1-1-2021

Everyday Conflicts_ Avoiding Self-Inflicted Ethical Quandaries

Indiana Continuing Legal Education Forum (ICLEF)

Everyday Conflicts: Avoiding Self-Inflicted Ethical Quandaries
March 30, 2021
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Feature Release 4.1
August 2020

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EVERYDAY CONFLICTS:
AVOIDING SELF-INFLICTED ETHICAL QUANDARIES

March 30, 2021

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EVERYDAY CONFLITS: AVOIDING SELF-INFLICTED ETHICAL QUANDARIES

Agenda

8:55 A.M. **Welcome & Introduction**

9:00 A.M. The QUIZ – A potpourri of the hottest topics in legal malpractice and ethics, and what you need to know to protect yourself from novel malpractice risks and ethics complaints.

10:00 A.M. **Break**

10:10 A.M. A look at Rules 1.18, 1.9, 1.10, 1.8, & 1.7 and how these Rules of Professional Conduct establish limits on lawyers' conduct and control of the attorney-client relationship in often surprising and unexpected ways.

10:00 A.M. **Break**

11:15 A.M. Everyday Conflicts *(continues)*.

12:15 P.M. **Program Adjourns**

March 30, 2021

EVERYDAY CONFLITS: AVOIDING SELF-INFLICTED ETHICAL QUANDARIES

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March 30, 2021

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Christian A Stiegemeyer is the Director of Risk Management for *The Bar Plan Mutual Insurance Company* and Executive Vice President of *The Bar Plan Foundation*. He annually conducts more than seventy Risk Management seminars, on a wide variety of ethical and legal malpractice issues, covering current issues concerning professionalism and providing practical solutions for dealing with malpractice and ethical concerns.

Mr. Stiegemeyer also directs The Bar Plan's Practice Management Program, providing on-site, personalized reviews of lawyers' law firm practices to help improve risk management and case handling procedures. In addition, Mr. Stiegemeyer responds to The Bar Plan's ethics and malpractice telephone "Hotline" to timely assist its insureds with issues that arise in their daily practice and has written numerous articles appearing in a variety of national, state and local bar association publications. He received his B.A. from *Southeast Missouri State University* and J.D. from *The Saint Louis University School of Law* in 1992.

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Everyday Conflicts
Indiana

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A QUIZ

- Christian A. Stiegemeyer | Director of Risk Management
- Whittney A. Dunn| Risk Manager

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1. A former client posts a comment on your law firm website saying, “What a great lawyer! Her ads said ‘Bankruptcy, but keep house & car.’ She was right!” You:

A. Have no duty to remove the post because you did not ask the former client to comment.

B. Have no duty to remove the post because the former client actually kept his house and car in the bankruptcy.

C. Have no duty to remove the post because the advertising language is not false or misleading.

D. Have to remove the post.

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2. Through an oversight you authorize trust account disbursements without prior client consent. The disbursements, while in the six figures, were legitimately earned fees or expenses. You have a law license in both Indiana and Ohio. You have a duty to self-report this conduct in:

A. Indiana and Ohio

B. Indiana only

C. Ohio only

D. Neither Indiana nor Ohio as the client will not give consent to the release of the confidential information.

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3. A former client posts a comment on the client's Facebook page saying, "What a great lawyer! Her ads said 'Bankruptcy, but keep house & car.' She was right!" You:

A. May like the post because you did not ask the former client to comment.

B. May like the post because the former client actually kept his house and car in the bankruptcy.

C. May like the post because the advertising language is not false or misleading.

D. May not like the post.

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4. There are three partners in your law firm of Smith Jones & Davis. Davis retires. Regarding your law firm name:

A. It may remain Smith Jones & Davis

B. It may remain Smith Jones and Davis if Davis is indicated as retired on all advertising

C. It may remain Smith Jones & Davis because it is a tradename

D. It must be changed to Smith & Jones

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5. You post on your social media site, “What a great day! Jury came back with a great verdict for my client!!” You go on to mention the client’s name, adverse party’s name and the dollar amount of the verdict. You:

A. May post the adverse party’s name because it is public record but not the verdict amount or client name.

B. May post the verdict amount because it is public record but not the client’s or adverse party’s name.

C. May post the client’s name, adverse party name and the verdict amount because they are all public record.

D. Although all are public record may not post the client’s name, adverse party name or the verdict amount.

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6. You represent Wife in a marital dissolution. One day she brings to you emails sent to her by her daughter's 15-year old friend and asks what she should do about them. The emails are from Husband and are of a highly explicit nature, including frank photos of the husband. You:

A. Will violate Rule 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) if you fail to report the matter DCS.

B. Will not violate Rule 8.4(b) (commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) if you fail to report the matter DCS.

