

## Professional Responsibility

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# Conflicts of Interest

## 1 Conflicts Between Current Clients

### 1.1 Existence of a Conflict

#### Rule 1.7(a)

[ ... ] A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or a by personal interest of the lawyer.

#### 1.1.1 Directly Adverse

##### GSI v. Babycenter (2d Cir. 2010)

- Firm disqualified from representing plaintiff in suit against wholly-owned subsidiary of corporation that firm currently represented in other unrelated matters.
- Operational commonality, including legal affairs, and financial interdependence supports treating subsidiary as identical to parent for purposes of attorney-client relationship.

##### Maritrans v. Pepper, Hamilton & Scheetz (Pa. 1992)

- Representation of existing client's business competitors in labor negotiations with NY harbor unions was directly adverse, where client sought lawyer's advice about strategy during NY harbor strike.
  - Conflict arises from lawyer's possession of confidential information about client's plans to engage in direct competition with other companies in NY harbor.
  - Conflict was waivable under Rule 1.7(b).
    - Client consented, on condition that first would adopt screening procedure.
    - N.B. Rule 1.10(a)(2), providing for screening to avoid imputation of conflict arising from lawyer's former representation of client at prior firm, does not apply here. But client and firm may agree to screening as condition of client consent under Rule 1.7(b).
    - Breach of screening vitiated the consent.

##### Dresser Industries (5th Cir. 1992)

###### Facts

- Firm represented Dresser as defendant in two lawsuits.
- While those suits were pending, partner in firm represented plaintiff class in antitrust suit against manufacturers of oil drill bits.
- Firm notified Dresser that it might be joined as defendant in drill bits suit, but Dresser declined to replace firm as counsel in the two other suits.

### Questions

- Is there a conflict under Rule 1.7(a)?
  - If so, is the conflict waivable?
- If the two other suits were concluded and the firm no longer represented Dresser, would representation of plaintiffs in drill bits suit against Dresser be a conflict?
  - If so, is the conflict waivable?

## 1.1.2 Materially Limited

### Mendoza-Toro v. Gil (D.P.R.)

- Assistant U.S. Attorney's personal beliefs about defendant's civil disobedience was not a conflict under R. 1.7(a)(2) justifying refusal of assignment to prosecute criminal case.

### Brown v. Kelton (Ark. 2011)

- Insurance carrier assigned Brown, a lawyer employed by carrier as in-house counsel, to represent policy holder as defendant in lawsuit arising from collision involving policy holder's vehicle.
- Plaintiff moved to disqualify Brown based on conflict of interest.
  - Court held that plaintiff had standing to object to defendant's choice of counsel where representation is prohibited by law.
- Court upheld disqualification on grounds that representation by carrier's in-house counsel constituted the unauthorized practice of law by a corporation under state statute (because in-house counsel is employee/agent of the corporation).
  - Declines to address issue of whether disqualification was also proper based on conflict of interest.
- Concurring opinion: disqualification was proper based on the inherent conflict arising from attorney's duties to carrier (as employee) and client (as lawyer).
  - Client's consent will not cure the conflict, because attorney cannot provide competent and diligent representation in this situation.

## 1.2 Waiver

### Rule 1.7(b)

- Conflict is waivable if:
  - Lawyer reasonably believes that she will be able to provide competent and diligent representation to each client,
  - Dual representation not otherwise prohibited by law
  - No claims by one client against another represented by same lawyer in same litigation or proceeding, and
  - Informed written consent by each client

### Examples

1. Lawyer represents A in a pending automobile accident lawsuit against X. B has made an offer to buy A's house. B asks Lawyer to represent B in the closing.

