Legal Profession

MF Chapter 9

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Contents

M&F3rd, CHAPTER 9

Conflicts of Interest: Loyalty and Independent Judgment

The two main CURRENT conflicts of interest rules are Model Rules 1.7 and 1.8.

Model Rule 1.7

Conflict of Interest: Current Clients

Model Rule 1.7 is the general conflicts rule. The Rule itself is pretty short, but it comes with 35 comments, more than any other Model Rule, by far.

Model Rule 1.7 contains three parts:

- (a)(1) we'll call *"directly adverse"* conflicts;
- (a)(2) we'll call "materially limited" conflicts;
- (b), as in "except as provided in paragraph (b)," we'll call: *"Eek! I have a conflict! Now what?"*

Model Rule 1.7(a)

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. 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 by a personal interest of the lawyer.

Except with informed consent

Like so many Model Rules, it begins with a proviso that doesn't make sense yet.

`Except as provided in paragraph (b) . . . .`

Imagine Charles Dickens starting the *Tale Of Two Cities* by writing: … "Except as provided in Chapter 27, it was the best of times, it was the worst of times."

For the time being, pretend that Model Rule 1.7 begins: "*Except with informed consent*, a lawyer shall not represent a client if the representation involves a *concurrent conflict of interest*.

This is usually what it means. Concurrent conflicts are prohibited, but are sometimes okay if we get informed consent. What is a *concurrent* conflict? A conflict between two clients, both of whom are *current clients* of the lawyer or firm. So Model Rule 1.7 deals, not with prospective clients (Model Rule 1.18), or former clients (Model Rule 1.9), but with *current clients*.

Direct Adversity: Easy!

Model Rule 1.7(a)(1) says that "A . . . concurrent conflict . . . exists if . . . one client will be *directly adverse to another client*.

Lawyers are usually good at spotting direct adversity. These conflicts constitute only about 10% of disciplinary actions arising out of conflicts of interest.

These are usually litigation-type conflicts:

- One lawyer should not represent joint defendants in a murder trial where there's only one shooter.
- One lawyer should not represent both the driver and a passenger in an automobile accident if there's any question about the driver's negligence.

The trial lawyers and the litigators have it pretty easy when it comes to conflicts (they are used to representing people who are fighting). It can trickier when

lawyers are helping people form businesses or do estate planning or trying to sort out water rights. In those cases, lawyers are often dealing with small groups of people who are *not* directly adverse . . . *yet*.

Example

Two ranchers, Wally Waters and Ricky Rivers, are involved in a water rights dispute.

Larry Lawyer cannot represent *both* ranchers in the same dispute, because the clients would be directly adverse, current clients. That's the easy part.

So Larry Lawyer represents Wally Waters in the water rights dispute, and Ricky Rivers gets his own lawyer, Ada Attorney.

Now a bank Larry Lawyer regularly represents asks Larry Lawyer to sue Wally Waters on a promissory note. The note is not connected with the water rights litigation.

May Larry Lawyer represent the bank and sue Wally on a promissory note?

Using the language of Model Rule 1.7, If Larry represents the bank, then one of his clients (the bank) will be *directly adverse* to another of his clients (Wally Waters). So Larry Lawyer may *not* agree to represent the bank, unless Larry can meet the four conditions set forth in Model Rule 1.7(b).

What if Larry Lawyer asks another lawyer in his firm to represent Wally Waters against the bank? Will that *cure* the conflict?

No. Because of Model Rule 1.10(a), Larry's conflict of interest between his two current clients is *imputed* to his entire firm:

Model Rule 1.10(a)

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 …

There are exceptions, which don't apply here. But note, the imputation Rule applies even if Larry Lawyer's firm is a giant international law firm with 1500 lawyers all over the world. All 1500 lawyers in Larry's firm are conflicted out of the representation, even if John Waters is a rancher in Western Nebraska and the bank is in Singapore. The Singapore office of Larry Lawyer's firm may not represent the bank and sue John Waters on the promissory note. Because John Waters and the bank are *directly adverse current clients*.

Rule 1.7, Comment 6

> Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

So, even if Wally gives informed consent to let Larry Lawyer represent the bank suing on the promissory note, Wally needs another lawyer from another firm to defend him on the promissory note. Otherwise, Larry will run afoul of Model Rule 1.7(b)(3), which provides that, notwithstanding conflicts identified in (a), a lawyer *may* represent a client if:

> the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal;

Materially-Limited Conflicts: Hard!

Model Rule 1.7(a)(2) says that "A . . . concurrent conflict . . . exists if . . . 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
- by a personal interest of the lawyer.

These are the tricky ones, which cause roughly 85-90% of *conflict* disciplinary actions.

Litigation tends to be easier, again, because direct adversity is easier to spot in the context of a lawsuit. Much harder in other contexts.

Non-litigation Conflicts.

