Focus on Professional Responsibility

Conflicts of Interest—The Basics

By John W. Allen

John W. Allen, chairperson of the State Bar of Michigan’s Standing Committee on Professional and Judicial Ethics, has prepared a four-part series on the important topic of conflicts of interest. Parts One and Two were published in the January 1999 edition of the Michigan Bar Journal. This publication covers Parts Three and Four.

Part Three—Conflict with Former Client

The gist of MRPC 1.9 is that, even after a lawyer’s representation of a client ceases, the lawyer may not represent a prospective client (Client A on Decision Tree No. 3) in the same or a substantially related matter in which the prospective client’s (A) interest are materially adverse to those of the former client (B), if information protected by MRPC 1.6 (e.g., “confidences or secrets” of the former client) would be revealed, or used to the disadvantage of the former client. Even if otherwise prohibited, such a conflict may be waived, if the former client consents after consultation.

As with a present client, this analysis does not turn upon any likelihood of an “appearance of impropriety,” which was the test applied by the former Code of Professional Responsibility (CPR), and which is specifically rejected by both the American Bar Association’s Model Rules of Professional Conduct, as well as the Michigan Rules of Professional Conduct (MRPC), because it is too vague a standard for discipline. Unlike the CPR, the MRPC contains a specific provision (MRPC 1.9), which directly addresses former-client conflicts, with specific fact-based tests.

Who is the Client?

The first step is to identify the client. Lawyers represent clients, not property, or issues, or positions, or work product. The fact that the former representation concerned the same property or issue, is not controlling. If there had never been any attorney-client relationship between the lawyer and the person claiming to be the former client (B), then the analysis under MRPC 1.9 would end with that conclusion. There is no conflict, and the prospective representation is permitted, even if, in the past, the lawyer had represented one or more others in relation to the same property or issue.

There is no clear indication of when a client becomes a former client. Since the principal aim of MRPC 1.9 is to preserve protected information, the currency or usefulness of such information, in light of its age, is one logical ground of inquiry.

Some decent interval is usually required, and the “hot potato” client may not be dropped, attempting to turn the present client conflict prohibition under MRPC 1.7, into a former client conflict under the more lenient standard of MRPC 1.9.

Exception—Required Conditions

• Will representation be materially limited?

Generally, the representation of prospective client (A) will be prohibited, if the former client (B) could have a limiting effect, such as foreclosing alternative courses of action. This analysis is objective.

• Does the prospective representation concern the same or a substantially related matter?

This “substantial relationship” test was first fashioned by courts, and then codified into ABA Model Rule 1.9(a), from which MRPC 1.9 was adopted. In deciding whether a “substantial relationship” exists, the scope and subject matter of the

The full TEXT to all Michigan ethics opinions, both professional and judicial, can now be found on the State Bar of Michigan's internet site:

http://www.michbar.org

free of charge. This service has been added to assist Michigan lawyers in researching ethics inquiries.
representations of former client (B) and prospective client (A) must be examined. Some cases use a transactional analysis, which holds that a conflict exists if the former representation and the prospective representation involved, even interconnected (but not the same), events which could reveal a pattern of client conduct; this is done on the presumption that relevant confidences could have been acquired by the lawyer in question.8

Other cases use a narrower issues analysis, finding a "substantial relationship" only when the issues involved in the two cases or transactions are identical or virtually so; this may be more consistent with Michigan's view that the presumption (of acquiring relevant confidences) is rebuttable and not absolute.9 Michigan has not taken a specific position on which analysis should be used.10

The spectacle of a lawyer changing sides is at the heart of the prohibition.11 Regardless of the result of the "substantial relationship" test (and regardless whether a transactional or issues analysis is used to apply that test), the analysis must also examine the likelihood of the use or revelation of protected information.

• Are the client interests "materially adverse"?

Even if there is a "substantial relationship" between the two matters, there is no conflict unless the interest of the prospective client (A) is materially adverse to the former client (B). The adversity must be objectively "material" as with MRPC 1.7. As to the "materiality" determination, the same analysis applies.12

• Will protected information obtained from or about the Former Client be revealed, or used in the prospective representation to the disadvantage of the Former Client?