C. Will violate Rule 1.6 Confidentiality if you report the matter DCS.

D. Will not violate Rule 1.6 Confidentiality if you report the matter DCS.

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7. A former client posts a comment on your law firm website saying, “What a great lawyer! Not only is she a specialist in divorce law, she’s a specialist is great client service too!” You:

A. Have no duty to remove the post because you did not ask the former client to comment.

B. Have no duty to remove the post because the former client actually got a great result in the divorce.

C. Have no duty to remove the post because the former client actually received great service.

D. Have to remove the post.

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8. After settling your clients matter, the client demands immediate payment of all funds except your fee despite notice of outstanding medical liens, and threatens you with a grievance complaint if you don't comply. You explain the risks of the liens and further that if the client files a grievance you will sue her for defamation. This threat:

A. Violates Rule 8.4(d) (engage in conduct that is prejudicial to the administration of justice).

B. Is a legitimate attempt to protect your reputation.

C. Is not spurious as there is no immunity for complaints made with malice.

D. Should have also included a libel threat.

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9. In 2020 the Indiana Supreme Court issued 39 opinions in disciplinary matters. Of those 39, the percentage in which the attorney had been convicted of OWI was:

A. 7%

B. 52%

C. 13%

D. 16%

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10. In 2020 the Indiana Supreme Court issued 39 opinions in disciplinary matters. Of those 39, the percentage in which the attorney Failed to Cooperate was:

A. 7%

B. 52%

C. 31%

D. 16%

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2021 Everyday Conflicts

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A Look at Rules…

Everyday Conflicts

1.7. Conflict of Interest: Current Clients

1.8. Conflict of Interest: Current Clients: Specific Rules

1.9. Duties to Former Clients

1.10. Imputation of Conflicts of Interest: General Rule

1.18. Duties to Prospective Client

THE BAR PLAN FOUNDATION

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Everyday Conflicts

Rule 1.18. Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) 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 person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
- (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (ii) written notice is promptly given to the prospective client.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

"Discussion" Results in "Prospective Client"-Lawyer Relationship

***In re Anonymous*,** 932 N.E.2d 671 (Ind. 2010).

Friend confided in telephone call to Attorney details of Friends marital difficulties. In a second phone call that month, Friend asked Attorney for a referral of a family law lawyer. Attorney gave Friend name of Colleague in firm then called Colleague to inform her of the referral. Colleague called Friend that day and arranged a meeting the following day, when Friend retained Colleague. Attorney was aware Friend had retained Colleague from her firm and had had him file for divorce.

Several months later Attorney was socializing with a friend of Friend, told her about the divorce filing and suggested contacting Friend when the friend expressed concern, which she did. Friend became upset about the revelation of the information and filed a grievance against Attorney.

Attorney argued that Friend gave her the initial information seeking *personal* rather than professional advice and only later phoned to ask for an attorney referral. She argued the information was not confidential when first disclosed to her, subsequent events did not change its nature, and she violated no ethical obligation in later revealing it.

Held - The information at issue was disclosed to Attorney not long before the second call when Friend asked for a referral and Attorney recommended Colleague. At that point, if not before, Friend became a prospective client under Rule 1.18.

Everyday Conflicts

Attorney also argued: 1) Friend disclosed the information to others, and 2) revelation of information was not barred because it could be discovered by searching public records and the internet.

Court, as to: 1) Fact that a client may chose to confide to others information relating to a representation does not waive or negate the confidentiality protections of the Rules, and as to 2) No exception in the Rules allowing revelation even if a diligent researcher could unearth it through public sources.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Everyday Conflicts

Because of the unusual factual situation in this case, the Court clearly states that its present holding is limited to the facts in this case. The Court does not suggest that all of an attorney's relations with friends—even long-term, close relations—will bar all future attorney—client relationships that are adverse to those friends. However…

"Discussion" Results in "Prospective Client"-Lawyer Relationship

Plaintiff owned 4 nursing homes in financial difficulty. For a promise of a cash infusion he sold the homes to Defendants in exchange for a salary/consulting fee. Soon after, Defendants discharged Plaintiff based on occupancy of the homes falling below 90%, a condition of the sales agreement. Plaintiff sued for breach of contract. Defendants were represented by attorney Schulman.

Plaintiff and Schulman played golf and dined together a least twice a week for 10-12 years prior to Plaintiff's suit. As the situation deteriorated with Defendants, Schulman said to Plaintiff: "*Michael, whatever you need me to do, I will do. Whatever you need me for, I will be there for you*." And then Schulman gave Plaintiff certain advice.

HELD - ***Without doubt, Plaintiff was not a prototypical "prospective client" for Schulman. Plaintiff never met…in Schulman's law office…the two never signed [a]…retainer agreement…they never had a formal discussion concerning Schulman's representation. However, despite the lack of the usual formal "prospective client" aura, the Court finds that the totality of the parties' relationship demonstrates that Plaintiff was a prospective client of Schulman.*** Miness v. Ahuja, 762 F. Supp. 2d 465 (E.D.N.Y. 2010).

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Reasonable Expectation/Bad Faith Communications

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"If from the beginning, the purported investor's aim was to perpetrate a fraud on the inquirer rather than to obtain legal services, then the purported investor never became even a prospective client within the meaning of the Rules, much less an actual one, and is therefore not entitled to the protection of the confidentiality rules." **NYSBA Ethics Opinion 923, 5/18/2012.**

Missouri Informal Opinion Number 2018-06

Question: May Attorney report to law enforcement authorities a purported prospective client who contacted Attorney with the apparent objective of defrauding the lawyer by sending Attorney a bogus check for deposit in Attorney's trust account?

Answer: If Attorney has formed a client-lawyer relationship with the individual, Rule 4-1.6 prohibits disclosure of the suspected trust account scam unless the client gives informed consent, Attorney is required by law or a court order to disclose the information, or another exception to Rule 4-1.6 exists.

