



Keeping Your Eyes Open for Conflicts of Interest

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Rule 1.7(a) Conflict of Interest: Current Clients

- 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:
 - the representation of one client will be directly adverse to another client; or
 - 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.

Rule 1.7(a) Conflict of Interest: Current Clients

- Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.
 - [Rule 1.7, Comment 1]

Rule 1.7(b): The Exceptions

- Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - the representation is not prohibited by law;
 - 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
 - each affected client gives informed consent.

Rule 1.7(b)(4): Informed Consent

- Considerations:
 - What to discuss
 - [Rule 1.7, Comment 18; Rule 1.0(e): Definition]
 - What to disclose
 - [Rule 1.7, Comment 19; Rule 1.6: Confidentiality]
 - What to write down
 - [Rule 1.7, Comment 20; but see Rule 1.8(a)(3)]
 - Consent can be revoked
 - [Rule 1.7, Comment 21]

Rule 1.7: Burdens & Presumptions

- Party seeking disqualification has burden of proof:
 - “Directly adverse” and “materially limited” under Rule 1.7; and
 - “Substantially related” if under Rule 1.9
 - [Brennan v. Independence Blue Cross, 949 F.Supp. 305 (E.D.Pa. 1996)]
- Opposing party enjoys presumption in favor of representation by counsel of choice.
 - [Commonwealth v. Cassidy, 568 A.2d 693 (Pa.Super. 1989)]

Decisions; Decisions

- Resolution of a conflict of interest problem under this Rule requires the lawyer to:
 - clearly identify the client or clients;
 - determine whether a conflict of interest exists;
 - decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and
 - if so, consult with the clients affected under paragraph (a) and obtain their informed consent.
 - [Rule 1.7, Comment 2]

Rule 1.7: Lawyers as Community Volunteer

- A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.
- If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise.
- The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.7: Relationship to Disciplinary Rules

- DR 5-101(A) -- which prohibits an attorney from accepting employment if the exercise of his professional judgment on behalf of his prospective client will be or reasonably may be affected by his own financial, business, property or personal interests unless the client consents after full disclosure.

DR 5-104(A) -- which prohibits an attorney from entering into a business transaction with a client if they have differing interests and if the client expects the attorney to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure;

DR 5-105(A) -- which provides that an attorney shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C);

DR 5-105(C) -- which provides that in situations covered by DR 5-105(A), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

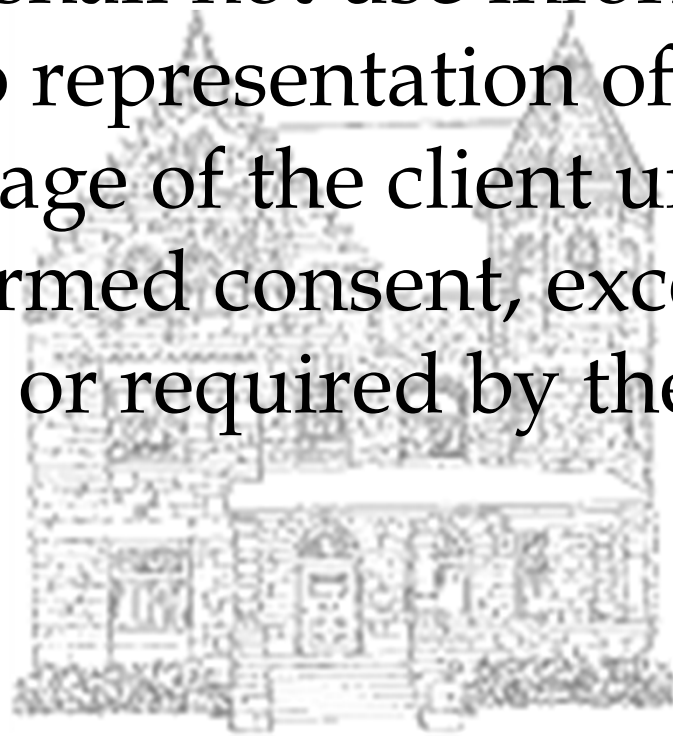
- [Office of Disciplinary Counsel v. Wittmaack, 522 A.2d 522, (Pa. 1987)]

Rule 1.8(a): Prohibited Business Transaction

- 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:
 - 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;
 - 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
 - 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.

Rule 1.8(b): Confidentiality

- 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.