MRPC 1.6 prohibits the revealing of a client's confidences or secrets, even after the termination of the lawyer-client relationship. This has long been Michigan law.13 MRPC 1.9(c)(1) also prohibits the "use" of such information to the disadvantage of a former client. The fact that the same information was also made known to another joint client, in the course of a joint representation by the same lawyer, does not operate to negate this prohibition unless the joint representation created no reasonable expectation that the information would remain confidential.14

An exception to this prohibition exists regarding information "generally or publicly known" about a former client, regardless of a lack of client consent.15 In contrast, the "public information" exception does not apply regarding a present client.16 The presumption that protected information was acquired is not irrebuttable. Courts frequently consider whether the previous involvement was minimal or peripheral so that protected information was not gained by the lawyer.17 Moreover, when changing employment, Michigan permits both government and private lawyers to use a "screening device" to prevent the attribution of information to lawyers at the new employer.18 In all other situations, if non-public protected information regarding a present client is used, the presumption that it was acquired is not rebuttable.19

The diagram below illustrates the decision tree for conflicts of interest.

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**CONFLICTS OF INTEREST - DECISION TREE**

No. 3

**Part Three - Conflict with FORMER Client**

1. Is B a FORMER client [RPC 1.9], who could have a limiting effect on A's representation?

   - YES
   - NO

2. Is A's matter the same or "substantially related" to the transaction/issue of B's matter? [RPC 1.9(a)]

   - YES
   - NO

3. Is interest of A 'materially adverse' to B? [RPC 1.9(a)]

   - YES
   - NO

   = UNLESS

4. Will any "protected information" regarding B likely be used [RPC 1.9(c)(1)]?

   = NO

   = YES

5. Does B consent after full disclosure and consultation? (Writing NOT required, but preferred.)

   - "Appearance of Impropriety" is NOT the RPC test.

   = NO

   = YES

   = Conflict Danger ***STOP***

   = Conflict Caution ***USE CARE*** Continue with Chart

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FOCUS ON PROFESSIONAL RESPONSIBILITY

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EXHIBIT A
CONFLICT WAIVER/CONSENT

Re: Waiver of Conflict and Consent to Representation.

Dear [A] and [B]:

We represent both [Client A] and [Client B]. [Client A] has asked us to represent it involving [Describe Engagement].

We believe that the representation of [A] and our relationship with [B] will not be adversely affected; nevertheless, the Rules of Professional Conduct prohibit us from representing either [A] or [B] in this matter, without the knowing and voluntary waiver of the conflict by both clients, and that you be informed, and consider, the implications, advantages, and risks of doing so.

Our representation of [A] in this matter could yield advantages to both parties. We routinely handle matters of this nature and the benefit of our experience may assist both parties in resolving these issues in the most efficient way, and successfully concluding this transaction as both [A] and [B] desire. [Add other fact-specific advantages.]

There are also risks. Because we have represented both parties, the possibility exists that protected information could be transferred during the representation. While the possibility exists, we believe the probability of this occurring to be remote and we do not anticipate the exchange of any such information. We shall admonish all lawyers and staff on this matter to avoid it. In addition, an irreconcilable actual conflict in the future could mean that we could not represent either of you in this matter. [Add other fact-specific risks.]

Because of our conflict, both of you may wish to seek independent counsel to advise each of you regarding this waiver. If, after full review and consultation, you decide to waive the conflict and allow us to represent [A] or [B] in this matter, please sign your copy of this letter and return it to us. If you have any questions, or if we can provide any other information, please call us.

Very truly yours,

[Lawyer]

After full review and consultation, the undersigned waive the conflict and consent to [Your Firm]’s representation of [Prospective Client A and Client B].

Signed: [Prospective Client A]  Signed: [Client B]

FOCUS ON PROFESSIONAL RESPONSIBILITY

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Mr. Allen wishes to acknowledge the special contributions to these articles by: Terry Bacon; Tom Byerley; Roger Clark; Jerry Godz; Marcia Proctor; and the entire Ethics Committee.