Missouri has no crime-fraud exception in Rule 4-1.6.

Whether a client-lawyer relationship exists is a question of fact and law outside the scope of the Rules of Professional Conduct.

If the individual is a prospective client under Rule 4-1.18, Attorney may not use or disclose information gained in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.

If no client-lawyer relationship was formed and the individual does not qualify as a prospective client under Rule 4-1.18, Attorney has no duty of confidentiality regarding the information and is free to report the information to appropriate law enforcement authorities.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Confidentiality: Limits On Using Or Revealing Prospective Client's Information/Rule 1.9(b) generally known

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At the disciplinary hearing, [Attorney] and [Client] testified in accordance with their statements in the letters. The Board found that [Client's] version of the events…was "more credible". *Disciplinary Bd. of Supreme Court* of N.D. v. Carpenter, 2015 ND 111, 863 N.W.2d 223,

[Client] learned that a deceased person had owned a large number of mineral acres…and…spent more than 300 hours researching the deceased's potential heirs so he could either negotiate a finder's fee, or lease or purchase the mineral acres. [Client] and [Attorney] met and…reviewed documents from [the] research file.

Two days after the meeting [Attorney] sent [Client] a letter, in part, "This letter is to confirm what I told you both before and at the beginning of our meeting that I do not represent you in this matter. I also want to inform you that, in the event of further contact from Church representatives about this, I will divulge only public or published information to the Church. I received no confidential information from you at the time of our meeting that was not already communicated to the Church.

[Client] replied, "I do not recall you ever telling me, either before the meeting or at the beginning of the meeting, that you could not represent me in this matter. Quite to the contrary, I recall that at the end of the meeting I made a statement to you that you were representing me at that point and you replied that you were not representing me. You also stated that you…may be ethically obligated to …to provide [the Church] the information I had given to you.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Confidentiality: Limits On Using Or Revealing Prospective Client's Information/Rule 1.9(b) generally known

ABA Formal Opinion 479, 12/15/2017, December 15, 2017

The "Generally Known" Exception to Former-Client Confidentiality

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

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The record reflects that the information provided to [Attorney] had already been divulged to the Church through [Client's] efforts with [another] attorney.

We recognize that most of the information was contained in public records and generally…would not pose any significant harm.

But it is quite another matter when a person devotes more than 300 hours searching public records for pieces of a puzzle in an attempt to locate a deceased's [potential] heirs. …But for [Client] giving the information to [Attorney], [Attorney] would not have had the opportunity to represent the Church in obtaining the…mineral interests and receiving a portion of those interests.

While [Attorney] may not have "reveal[ed]" significantly harmful information to the Church, [Attorney]"use[d]" the information for his own personal benefit to the detriment of [Client]. *Disciplinary Bd. of Supreme Court of N.D. v. Carpenter*, 2015 ND 111, 863 N.W.2d 223.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Everyday Conflicts

ABA Formal Opinion 492 6/9/2020 Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information

"Whether information that "could be significantly harmful" has been disclosed by a prospective client is a fact-specific inquiry and determined on a case-by-case basis.

The test focuses on the potential harm in the new matter. The prospective client must provide some details about the time, manner and duration of communications with the lawyer and also some description of the topics discussed, but need not disclose the contents of the discussion or confidential information.

Whether information conveyed is "significantly harmful" in the subsequent matter will depend on, for example, the **duration of the discussion**, the **topics discussed**, whether the lawyer **reviewed documents**, and **whether the information conveyed is known by other parties**, as well as the **relationship between the information and the issues** in the subsequent matter."

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

ABA Formal Opinion 497 February 10, 2021, Conflicts Involving Materially Adverse Interests

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"Material adverseness" under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on behalf of a current client in the same or a substantially related matter. It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client.

"Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation.

However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.

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RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

Everyday Conflicts

Rule 1.18. Duties to Prospective Client

•Discussion

•Use/Reveal/Rule 1.9(b)/Significantly harmful

•Lawyer Disqualification/Firm Disqualification/Exception

- Both clients give informed consent in writing or:
- Affected lawyer took reasonable measure to avoid/screened/no/notice to client, and
- the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client/screened/no fee/notice to prospective client promptly

Comment [4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose.

Comment [5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent.

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Everyday Conflicts

RULE 1.7 Conflict of Interest: Current Clients

(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.

(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.

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RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Charging an Unreasonable Fee

Everyday Conflicts

•*In re Kendall,* 804 N.E.2d 1152 (Ind. 2004).

Attorney required certain clients to pre-pay him a portion of his fees before he performed any legal services. These arrangements were set forth in contracts between the Attorney and these clients that provided for the advance fee payments and specified that the advance fee payments were "nonrefundable." Notwithstanding this nonrefundability provision in the contracts, it was the Attorney's intention and practice to refund any unearned portion of the advance fee payments. That is, even though the contracts stated that the advance fee payments were "nonrefundable," they were in fact refundable.

HELD - We hold that the assertion in an attorney fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee "shall be reasonable."

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RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Charging an Unreasonable Fee

Everyday Conflicts

•*In re Newman,* 958 N.E.2d 792 (Ind. 2011).

Client signed a fee agreement under which Attorney would be paid $195 an hour, payable only upon receipt of Client's distribution from the estate, plus 25 percent of Client's distribution.