- Lawyer may NOT represent B in the closing, unless both clients consent in writing and neither client will be adversely affected (which may well be true if both give informed consent).
- 2. Lawyer represents A in a pending automobile accident lawsuit against X. X asks Lawyer to represent X in the same lawsuit.
  - Lawyer may NOT represent X, even if both clients consent.
    - Because one client is asserting a claim against the other client *in the same action*.
    - The result is the same if another lawyer in the same firm represents X.
      - Lawyer's conflict is imputed to all other lawyers in the firm, and
      - The conflict is not waivable under Rule 1.7(b), because it involves the assertion of a claim by one client of the firm against another client of the firm *in the same action*.
- 3. Lawyer represents A in a pending automobile accident lawsuit against X. While A's case is pending, W asks Lawyer to represent W in an unrelated real estate lawsuit against A.
  - Lawyer may NOT represent W, even if both clients consent.
    - Because Lawyer cannot reasonably believe they could provide competent and diligent representation to both clients.
    - But it might be permissible for another lawyer in the same firm to represent W.
      - Lawyer conflict is imputed to all other lawyers in the firm, but
      - The conflict might be waivable under Rule 1.7(b)
        - Neither client is asserting claims against the other *in the same action*.
        - The lawyers might adopt protective measures (screening) to protect each client's confidential information.
        - The Model Rules don't provide for screening in the case of concurrent client conflicts.
        - But screening might make it reasonable for each lawyer to believe they can provide competent and diligent representation to their respective client.
        - Each client must also give informed consent, confirmed in writing. The clients might insist on screening as a condition of giving consent.
        - In practice, this is more likely to be permissible in a large firm.

### 1.3 Special Rule: Aggregate Settlements or Pleas

#### Rule 1.8(g)

- Each client must give informed consent, in writing and signed by client
- Must disclose
  - Existence and nature of all claims/pleas involved, and
  - Each clients share of settlement

## 2 Conflict Between Current & Former Client

### 2.1 Disqualification

#### Rule 1.9(a)

- Lawyer may not represent a client in a matter if
  - Lawyer formerly represented another client in the same or substantially related matter, **and**
  - Current clients interests are materially adverse to the former
- Conflict is waivable if former client gives informed consent, confirmed in writing

#### Examples

1. L represented A, a physician, in an automobile accident lawsuit against X. The lawsuit concluded five years ago, and L has not represented A since that time. B asks L to represent B in a medical malpractice case against A.
  - L may represent B, since the two matters are not substantially related.
2. L represented ABC Corp. in its negotiation of an employment contract with X. The contract negotiations were successful and concluded 5 years ago. L has not represented ABC Corp. since that time. X wishes to sue ABC Corp. for breach of his employment contract (the one drafted by L). X asks L to represent X in a suit against ABC Corp.
  - L may NOT represent X, because the two matters are substantially related, unless ABC consents in writing.

#### Maritrans v. Pepper, Hamilton, & Scheetz (Pa 1992)

- Representation of former client's business competitors was "substantially related" matter in which current client's interests were "materially adverse" to former client, where lawyer had access to former client's confidential information regarding direct competition.
  - Actual receipt and disclosure of confidential information is not required for a conflict to exist under Rule 1.9(a). These are presumed, as long as the lawyer *had access*.
  - In *Maritrans*, the former client's confidential information was actually revealed to the partners representing the competitors.
    - This may have been necessary to support injunction.

#### Carey v. Danis (Mo. 2002)

- Attorneys indefinitely suspended from practice of law where they represented plaintiffs in class action suit substantially related to matter in which they had formerly represented defendant

### 2.2 Information related to former representation

#### Rule 1.9(c)

- May not use information to former client's disadvantage, unless
  - The Rules would otherwise permit, or
  - The information has become generally known
- May not reveal information, except as Rules otherwise permit or require for client information

*Example*

Five years ago, L prepared a will for A. During this process, L learned a great deal about A's "secret" assets. X now asks L to sue A to collect a promissory note.

- L may not represent X because L has confidential information about A, L's former client, that L could use to the disadvantage of A

### 3 Conflicts Between Lawyer & Client

**Rule 1.8(a)**

- Business dealings with, or financial interest adverse to, a client

**Rule 1.8(b)**

- Use of client information to client's disadvantage

**Rule 1.8(c)**

- Gifts from clients
  - May not solicit
  - May not prepare instrument
  - Exception for close relatives

**Rule 1.8(d)**

- Literary or media rights based on information related to representation
  - May not negotiate or enter into agreement before representation is concluded