Model Rule 1.7 Comment 7:

> Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in

> negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Model Rule 1.7 Comment:

> Even where there is no direct adverseness, a conflict of interest exists if there is a significant RISK that a lawyer's ability . . . will be materially limited as a result of the lawyer's other responsibilities or interests.

The lawyer often deals with multiple clients seeking joint representation. Often the clients like each other, even love each other, so why not use one lawyer?

- helping to organize a business in which two or more clients are entrepreneurs,
- working out the financial reorganization of an enterprise in which two or more clients have an interest or
- arranging a property distribution in settlement of an estate.

It often makes sense for a family to use one estate planning lawyer. Sometimes it makes sense for groups of farmers or ranchers to use one water rights lawyer, assuming the lawyer's representation of any one of them will not be materially limited by your representation the others.

Many times it's helpful just to constantly ask who is the client and who is not the client.

The lawyer's best friend and two other neighbors want to hire the lawyer to set up a closely held corporation and represent them on a regular basis. The lawyer should resist the urge to be what commentators call a lawyer to the situation. "Here's a mess," says the lawyer, "I can sort it out for these people." Instead the inquiry should begin with: Who is the client? The lawyer's best friend. The two neighbors? All of them? And the corporation they propose to form?

Rule 1.7 Comment 28: . . . . Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example,

It's impossible to prescriptively list all of the situations the lawyer will encounter.

Comment 28 begins: "Whether a conflict is consentable depends on the circumstances . . . . "

The real question: Is there a common objective which the lawyer can serve that *transcends* the many ways in which the parties interest otherwise differ?

It requires judgment, and it's an art, not a science. The lawyer should get help in case of doubts.

Model Rule 1.7(b)

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*

(4) each affected client gives informed consent, confirmed in writing. Client-Lawyer Relationship

Examine each condition separately

Condition 1:

> The lawyer reasonably believes that the lawyer can provide competent and diligent representation.

Despite the directly-adverse or materially-limited conflict identified in section (a), does the lawyer believe she can competent and diligent representation? Lawyers like to believe they will *always* provide competent and diligent representation. Note the reasonable lawyer standard ("the lawyer reasonably believes"). Would reasonable lawyers believe they could provide competent, diligent representation to Larry King and all seven of his ex wives?

The lawyer should also consider: Am I personally capable? As in, will pressures at home or work interfere with my representation of this client? What if the lawyer is struggling with alcohol? Depression? Medication? Grief?

Here is where the lawyer take a hard look at their "fitness" to serve demanding clients.

Condition 2:

> The representation is not prohibited by law.

Is the representation prohibited by state law? Some states will not allow one lawyer or firm to represent both husband and wife in an amicable divorce.

Other states will not allow one lawyer to represent both the buyer and a seller in a real estate transaction. Others say no joint defendants in capital murder cases.

You just have to check.

Condition 3:

> The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a *tribunal*.

Even with consent, a lawyer or law firm cannot represent both sides of a claim in the same litigation or proceeding.

Worth looking again at the terminology section for a reminder of what is a tribunal?

Rule 1.0 Terminology

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Condition 4:

> And each affected client gives *informed consent*, confirmed in writing.

Why "confirmed in writing," why not just a "signed writing," as we see in some of the other rules?

Why not just consent as we see in still others?

What does "confirmed" in writing mean?

Rule 1.0 Terminology

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Writing can be an e-mail and it only has to confirm the consent.

It does not have to be signed by the client.

Model Rule 1.0(n) separately defines a "signed" writing.

Getting written consent is normally the prudent way to proceed. The writing serves as a record of the disclosures that were made and tends to bring home to both lawyer and clients that they are doing something significant.

Further if the client later sues the lawyer, recollections about an oral waiver may differ.

For that reason, some people argue that an oral waiver may not be worth the paper it's printed on.

Informed Consent, Confirmed In Writing

Model Rule 1.7, Comment 20:

> "The requirement of a writing does not supplant the need in most cases for the lawyer to TALK WITH THE CLIENT . . . Rather, the writing is required to impress upon the client the seriousness of the decision . . . ."

Well, the ABA has something specific in mind. They want the lawyer to *talk* to the client and explain all of the benefits and the risks of consenting to a conflict of interest.

Then they want the lawyer to send a writing—an e-mail, a letter, an engagement agreement—a writing that impresses the importance of the decision on the client.

This avoids disputes or ambiguities that might later occur. Don't pass up the chance to spell out the particulars. It does not have to be signed by the client.

Must include specific descriptions about conflicts and risks of conflicts. The case law shows how blanket general waivers are not informed consent. If the conflict risks were foreseeable risks, the lawyer must spell them out.

Lawyer should identify and describe all of the conflicts and the risks of conflicts that the lawyer wisely foresaw when he assessed the representation under 1.7(a).

Lawyer must do this for *each affected client*.