After being discharged by Client, Attorney filed a "Notice of Intent to Hold Attorney's Lien" on Client's distribution from the estate for his hourly fee plus 25 percent of the distribution.

HELD - Rule 1.5(a) prohibits not only making an agreement for an unreasonable fee, but also *charging or collecting* an unreasonable fee. Even if a fee agreement is initially reasonable, subsequent events may render collection of the fee unreasonable.

•After being discharged, Attorney filed a "Notice of Intent to Hold Attorney's Lien" on Client's distribution from the estate for his hourly fee *plus 25 percent of the distribution.* Attorney conceded that once discharged, his fee had to be based on *quantum meruit.* Thus, he had no colorable basis to assert a lien for 25 percent of Client's distribution. And even after he eventually dropped this claim, the record shows that he asserted a *quantum meruit* claim of $60,000 when he conceded that a fee based on his hourly rate would be around $7,000.

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RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
A Receipt That's Really a Release

Everyday Conflicts

In re Darby, 426 N.E.2d 683 (Ind. 1981).

Attorney was employed by a to recover property damages resulting from an automobile accident and was given by his client documents relating to the accident. No lawsuit was filed so client informed Attorney that another attorney had been retained and requested the return of his documents.

Attorney informed his client that he would return the documents if the client signed a release promising not to sue the Attorney. On the advice of new counsel, the client refused to sign the release. A lawsuit was filed by the newly obtained counsel and Attorney was named as a defendant. During the course of the lawsuit, Attorney delivered the documents pursuant to a subpoena.

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RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

Everyday Conflicts

Indiana, 2008

When Client met with Attorney to discuss a divorce from her husband, Attorney made two attempts to kiss her, which she rebuffed. Attorney then filed a divorce action on behalf of the client. When Client subsequently notified Attorney that she did not wish to proceed with the divorce, Attorney attempted to talk her into proceeding with it. He later filed a motion to dismiss the divorce action.

Although Client thwarted Attorney's attempt to engage in a sexual relationship with her, Attorney's attempt itself was a breach of Rule 8.4(a) [violate or attempt to violate the Rules of Professional Conduct, aka 1.8(j)], which prohibits attempting to violate the Rules of Professional Conduct.

In addition, Attorney violated Rule 1.7(a)(2) by representing Client when the representation would be materially limited by the attorney's own self-interest, i.e., his desire to engage in a sexual relationship with her.

Attorney also violated Rule 1.16(a)(1) by failing to withdraw from representing her when the continued representation resulted in violation of the Rules of Professional Conduct.

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Unpaid Fees

Everyday Conflicts

Lustig v. Horn, 315 Ill. App. 3d 319, 247 Ill. Dec. 558, 732 N.E.2d 613 (App. 1st Dist. 2000),

Attorney's retainer agreement stated: *BILLING*. **I*n the event of default in payment Client will pay reasonable attorney's fees and costs incurred in collecting said amount which may be due, whether by suit or arbitration***. Client authorizes Attorney or his agent to obtain and/or exchange credit reports and information on Client. Client authorizes Attorney to withdraw from any Client funds in his possession, fees and costs which have been billed to Client. Any statement not objected to in writing within thirty days from presentment will be deemed accepted and approved by Client." (Emphasis added.)

Attorney sued Client for unpaid fees. Trial Court awarded some fees, disallowed others, and awarded "collection" fees of $4,625 and "collection" costs of $405, incurred as a result of Attorney's attempts to collect the $1,740.00 in additional fees.

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Unpaid Fees

Everyday Conflicts

A key point relied on by the Appellate Court was that the agreement was entered into after the creation of the attorney client relationship.

Lustig v. Horn, 315 Ill. App. 3d 319, 247 Ill. Dec. 558, 732 N.E.2d 613 (App. 1st Dist. 2000),

Held on Appeal - An attorney should not place himself in the position where he may be required to choose between conflicting duties or where he must reconcile conflicting interests rather than protect fully the rights of his client…

As evidenced from [Attorney's] conduct, [the agreement] gives rise to substantial fees for vigorous prosecution of the attorney's own client.

As [Client] aptly points out, this provision very well could be used to silence a client's complaint about fees, resulting from the client's fear of his attorney's retaliation for nonpayment of even unreasonable fees.

Such a provision is not necessary to protect the attorney's interests; on the contrary, it merely serves to silence a client should that client protest the amount billed.

Here, such a provision clearly is unfair and potentially violative of the Rules of Professional Conduct barring an attorney from representing a client if such representation may be limited by the attorney's own interests.

[Attorney's] fees and costs incurred in collecting on his bills…must be denied in the instant case where such a request is premised upon a void provision of the retainer agreement.

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Pro se Attorney Fees

Everyday Conflicts

Case 1 - A provision of the Indiana Access to Public Records Act (APRA) provides for an award of attorneys' fees to a prevailing plaintiff, and in a case in which an attorney who successfully litigated a claim pro se under the APRA sought an award of attorneys' fees under the statute, the court held that a pro se attorney may not receive an award of attorneys' fees under the APRA.

Marion County Election Bd. v. Bowes, 53 N.E.3d 1203 (Ind. Ct. App. 2016), transfer denied, 57 N.E.3d 817 (Ind. 2016).