Waivers and Consents

Although MRPC 1.7 and 1.9 generally prohibit a lawyer from undertaking representation which results in a conflict of interest, each of these rules also provides for the possibility of client consent to overcome what otherwise would be a prohibitive conflict. Conflicting client interests may be represented if two general conditions are met: the lawyer must reasonably believe that the client will not be adversely affected; and the client must consent after consultation.

Lawyer Must Reasonably Believe That Client Will Not Be Adversely Affected

The comment to MRPC sets forth the standards for determining whether it is proper for a lawyer to obtain a client’s consent to otherwise impermissible representations. When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent. These are conflicts without cure, and the client’s waiver and consent should not be sought.

The seeking of consent also presumes that the client is competent to do so; consent should not be sought from a client who is incompetent, ill-advised, or disadvantaged in the bargaining process such that the integrity of the waiver and consent would be compromised.

Consultation

The second condition necessary for curing an otherwise impermissible conflict is that the client must consent after consultation. “Consultation” is defined in the Rules as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

The consultation requirement is intended to assure that the client is reasonably informed. Thus, the lawyer must disclose that multiple representation is sought and the implications of the prospective representation, including its risks and advantages.

Writing Preferred, But Not Required

The MRPC does not require waivers and consents to be in writing. Although verbal...


determinable. Through the screening device, the lawyer's present employer may continue to represent the former client's opposite interests. However, the client must be given a writing signed by the client, now or in the future, regarding the above types of matters, and that you still wish that we enter into an engagement for legal services with you. You also understand that we have recommended that you have the right to [and in fact did] seek independent legal counsel about this matter.

By signing this letter, you affirm that understanding, and waive the conflict of interest, or potential conflict of interest, which might exist now or in the future, and consent to our representation. Your waiver and consent is a requirement of the Rules of Professional Conduct, and we are relying upon it as a condition to accepting and continuing this engagement.

Rule 1.9 Conflict of Interest: Former Client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client. The principal risk in a future conflict is that, in this or other previous representations of you, we may have obtained confidential or protected information, which could be used to an adversary’s disadvantage. Under no circumstances, would we actually disclose or use such confidential information against you; nor do we interpret your waiver and consent as an agreement to waive any rights of confidentiality of the attorney-client privilege.

(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

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

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
Typical elements of an effective screening device include:

- Separation from any participation in the representation;
- Segregation of file materials;
- Instructions to other staff regarding screening restrictions;
- Notice to the relevant clients; and (if the screened lawyer has actual knowledge of material protected information of the former client)
- Segregation of fees derived from the representation.27

If the screened lawyer does not have actual knowledge of material protected information of the former client, or if the compensation benefit is only indirect, then segregation of fees derived from the representation is not necessary. A screening device is equally useful and necessary to avoid imputed disqualification upon the transfer of staff or nonlawyer employees.28

If the representation includes an appearance in a tribunal, then notice to the tribunal is also necessary.29 (See Exhibit C for an example of a Screening Device and Notice to the Tribunal).

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**EXHIBIT C**

SCREENING DEVICE MEMORANDUM

TO: ALL ATTORNEYS AND STAFF

DATE: __/__/____

RE: [Client A—Name]: SCREENING DEVICE AND IMPLEMENTATION PROCEDURES FOR LATERAL LAWYERS.

1. The "Screened Lawyer" are [Lawyers #1 and #2], who previously worked at [Former Firm] and joined This Firm on ___/___/___.

2. Before that date, [Screened Lawyer #1] and the [Former Firm] represented [Former Client B] against [Client A]. It is believed that the [Screened Lawyer #1] may have acquired privileged or confidential information material to [Former Client B].

3. Before joining This Firm, [Screened Lawyer #2] did not personally represent [Former Client B], and did not acquire privileged or confidential information material to [Former Client B].

4. In order to avoid any conflict of interest, imputed or otherwise, this memorandum is intended to operate as the implementation of a Screening Device by This Firm in relation to the Screened Lawyers, as concerns all matters related to [Former Client B].