**Rule 1.8(e)**

- Financial assistance to client
  - In connection with litigation
  - But may advance costs and expenses
    - Repayment may be contingent on outcome
    - May pay costs and expenses for indigent client

**Rule 1.8(h)**

- Lawyer's liability to client
  - Agreement prospectively limiting malpractice liability
    - Client must have independent representation in making agreement
  - Settlement of malpractice claims with unrepresented client
    - Must advise client in writing that seeking independent legal counsel is desirable, and
    - Must give client reasonable opportunity to do so

**Rule 1.8(i)**

- Proprietary interest in cause of action or subject matter of litigation
  - Attorney's lien permitted
  - Contingent fee permitted

**Rule 1.8(j)**

- Sexual relationship with client
  - Unless relationship existed before representation

**Matter of Halverson (Wash. 2000)**

- Attorney subject to discipline under Wash. RPC 1.7(b), where attorney began a sexual relationship with client after she retained him to represent her in obtaining a divorce.
  - At time of case, Washington had not adopted MRPC Rule 1.8(j).
  - Wash. RPC 1.7(b) is equivalent to current MRPC Rule 1.7(a)(2). Conflict existed because lawyer's representation of client was materially limited by lawyer's personal interest.
  - Special vulnerability of clients in divorce matters makes sexual relationship particularly inappropriate.
  - Client's consent was insufficient to waive conflict under MRPC 1.7(b), where
    - lawyer's belief that representation would not be adversely affected was unreasonable, and
    - lawyer did not adequately inform client of risks (legal and otherwise) of sexual relationship with lawyer during divorce case.
- Additional violations
  - Attorney breach duty of communication under Rule 1.4(b), by failing to explain the risks of entering into a sexual relationship under the circumstances.
  - Attorney breach duty to exercise independent professional judgment under Rule 2.1, by failing to advise client of his own "published, professional opinion" that individuals going through a divorce should avoid new sexual relationships, and by failing to discuss consequences of or take precautions to avoid pregnancy.

## 4 Lawyer Changing Firms

### 4.1 Conflicts that Follow the Departing Lawyer

**Rule 1.9(b)**

- Same or substantially related matter
- Current client's interests are materially adverse to client of former firm
- Lawyer had information protected by Rules 1.6 & 1.9(c) that is material to the matter

Waivable with informed written consent by *former* client

## 4.2 Conflicts that a Departing Lawyer Leaves Behind

### Rule 1.10(b)

- Firm may not represent a person with interests materially adverse to former lawyer's client (not currently represented by Firm), if:
  - Same or substantially related matter, and
  - Any lawyer remaining in the firm has material information about the former client protected by Rules 1.6 and 1.9(c)

## 5 Imputed Conflicts

### 5.1 Scope of Restriction

#### Rule 1.10(a)

- Where one lawyer in firm is disqualified by conflict, all lawyers in the firm are disqualified
- Exception:
  - Conflict based on personal interest of lawyer, and
  - No significant risk that the lawyer's personal interest will materially limit representation by another lawyer in the firm

### 5.2 Conflicts Involving Client of Lawyer's Former Firm

- Not imputed to other lawyers in the current firm if:
  - Disqualified lawyer is timely screened and receives no portion of fee
  - Former client receives written notice
    - describing the screening procedures
    - stating firm's compliance with the Rules
    - stating that review may be available from tribunal
  - Firm agrees to respond to any written inquiries or objections by former client regarding screening procedures
- Not imputed to lawyers at former firm if former client is not currently represented by the firm, unless:
  - Same or substantially related matter
  - Any lawyer in the firm has material information protected by Rules 1.6 and 1.9(c)

*Note:* Some jurisdictions permit screening to avoid imputation among lawyers in same firm, not only where conflicted lawyer represented former client as previous firm. See, e.g. *Maritrans* (Pa. RPC 1.10)

### 5.3 Conflicts Between Attorney & Client

#### Rule 1.8(k)

- Imputed

- Conflicts under Rule 1.8(a)-(i)
- Not imputed
- Conflicts under Rule 1.8(j)

## **5.4 Waiver**

Imputed conflicts under Rule 1.10(a) or (b) may be waived if conditions in Rule 1.7(b) are satisfied