Case 2 - A retainer agreement recited that any dispute concerning billing, the agreement, or the representation of would be submitted to binding arbitration. The agreement informed Client of his right under the Mandatory Fee Arbitration Act to require attorney fee dispute be arbitrated in accordance with a program established by a local bar association. The agreement also provided: "The arbitrator(s) shall have the discretion to order that ... reasonable attorney's fees[ ] shall be borne by the losing party."

Firm requested Of Counsel handle the matter. Attorney fees denied because law firm did not "incur" a debt liability from Of Counsel's representation. *Sands and Associates v Juknavorian*, Cal.App. 2 Dist., October 24, 2016.

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

But See…

Everyday Conflicts

Burke v. Elkin, 51 N.E.3d 1287 (Ind.Ct.App. 2016).

Client filed a frivolous lawsuit against Attorney who responded with a counterclaim for abuse of process and a motion for summary judgment. Both parties proceeded pro se. The trial court granted summary judgment in favor of Attorney and set the matter for a damages hearing.

At the hearing, Attorney testified regarding the time he spent defending against Client's frivolous suit and indicated that his hourly rate was $200.

Based upon this evidence, the trial court awarded damages to Attorney in the amount of $1600 plus costs. On appeal, Client Burke argued that Attorney was not entitled to recover his own attorney fees as damages.

Held – Followed the majority rule permitting an attorney representing him or herself to recover an award of attorney fees for the time and effort spent in defending against a frivolous lawsuit, quoting *Ziobron v. Crawford,* 667 N.E.2d 202, 208 (Ind.Ct.App.1996), *trans. denied* "an attorney may recover compensation for the time and effort spent in defending against a malicious prosecution as an element of his damages. To hold otherwise would be analogous to prohibiting an auto body repairman, who had repaired his own car, from recovering reasonable compensation from the vandal who had damaged the car."

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

Arbitration Agreements

Missouri Informal Opinion 990130 - Rule Number: 4-1.4(b); 4-1.7(b);

Reference Note: Effective July 1, 2007, Rule 4-1.8 was amended. This opinion is based on Rule 4-1.8 in effect prior to that date. Rule 4-1.8(h) and its relevant comment should be consulted.

QUESTION: Attorney would like to put a binding arbitration provision in Attorney´s fee agreement providing that all disputes between Attorney and Attorney´s client would be arbitrated. Is this prohibited?
ANSWER: Attorney may include a binding arbitration agreement in Attorney´s fee agreements without violating Supreme Court Rule 4. However, under Rules 4-1.4(b) and 4-1.7(b), Attorney has an obligation to orally point out this provision and to explain it, to the extent necessary for the individual client.

Everyday Conflicts

Indiana Rule 1.8 COMMENT [14] This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

4-1.7(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a) [significant risk…representation…will be materially limited by…a personal interest of the lawyer.], 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.

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

Arbitration Agreements

[Attorney's] retainer agreement stated that "any dispute (including, without limitation, any dispute with respect to the Firm's legal services and/or payment by you of amounts to the Firm), ... will be submitted to and finally determined by Arbitration" and "[a]ny disputes arising out of or relating to this engagement agreement or the Firm's engagement by you will be conducted pursuant to the JAMS/Endispute Arbitration Rules and Procedures."

A link to the JAMS Rules was provided in the agreement

Neither the retainer agreement nor the lawyer advised the client that:

In arbitration a single arbitrator presides over the disputed issues. In a trial a malpractice lawsuit could be filed in Superior Court in the county where [Client] resides or where [Attorney] maintains its offices, and have a jury representing a cross-section of the county's citizens sit in judgment of the case;

In a future malpractice action against the firm, costs and expenses of arbitration could be awarded against the plaintiff (which would be contrary to Rule 1.8(h)(1);

The advantages and disadvantages of arbitrating a malpractice claim;

- In the judicial forum client would have access to broad discovery,
- The right to a jury trial in an open courtroom,
- The right to speak freely on the subject matter without confidentiality restrictions,
- The right to appeal an erroneous ruling
- No high filing fees or payments for the services of the judge.

Everyday Conflicts

RULE 1.0. TERMINOLOGY

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Delaney v. Dickey, 242 A.3d 257 (N.J. 2020).

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Confidentiality Agreements

Everyday Conflicts

IRPC 8.4(h) Misconduct to enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission

Rule 8.4(d). Misconduct

It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

[Attorney's] retainer agreement stated: Client agrees to make all matters of said representation confidential between client(s), his/her agents, assigns and principals and to refrain from reporting any phase of said representation to any external agency, including but not limited to the Missouri Bar, ARDC etc.

Attorney explained at her hearing:

I got this contract just specifically for this [Adams] case . . . [and] put this together by the time Mr. Adams was referred to me by someone that I had done a lot of stuff, favors for, his friend and employee, and it came to the situation where after [Adams] received the replevin, and I had spoken to him, and . . . I found out that he would even go and say all . . . about his case.

I believe it [the non-disclosure provision] was appropriate just in situations like - in my gut, I know it's wrong, but . . . where clients, they want all my work . . and then I hand it over to them, and then another lawyer just puts their name on it and try's to get credit, just what Mr. Adams said he was going to do to me, which he did.

In re Laura Lee Robinson
Attorney-Respondent
Commission No. 2016PR00126, ***Filed August 16, 2017***

THE BAR PLAN FOUNDATION

RULE 1.7 Conflict of Interest: Current Clients

Significant risk/materially limited/by a personal interest of the lawyer.