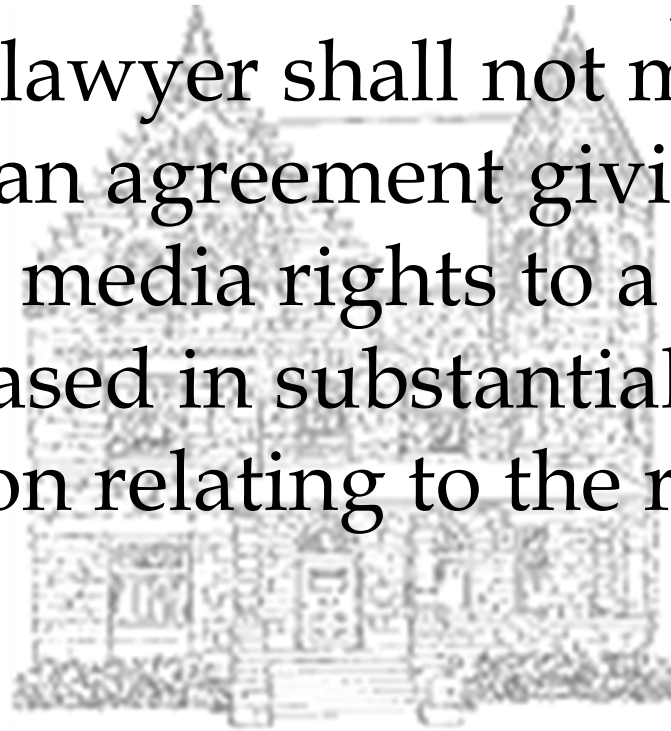


Rule 1.8(c): Gifts

- 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.

Rule 1.8(d): Publicity Rights

- 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.



Rule 1.8(e): Financial Assistance

- A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Rule 1.8(f): Third-Party Payments

- A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - the client gives informed consent;
 - there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - information relating to representation of a client is protected as required by Rule 1.6.

Rule 1.8(g): Compromise/Settlement

- 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. 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.

Rule 1.8(h): Legal Malpractice

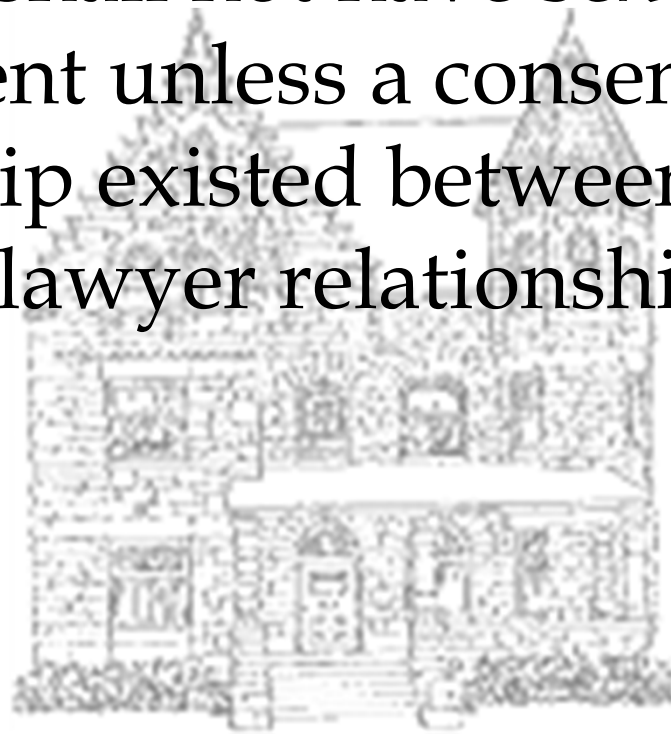
- A lawyer shall not
 - make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
 - settle a claim or potential claim for such liability with an unrepresented client or former client unless that 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.

Rule 1.8(i): Proprietary Interests

- A lawyer shall not acquire a proprietary interest in a cause of action that the lawyer is conducting for a client, except that the lawyer may:
 - acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - contract with a client for a reasonable contingent fee in a civil case.

Rule 1.8(j): Sexual Relations

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



Rule 1.9(a): Former Clients

- 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.
 - Two matters are “substantially related” when an attorney might have acquired confidential information as counsel in one matter which is also relevant in the other matter.
 - [Akerly v. Red Barn System, Inc., 551 F.2d 539 (3d Cir. 1977)]

Rule 1.9: Former Clients & Consent

- Must consult directly with client; discussions and agreements with former-client's present counsel is insufficient.
 - [ILA, Local Union 1332 v. International Longshoremen's Association, 909 F.Supp. 287 (E.D.Pa. 1995)]
- Silence can act as waiver; the silence after notice must continue for an unreasonable amount of time.
 - [Commonwealth Ins. Co. v. Graphix Hot Line, 808 F.Supp. 1200 (E.D.Pa. 1992)]
- Awareness of conflict not enough to waive conflict; actual consultation is required.
 - IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978).