5. The Screening Device consists of the following elements:

A. Prohibitions Against Screened Lawyers. By this memo, the Screened Lawyers are prohibited from:

(1) Participating in any way in the preparation or conduct of any matter related to [Former Client B].

(2) Discussing any aspect of any [Former Client B] matter with anyone at This Firm.

B. Restrictions Upon Remuneration.

(1) Because of acquisition of protected information, [Screened Lawyer #1] is prohibited from receiving, directly or indirectly, any remuneration derived from This Firm's representation adverse to [Former Client B].

(2) Because he/she has not acquired protected information regarding [Former Client B], [Screened Lawyer #2] is not prohibited from receiving remuneration directly or indirectly regarding This Firm's representation adverse to [Former Client B].

C. File Management. In addition, by this memo, This Firm takes the following action:

(1) The Screened Lawyers are excluded from any participation in any matter adverse to [Former Client B].

(2) All other attorneys and staff in This Firm are instructed not to discuss such matters in the presence of the Screened Lawyers, not to allow the Screened Lawyers to review any documents or any other materials relating to, and not to receive any information from the Screened Lawyers concerning any such matter.

(3) The files relating to such matters shall be moved to a physically segregated place, and marked, indicating that the files contain screened material. Any attorney or staff person reviewing the marked file, shall also review and consult this Screening Memorandum, which shall be prominently placed in the file.

(4) By appropriate accounting measures, the remuneration attributable to this representation shall be segregated, so as to assure that the [Screened Lawyer #1] will not receive any portion of it, directly or indirectly.

D. Special Instruction to Staff in Charge of File. The staff person in charge of this file shall do the following:

(1) Prepare a label and place it on the outside of the file stating, "THIS FILE CONTAINS SCREENED MATERIAL," or words to that effect.

(2) Place a copy of this Screening Memorandum prominently in the file, by establishing a separate file folder so labeled, or by separately attaching it to the principal file folder.

(3) Arrange for the distribution of this memorandum to all lawyers and staff members at all offices of This Firm.

E. Notice to Tribunal. The attached Notice shall be filed with the Court and served upon all counsel of record and all unrepresented parties.

6. Violations. Any violations of these procedures should be reported immediately to the supervisory lawyer, Firm Ethics Committee, or Managing Partners.

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NOTICE OF SCREENING DEVICE

[Client A—Name]; SCREENING DEVICE

TO: The Court, All Parties, and their Attorneys

PLEASE TAKE NOTICE THAT on __/__/19, [Your Firm] implemented a screening device in relation to [Screened Lawyers #1 and 2], previously employed by [Former Firm], which represents or represented one or more other parties or other related entities in the above matter.

This Notice is given pursuant to the requirements of Formal Opinion R-4 issued by the State Bar of Michigan Committee on Professional and Judicial Ethics.

Dated: ___________, 19__.

Respectfully submitted,

[Your Firm]

By:_____________________

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1. See Footnote 1, MRPC 1.8(b).
2. See Part One—Present Client, Direct Conflict, supra.
3. See Footnote 5 and 6, supra, and Accompanying Text.
4. See Footnotes 6, 7 and 8, supra, and Accompanying Text.
7. See Footnotes 13 and 20, supra, and Accompanying Text.
12. See Footnotes 13, 20-21, supra, and Accompanying Text.
13. Murphy v Riggs, 238 Mich 151, 156; 213 NW 110 (1927).
15. See MRPC 1.9(c)(1).
16. See MRPC 1.8(b).
19. MRPC 1.9(a) and (b)(2). See Footnotes 15-17, supra, and Accompanying Text. See also Part Four of this Series: “Waivers, Consents and Screening Devices.”
23. MRPC, Terminology.
24. MRPC 1.7(b)(2).
26. The term “screening device” is preferable to the more archaic “Chinese Wall,” which is ethnically insensitive, and should be avoided. Regarding successive government and private employment, see MRPC 1.11.
27. Michigan Formal Ethics Opinion, R-4 (September 22, 1989). Not all jurisdictions permit screening to cure lateral hire conflicts without consent of the adverse party in private employment; if the lateral is a government lawyer, screening is generally permitted.
29. MRPC 1.10(b)(2).