Everyday Conflicts

A confidential or fiduciary relationship exists when confidence is reposed by one party in another with resulting superiority and influence exercised by the other. These relationships include that of attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, and, as in this case, parent and child. *Leever v. Leever*, 919 N.E.2d 118 (Ind.Ct.App.2009).

"In addition, an attorney has the basic fiduciary obligations of undivided loyalty and confidentiality." *Klemme v. Best* , 941 S.W.2d 493 (Mo. 1997).

THE BAR PLAN FOUNDATION

RULE 1.8 Conflict of Interest: Specific Rules

Everyday Conflicts

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a 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 in a manner that can be reasonably understood by the client;

•(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

•(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

•(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

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

(f) A lawyer shall not accept compensation for representing 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 representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

•(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

•(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

•(1) acquire a lien authorized 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.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) and (l) that applies to any one of them shall apply to all of them.

(l) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

THE BAR PLAN FOUNDATION

RULE 1.8 Conflict of Interest: Specific Rules

Creating Your Own Conflicts
Altering Time Limitations

Everyday Conflicts

Devereux v. DiBenedetto, 45 N.E.3d 842 (Ind.Ct.App 2015).

Contract States: "CLIENTS and ATTORNEYS mutually agree that, regardless of any statute of limitation which may provide otherwise, any claim or dispute between them of any nature, i.e. common law, statutory, contractual or other, shall have a one year statute of limitations and all claims not commenced within one year of the date the claim accrued shall be forever barred."

Held: "However, as we held in *Briggs v. Clinton County Bank and Trust Co.,* "[a] contract for legal services is governed by more strict rules than those applicable to a contract between parties on equal footing…Further, Indiana Rule of Professional Conduct 1.8(h) requires a client be 'independently represented in making [an] agreement' that would 'retrospectively limit the lawyer's liability for malpractice[.]'" [Internal citations omitted.]

"The clause in [Client's] contract with the Firm that shortens the time for filing a lawsuit violates public policy and is void."

THE BAR PLAN FOUNDATION

RULE 1.8 Conflict of Interest: Specific Rules

Creating Your Own Conflicts

Unpaid Fees

Everyday Conflicts

Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 726 N.W.2d 397, Iowa 2007

Contract States: "If you have any questions concerning the…invoice, you agree to contact the finance manager…within ten (10) days…If you do not…you will be deemed to have agreed that the invoice is accurate and valid, and to have waived any claims as to the accuracy or sufficiency of the work performed on your behalf."

"You agree to pay all…fees, including those of [firm] proceeding pro se, relating to collection of amounts due under this agreement … [including] any complaints caused by client relating to the services performed by [firm] before any agency, department, court or branch of any government, or any bar association which renders a decision favorable to [firm]."

The ten-day provision substantially limits the time in which a client can bring a legal negligence action against Powell.
By shifting the burden of litigation costs and attorney's fees to his clients, Powell limited his future liability to only those clients who can afford to bear these costs if they bring suit and lose.
Accordingly, Powell's conduct in placing provisions in his attorney fee contract requiring a client to contest the sufficiency of his work within ten days and providing him indemnity when a client loses a legal negligence claim the client might bring because of his representation violated [current Rule 1.8(h)

THE BAR PLAN FOUNDATION

RULE 1.8 Conflict of Interest: Specific Rules

Creating Your Own Conflicts
Unpaid Fees

Everyday Conflicts

In re Bulen, 375 B.R. 858 (Bankr. D. Minn. 2007).

Attorney's Fee Agreement says: "WITHDRAWAL OF ATTORNEY: Client understands and expressly agrees that Attorney may withdraw from representation of Client at any time if Client fails to honor the fee arrangement herein set forth including, but not limited to, payment of fees and expenses on a timely basis; fails to cooperate in the preparation of the case; or otherwise takes any action which impedes the ability of Attorney to provide adequate and ethical representation."

Court says - "A provision in a retainer purporting to give the attorney the right of withdrawal and nonappearance is at best misleading, intimidating, and it works to prevent a [client's] objection to a motion to withdraw or to a failure to appear."

Attorney's New Fee Agreement, written by Court, says: - "WITHDRAWAL OF ATTORNEY. Attorney reserves the right, upon nonpayment by Client of any fees or costs incurred pursuant to this agreement, to request that Client obtain alternative counsel and, if Client fails to do so within a reasonable time, to apply to the Bankruptcy Court for permission to withdraw. Until substitute counsel or Bankruptcy Court permission to withdraw is obtained, Attorney will continue to provide legal services to Client in connection with Client's bankruptcy case to the extent required by Local Bankruptcy Rules…"

THE BAR PLAN FOUNDATION

RULE 1.8 Conflict of Interest: Specific Rules

A lawyer shall not:

•(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

•(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

Everyday Conflicts

THE BAR PLAN FOUNDATION

Everyday Conflicts

RULE 1.9 Duties to Former Clients

(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 unless the former client gives informed consent, confirmed in writing

(b) 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 had 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; unless the former client gives informed consent, confirmed in writing.

(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 these Rules 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 these Rules would permit or require with respect to a client.