Rule 1.9: Hot Potato Rule

- “An attorney cannot drop one client like a ‘hot potato’ in order to avoid a conflict with another, more remunerative client. Such behavior is unethical as it violates the attorneys’ duty of loyalty.”
 - [ILA, Local Union 1332 v. International Longshoremen’s Association, 909 F.Supp. 287 (E.D.Pa. 1995)]

Rule 1.9: Firm Issues

- Rule 1.9(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
 - whose interests are materially adverse to that person; and
 - 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.
- Rule 1.9(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:
 - 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
 - reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10(a): Imputation

- 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, 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, or unless permitted by Rules 1.10(b) or (c).

Rule 1.10(b): Attorneys Arrive...

- When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:
 - the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

Rule 1.10(b): Ethics Screen

- The effectiveness of an ethics screen is determined by the following factors:
 - the substantiality of the relationship between the attorney and the former client;
 - the time lapse between the matters in dispute;
 - the size of the firm and the number of disqualified attorneys;
 - the nature of the disqualified attorney's involvement;
 - the timing of the wall.

Rule 1.10(b): Firm Management

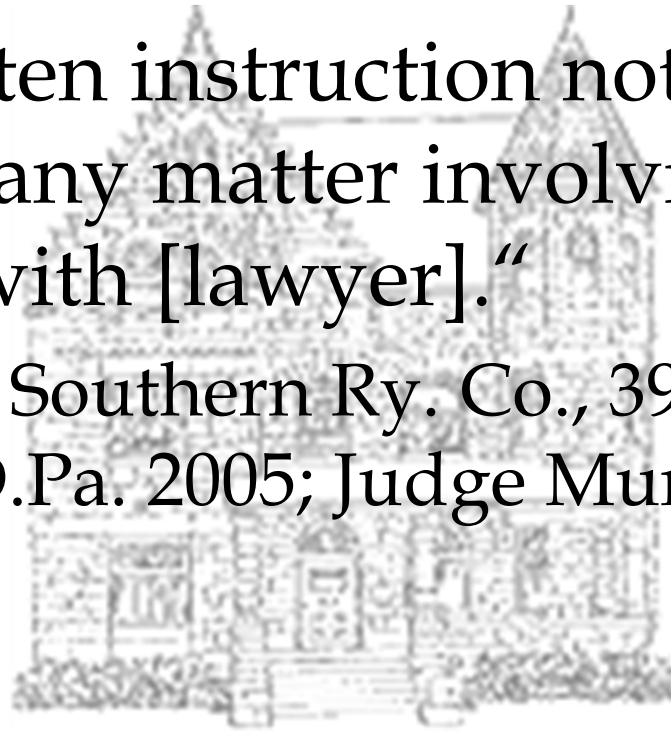
- In addition, the wall itself must satisfy the following criteria:
 - the prohibition of discussion of sensitive matters;
 - restricted circulation of sensitive documents;
 - restricted access to files; and,
 - strong firm policy against breach, including sanctions, physical and/or geographical separation
 - [Norfolk Southern Ry. Co. v. Reading Blue Mtn. & Northern Ry. Co., 397 F.Supp.2d 551, 554 (M.D.Pa. 2005; Judge Munley)]

Rule 1.10(b): Good Screen

- "There is an absolute prohibition of any conversations with, around, near, or in the presence of the screened attorney concerning or relating to the screened files, and/or matters. Any employee who violates this policy will be terminated and will be subject to disciplinary proceedings."
 - [Dworkin v. GM Corp., 906 F.Supp. 273 (E.D.Pa. 1995)]

Rule 1.10(b): Bad Screen

- "All personnel of this law firm are under strict written instruction not to discuss or reference any matter involving [defendant railway] with [lawyer]."
 - [Norfolk Southern Ry. Co., 397 F.Supp.2d at 555 (M.D.Pa. 2005; Judge Munley)]



Rule 1.10(c): Attorneys Depart...

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

Rule 1.10(d): Waiver

- A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
- While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) of Rule 1.8 that applies to any one of them shall apply to all of them.

Referrals Necessitated by Client Conflict

- A fiduciary is precluded from receiving a referral fee from another attorney on behalf of the person to whom the fiduciary owes his duty of care.
- Such an arrangement creates a potential conflict of interest in that the fiduciary would thereby have an interest in increasing the attorneys' fees paid to the referring attorney to the detriment of the person to whom the fiduciary owes his duty of care.
- It matters not that the harm did not actually occur; it is the potential for such harm that causes the conflict of interest.
 - [Epstein v. Saul Ewing, LLP, 7 A.3d 303 (Pa.Super. 2010)]

Questions?

