact. If this is unavoidable in a particular circumstance because the would-be client insists on speaking with the lawyer before making an appointment, the lawyer should be certain not to seek any information and should head off any attempts by the would-be client to impart any information that would qualify as "secret" or even a "confidence" as those terms are used in Rule 1.6.

Second, **insure that the would-be client identifies opposing parties, opposing counsel, and the names of any key witnesses before contact with the lawyer.** These names should be cross-checked against the existing client base – which hopefully permits for the identification of witnesses and lawyers, in addition to parties. The reason for the inclusion of opposing counsel is to make certain to cover any lawyers with whom the lawyer was formerly associated. A written form should be utilized to obtain this information and it

¹⁰ Except where the lawyer is ordered to continue representation notwithstanding good cause for termination of the representation pursuant to Rule 1.16(c), a lawyer shall withdraw from representation if the representation will result in a violation of the Rules of Professional Conduct or other law. Rule 1.16(a)

should inform the would-be client of the reason for obtaining the information, making clear that the identification of persons is not to be construed as conveying confidential or secret information. If any conflicts are identified, the most prudent course is to decline the representation even where a rule allows for consent after consultation, waiver, or screening and notice. Where the lawyer chooses to utilize one of the methodologies to diffuse the conflict, any waivers or consents should be in writing. Optimally, the client should acknowledge having been afforded the opportunity to consent with another lawyer about the appropriateness of waiving the conflict.

Third, assuming that no conflicts are identified, **have a written fee agreement that describes with specificity the matter in which the lawyer agrees to represent the client** – including what final steps will signify completion of the representation. This information will be used to assist the lawyer in determining when a client becomes a former client, and whether a later matter is substantially related to the earlier representation.

If all systems fail and a conflict between two current clients is later discovered, the lawyer should immediately evaluate what steps can be taken to minimize the harm to each client, make full disclosure to each client about what has occurred, and take whatever steps can be taken to insure that each client's interests are preserved as their matters proceed.