THE BAR PLAN FOUNDATION

RULE 1.9 Duties to Former Clients

Creating Your Own Conflicts

The Former Client that's Really a Current Client

The Court notes…[Attorney's] attempts to minimize the relationship between [Client] and [Attorney] are not particularly impressive in at least two respects…Second, defendant characterizes the firm's relationship with [Attorney] as ongoing without…reference to actual pending matters, yet characterizes the firm's relationship with [Client] as having terminated the minute [Attorney] stopped billing, even though [Attorney] had dealt with [Client] on numerous occasions over the course of three years.

Gilmore v. Goedecke, 954 F.Supp. 187 (E.D. MO 1996).

Everyday Conflicts

Beginning in March 1992, [Client] retained [Attorney] to perform…three separate matters…The final matter…was concluded during January 1994; [Client] was billed by [Law Firm]for that matter on February 1, 1994.

In March or April 1994, following [Client's] February termination by defendant, [Client] [called] [Attorney] regarding the termination. [Client] and [Attorney] have different versions of this telephone conversation.

[Client] testified…that, during the 20–25 minute conversation, he described the circumstances regarding his hiring, the terms of his employment, his termination, conversations he had with…management personnel, and facts [Client] felt supported his age claim, and…asked for [Attorney's] legal assessment.
[Attorney] testified…[Client]…told [Attorney] he thought he had an age discrimination claim. [Attorney]…told [Client] that [Law Firm] represented [Defendant] and suggested…[Client] contact another attorney. [Attorney] stated that he did not give…any advice, nor would he have because he does not handle employment law matters.

[Client] contends [Law Firm] should be disqualified [because] [Client] was an ongoing client of the firm…and based on the extensive conversation. Defendant contends [Client] was not an ongoing client of the firm; rather, the firm merely handled three discrete matters…In addition, defendant contends that [Attorney] stopped his conversation with [Client] before any confidential information was obtained.

THE BAR PLAN FOUNDATION

RULE 1.9 Duties to Former Clients

Creating Your Own Conflicts

The Former Client that's Really a Current Client

Everyday Conflicts

Inclusion of Firm as contact under the contract settling the matter

The failure to formally close the matter was evidence that Firm intended to keep Client as clients.

Firm was paying for the storage of 49 bankers boxes of documents related to the matter in Firm's off-site storage facility, to make itself available to promptly respond to future requests from Client for legal work.

The contract signed by Client and Defending settling the case expires contained a noticed provision that provided: All communications under this Agreement must be in writing and are duly given when (a) delivered by hand (with written confirmation of receipt), (b) sent by facsimile (with written confirmation of receipt), provided that the communication also is mailed by certified or registered mail, return receipt requested, or (c) received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested). The appropriate addresses and facsimile numbers for receipt are set forth below. A party may designate by notice other addresses and facsimile numbers.

- If to Client: Address
- With a copy to: LAW FIRM: Address

Three years later Law Firm accepts a representation of a client that was adverse to the Rabanco, the parent company of Client. Rabanco files motion to disqualify.

Court Noted that whether or not a current attorney-client relationship exists is a question of fact.

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.

Washington courts have held that another key factor that is determinative of whether or not the attorney-client relationship exists is the subjective belief of the client.

However, this belief must be reasonably based on the factual circumstances of a particular case.

THE BAR PLAN FOUNDATION

RULE 1.9 Duties to Former Clients

Creating Your Own Conflicts
The Former Client that's Really a Current Client

Other courts have held that "once established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation of the relationship must transpire in order to end the relationship. The Court can find nothing in the record that constitutes an event inconsistent with the continuation of the attorney-client relationship between Firm and Client.

Everyday Conflicts

When asked by the Court at oral argument what this event could be, Firm attorney responded, "Silence. Three years of silence." The Court found three years of no contact between an attorney and client, without more, did not constitute an event inconsistent with representation.

Jones v. Rabanco, 2006 WL 2237708 (W.D.Wash.)

Firm argued that it should not be disqualified from representation because the current case is not "substantially related" to the settled matter.

The Court did not reach the analysis for attorney disqualification in instances where a the firm is adverse to a former client under RPC 1.9 because the Court finds that Client is a current Firm client RPC 1.7.

Firm argued that the main attorneys at the firm who represented Client had left Firm but that fact does not eliminate responsibility of Firm to Client,.

Court noted Comment Four to ABA Model Rule 1.3, outlining an attorney's duties of diligence, provides that "[d]oubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so." In this spirit, the Court found that Firm could easily have sent a letter to Client asking it to amend the contact information, or informing it of a departing attorney's new contact information, if the firm had really not wished to serve as a contact point under the contract. Without evidence that Firm took steps to amend the notice provision in the contract, the Court found that inclusion of Firm as a point of contact in the contract, along with the other circumstances outlined, created a reasonable belief on the part of the client that the firm named in the contract was still representing it on matters related to the contract.

THE BAR PLAN FOUNDATION

Everyday Conflicts

RULE 1.9 Duties to Former Clients

Take an act inconsistent with the Attorney-client relationship. Make a current client a former Client in writing with unambiguous, forthright language.

"This concludes my representation of you. I will take not further action on your behalf."

THE BAR PLAN FOUNDATION

Rule 1.10. Imputation of Conflicts of Interest: General Rule

(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, 1.9, or 2.2 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Everyday Conflicts

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

- (1) the personally disqualified lawyer did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;
- (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

THE BAR PLAN FOUNDATION

Rule 1.10. Imputation of Conflicts of Interest: General Rule

Creating Your Own Conflicts

When Imputations Strike

Everyday Conflicts

At former firm Attorney represented Client in six medical malpractice matters. Seven years later, at her subsequent firm, she conducted client intake in which she interviewed a prospective client concerning representation against former client and hospital. Firm accepted representation of new client. Former client moved to disqualify.

