

EQUAL JUSTICE UNIVERSITY
TENNESSEE ALLIANCE FOR LEGAL SERVICES

Conflict Checks, Confidentiality &
How to End an Attorney-Client Relationship

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COMMON AREAS OF COMPLAINT AND INQUIRY

A. Conflicts of Interest

1. Rules of Professional Conduct Implicated:

Rule 1.7 – 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. . . .”)

Comment 4 – “If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw . . . unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b).”

“Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client.”

Comment 13 – Interest of Person Paying for a Lawyer’s Service

Comment 14 – Prohibited Representations (“[S]ome conflicts are nonconsentable.”)

Comment 27, 27a – Nonlitigation Conflicts (“It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans Multiple representations of these kinds are appropriate where the interests of the clients [are] in cooperation and achieving common objectives predominate over any inconsistent interests.”)

Comment 35-37 – Common Representation of Co-Defendants in Criminal or Juvenile Delinquency Proceedings

Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules (“(f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless: (1) the client gives informed consent; (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 RPC 1.6.”)

Comment 11 – Person Paying for a Lawyer’s Services (may be prohibited “unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client.”)

Rule 1.9 – Duties to Former Clients (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”)

Rule 1.10 – Imputation of Conflicts of Interest: General Rule

Comment 9 – “The ‘appearance of impropriety’ standard existing under the Code of Professional Responsibility has not been retained in these rules.”

Comment 10a – “The requirements set forth in this rule include law clerks, paralegals, secretaries, and other staff employed by a firm, with due regard to their levels of responsibility in the matter.”

Rule 1.11 – Special Conflicts of Interest for Former and Current Government Officers and Employees

Rule 1.18 – Duties to Prospective Client

Comment 6 – “[T]he lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or substantially related matter, unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.”

2. Ethics Fact Patterns Discussion (Attached)

3. Additional Hypotheticals

- Attorney represents an estate. Executor files claims for fees and debt owed the executor. Other beneficiaries file claims for debts owed by the deceased. Some

claims are denied, but the Executor's claim is paid. Is the Attorney biased in favor of the Executor?

- Attorney represented husband in criminal action which is concluded. Wife owns a company and brings theft charges against an employee. May Attorney represent employee on Wife's criminal charges?
- Wife has initial consult with Attorney about divorce. Wife pays \$150 consult fee, and does not hire Attorney. May Attorney represent husband in divorce?

B. Confidentiality

1. Rules of Professional Conduct Implicated:

Rule 1.6 – Confidentiality of Information (“(c) A lawyer shall reveal information relating to the representation of a client . . . (2) to comply with an order of a tribunal . . . but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information . . . is protected.”)

Rule 1.9 – Duties to Former Clients (A lawyer who has represented a client in a matter “shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.”)

Comment 3b – “Even where the current matter does not involve the work previously done by the lawyer for the former client, it may still be substantially related to the former matter if there is a substantial risk that confidential factual information that would normally be obtained in the prior representation would materially advance the client's position in the subsequent matter.”

Rule 1.14 – Client with Diminished Capacity (“(c) . . . When taking protective action pursuant to paragraph (b) [for a client with diminished capacity], the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.”)

Comment 1 – “. . . [A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.”

Comment 3 – “The client may wish to have family members or other persons participate in discussions with the lawyer for purpose of assisting the lawyer with the client's representation.” The lawyer “must look to the client, and not family members, to make decisions on the client's behalf.”

Comment 5 – Protective action may be taken “[i]f a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken.”

Comment 6 – In determining the extent of the client’s diminished capacity, in appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

Comment 8 – The lawyer may disclose information about the client under (c) “even when the client directs the lawyer to the contrary.”

Rule 1.18 – Duties to Prospective Client (“(c) A lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that prospective client in the matter. . . .”)

Comment 2 – “Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’ within the meaning of paragraph (a).”

Comment 5 – “With the informed consent of the prospective client, a lawyer and a prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”

2. **Ethics Fact Patterns Discussion**

3. **Additional Hypotheticals**

- Attorney represents co-conservators for Mother over whom a conservatorship is in place. The conservatorship is for the body, finances and medical decisions of the Mother. Mother wants to hire her own attorney to dissolve the conservatorship. May New Attorney discuss Mother’s condition with co-conservators? Is New Attorney required to do so, if asked?

C. Terminating An Attorney-Client Relationship

1. Rules of Professional Conduct Implicated:

Rule 1.16 – Declining or Terminating Representation

(a). . . [A] lawyer shall not represent a client or . . . shall withdraw . . . if: (1) the representation will result in a violation of the Rules of Professional Conduct or other law. . . .

(b) . . . [A] lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal. . . .

(d) A lawyer . . . shall . . . take steps to protect the client's interests.

Comment 3 – “Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal Lawyers should be mindful of their obligations to both clients and the court under RPCs 1.6 and 3.3.”

Comment 6 – “If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests.”

Comment 7 – Optional Withdrawal – (“ . . . The lawyer has the option to withdraw for any reason if it can be accomplished without material adverse effect on the client's interests. . . . The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent.

ETHICS FACT PATTERNS

A. Senior Citizen Collection Defense Matter

1. Rules of Professional Conduct Implicated: 1.14 (Client with Diminished Capacity), 1.6 (Confidential Information), 1.4 (Communication), 1.7 (Conflict of Interest)

B. Minor Victim of Domestic Violence Matter

1. Rules of Professional Conduct Implicated: 1.14 (Client with Diminished Capacity), 1.6 (Confidential Information), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 1.7 (Conflict of Interest), 1.8 (Conflict of Interest – Specific Rules)

C. Susie's Eviction Matter

1. Rules of Professional Conduct Implicated: 1.7 (Conflict of Interest), 1.9 (Duties to Former Clients), 1.10 (Imputation of Conflicts of Interest), 1.18 (Duties to Prospective Client)