Positional Conflicts

ABA Formal Opinion 93-377

> When a lawyer is asked to advocate a position on a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction, the lawyer, in the absence of consent by both clients after

full disclosure, should refuse to accept the second representation if there is a substantial risk that the lawyer's advocacy on behalf of one client will create a legal precedent which is likely to materially undercut the legal position being urged on behalf of the other client.

If the two matters are not being litigated in the same jurisdiction and there is no substantial risk that either representation will be adversely affected by the other, the lawyer may proceed with both representations.

Conflict Dangers

- Attorney-client privilege will NOT attach if unforeseen litigation happens.
- Information imparted by one joint client will NOT be kept secret from the other.
- Shared loyalty may temper the level of partisanship for each client.
- Lawyer may be obligated to withdraw.

Again specific informed consent.

If litigation erupts the attorney-client privilege will not protect our communications.

No secrets.

I will do my best to be loyal to everybody, but that's different than just looking out for one client's interest.

Joint Clients v. The World

Atty-Client privilege protects joint clients and their joint communications with their lawyer from the world. Joints clients may assert the attorney-client privilege when it's The World vs. Them.

But any one of them may waive the privilege when all were present for the conference or helped create the document.

If one client tells the common lawyer something relevant to the joint representation, lawyer must tell the others.

When joint clients fall out, no privilege.

Why might clients consent?

- One lawyer is cheaper than two or three.
- Pooled resources.
- Coordinated positions and a friendly relationship.

- Parties may all wish to employ a particularly valued lawyer.

Rule 1.7, Comment 29

> "Ordinarily, the lawyer will be forced to withdraw from representing ALL of the clients if the common representation fails."

And for multiple clients who were hoping to save money by hiring only one lawyer, this factoid should be part of any informed consent confirmed in writing

Consent to Future Conflict

Rule 1.7, Comment 22 "If the consent is general and open-ended, then the consent ordinarily will be ineffective . . . ."

Consent to Future Conflict

> Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b).
>
> The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.
>
> The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.
>
> Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.
>
> On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b)

What about advance waivers?

Restatement § 122:

> Advance waivers are permissible if they cover events that can be foreseen. ABA Formal Opinion: "consent to mere representation of a client with adverse interests do *not* amount to consent to breach confidential disclosure . . ."

RLGL § 122, comment d

> if a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained.

Can Client Later Revoke Consent?

Can clients require that the lawyer not represent either client?

Rule 1.7 Comment 21:

Client may revoke consent and terminate lawyer;

whether client is precluded from representing other clients depends on . . .

- the nature of the conflict
- whether the client revoked consent because of a
- material change in the circumstances
- the reasonable expectations of other clients;
- whether material detriment to other clients or the lawyer would result.

RLGL § 122

comment f: "Revocation of consent" provides illustrations of how revocation works.

The illustrations from the Restatement help bring this down to earth.

1. (operating a restaurant): Client A reasonably concludes that the lawyer is favoring B and revokes consent. Lawyer can't represent either.
2. (co-defendants in breach of K action): On the eve of trial after months of preparation, Client A revokes consent to joint representation *for reasons not justified by client B or the lawyer* and insists that the lawyer not represent client B either. Client A's withdrawal of consent is ineffective to prevent the lawyer from representing B in the absence of compelling considerations such as harmful disloyalty by Lawyer.

The writing discussing the waiver can cover this situation and control most cases involving later revocation of consent.

Nonconsentable Conflicts

> If a reasonable and disinterested lawyer would conclude . . . that the representation (of either client) would likely fall short, the conflict is nonconsentable.

–RLGL § 122 comment (g)(iv)

> The general standard stated . . . assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client.
>
> Decisions holding that a conflict is nonconsentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict. Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is nonconsentable.

Rule 1.7 Corporate Families

- Comment 5: "Unforeseeable . . . changes in corporate . . . affiliations . . . might create conflicts in the midst of representation . . ."
- "Lawyer may have the option to withdraw from one of the representations to avoid the conflict . . ."

MR 1.7 Comment [5] allows a lawyer confronted with such a conflict to choose which client it wishes to continue to represent, as long as the lawyer did not cause the conflict.

RLGL § 132, comment j

"A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through the initiative of the clients."

Model Rule 1.7, Comment 34:

- "Lawyer who represents a corporation . . . does NOT . . . necessarily represent any . . . parent or subsidiary."
- "Lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer . . ."

Some circumstances might make the affiliate, as well as the represented entity, the client of the lawyer. These include:

(1) significant control of the nonclient by the client;
(2) financial loss or benefit to the nonclient that will have a direct, adverse impact on the client; and
(3) disclosure of confidential information of the nonclient entity. Any or all of these might suffice to create an implied client-lawyer relationship with the affiliate.

Model Rule 1.9

Although I discuss it here in class, see the much more thorough coverage in the notes to Chapter 11, which deals with this Rule in detail.

Model Rule 2.4

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.