Court applied 3-step analysis in disqualifying law firm:

1) determine whether a substantial relationship existed between the subject matter of the prior and present representations.

2)If substantial relationship exits ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted.

3) If shared confidences presumption not rebutted determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption would also make disqualification proper.

XYZ, D.O. v. Sykes, 20 N.E.3d 582 (Ind.Ct.App. 2014)

THE BAR PLAN FOUNDATION

Rule 1.10. Imputation of Conflicts of Interest: General Rule

Creating Your Own Conflicts

When Imputations Strike

Everyday Conflicts

Attorney defended Former Client against claimed FCRA violations for five years. Between 2001 and 2005, he represented Former Client in over 250 cases and billed over 4,000 hours of work for Former Client. He worked with Former Client's in-house counsel and employees, and he was given access to any information necessary for litigation.

Attorney had been twice previously disqualified from cases in which he represented plaintiffs who brought claims against Former Client

After analyzing the precedents and the history of the adoption of the Rules of Professional Conduct, District Court followed the guidance of Rule 1.9 rather than *LaSalle National Bank* and held Attorney should not be disqualified.

The district court found here that the passage of time [12 years] had removed any substantial risk that any confidential information from years ago might advance Current Client's litigation. Appellate Court did not find a clear error or an abuse of discretion. Over ten years had passed since Attorney last represented Former Client. It was not clear error for the district court to find that any confidential information Attorney may have gained during his prior representation has been rendered obsolete.

Watkins v. Trans Union, 869 F.3d 514 (7th Cir. 2017).

THE BAR PLAN FOUNDATION

Rule 1.10. Imputation of Conflicts of Interest: General Rule

Creating Your Own Conflicts

When Imputations Strike

Everyday Conflicts

A motion to disqualify must be decided on the unique facts of the case, and the Court is forced to balance competing considerations.

These include the privacy of the attorney-client relationship, the prerogative of each party to choose its own counsel, and the hardships that disqualification would impose upon the parties and the entire judicial process.

As required by the law, the Court approaches the motion and the opposing parties' response with caution, mindful that they can be misused as a litigation tactic or technique of harassment. "A motion to disqualify counsel deserves serious, conscientious, and conservative treatment."

At some time during her employment at Predecessor Firm, Attorney assisted another attorney in representation of Client in an ethics matter during which Client confided information to Attorney about a career as a prosecutor, employment at the City, intent to work as a prosecutor over the course of her career. Client believed Attorney used all of the information provided to her to advocate that Client acted properly and ethically.

Four years later, in 2004, Attorney left Predecessor Firm for Current Firm. In an affidavit Attorney swore she did not recall any details of her representation of Client, did not recall any meetings or conversations with Client, and asserted she did not retain any notes or materials related to the matter. Attorney stated she has no information regarding the ethics matter beyond that stated in the published opinion, and she has no information regarding Client's career aside from the evidence gathered in this case. Attorney swore no confidential or material information she may have learned in the prior representation of Plaintiff would be used in the current matter.

The Current Firm became involved in the current case since January 2014. Attorney formally entered her appearance for Defendants in January 2016—three weeks prior to the scheduled jury trial. Attorney intended to assist Current Firm Lead Attorney with trial preparation and trial. Ten days prior to trial Client filed her motion to disqualify Attorney and Current Firm.

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Rule 1.10. Imputation of Conflicts of Interest: General Rule

Creating Your Own Conflicts

When Imputations Strike

Everyday Conflicts

The Court found no harassment or dilatory motive present on either side. The conflict issue escaped Client's notice until Attorney appearance. Similarly, Attorney's representation of Client occurred several years prior during her work with another firm and likewise eluded her attention.

McDonald v. City of Wichita, 2016 WL 305366

Court found the information divulged by Client to Attorney in the prior representation—particularly her personal thoughts about her employment at the City, which is squarely at issue in this litigation—could reveal Client's pattern of conduct as a prosecutor. Specifically, given the sensitive nature of Attorney's prior representation of Client, the Court found it highly likely the information divulged was of the most confidential nature. Despite the differences between the two cases, "the underlying concern is the possibility, or *appearance of the possibility*, that Attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought."

Upon a finding that Attorney was disqualified under KRPC 1.9, the Court examined the requirements of KRPC **1**.**10**(a) which states: "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 KRPC 1.9 (emphasis added).

The purpose behind the imputation is that "a *firm* of lawyers is essentially *one lawyer* for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Because Attorney was disqualified, the presumption arose that she shared information with her current law partners at Current Firm and under KRPC **1**.**10**(a), Current Firm was disqualified from representing Defendants.

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Rule 1.10. Imputation of Conflicts of Interest: General Rule

Everyday Conflicts

All attorneys should maintain a portable Conflicts of Interest checking data base.

No single attorney in the firm should be able to unilaterally decide whether or not a prior representation creates a current conflict.

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Thank You

The Bar Plan Mutual Insurance Company

Christian A. Stiegemeyer
Director of Risk Management

Whittney A. Dunn
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