HINSHAW

Identifying and Resolving Conflicts of Interest: Three Simple Rules

Lawyers' Lawyer Newsletter

Lawyers' Lawyer Newsletter | 8 min read
January/February 2023

The duty of loyalty is the highest duty that a lawyer owes to a client. Indeed, it can be argued that all of the duties that an attorney owes to a client are derivative of the duty of loyalty. Not surprisingly, conflicts of interest have been broadly condemned for the damage they cause to the attorney-client relationship and the legal profession.

Analyzing conflicts of interest is often a complex, fact-intensive inquiry, and entire books have been devoted to the subject. However, the vast majority of conflicts issues facing lawyers in private practice are fairly straightforward. Here are ***three simple rules***[1] that should help keep the average practitioner out of trouble 90% of the time.

Rule #1: A lawyer cannot be adverse to an existing client.

ABA Model Rule 1.7 provides that 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 [a client] 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."[2]

This rule applies even if the matters have nothing to do with one another. Thus, if a lawyer is representing the seller of a house in a real estate transaction, he or she cannot represent someone adverse to the client in a car accident case. The interests of the car accident victim are directly adverse to the residential real estate client. The problem here is with divided loyalties and the possibility that one client's interests will be favored over another.

© 2026 Hinshaw & Culbertson LLP

I see this scenario in my practice more often than you might think, where lawyers are trying to maintain a business relationship or do a favor for a friend. For instance, I have seen a lawyer representing both the husband and wife in an uncontested divorce proceeding. The couple said everything was agreed to and the lawyer just needed to write it up. This is a direct violation of Rule 1.7, which expressly prohibits the assertion of a claim by one client against another client in the same litigation or proceeding,[3] and is a recipe for a legal malpractice case. Inevitably, one of the spouses discusses the situation with another attorney (for some reason, this is almost always at a cocktail party) and comes to believe that he or she got screwed – and that it was the original lawyer's fault.

The corollary of Rule #1 is that an attorney cannot represent a client where the lawyer's own personal interests are adverse to an existing client. ABA Model Rule 1.8 provides that "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."[4] There are narrow exceptions where the terms of the transaction are fair and reasonable to the client, the terms are set forth in writing in language the client can understand, the client is advised of his or her right to consult with independent counsel, and the client gives informed consent.[5]

This type of conflict most often occurs when a lawyer enters into a business transaction with the client after the formation of the attorney-client relationship. Some examples include purchasing property from the client at a below-market rate and drafting a will where the lawyer is a beneficiary. Yes, these things really do happen in the real world. This rule also applies to changes to a contingency fee agreement. Again, the risk here is that the lawyer will favor his or her own interests over the client's interests.

There may be dire consequences for a lawyer entering into one of these prohibited transactions without the appropriate written disclosures. Under most states' laws, the business transaction is presumed to be the product of undue influence, the burden is on the lawyer to prove that it was fair, and the standard of proof is clear and convincing evidence. Translation: the lawyer almost always loses. Best practices dictate that if an attorney engages in a business transaction with a client, the client should have independent legal representation – even if the lawyer has to pay for it.

Rule #2: A lawyer cannot be adverse to a former client if the representation is substantially related to the former representation.

In our client-focused, service-based industry, the duty of loyalty also extends to former clients. ABA Model Rule 1.9 provides that 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."[6] Again, there is an exception where the former client gives informed consent in writing.[7]

Thus, if an attorney represents the buyer in a residential real estate transaction with a mortgage, the lawyer cannot subsequently represent the lender in a foreclosure action. That seems easy enough, but who exactly is a "former client?" For example, if an attorney represents a strip mall by reviewing leases as they come up for renewal, is the client former (since no leases are presently being reviewed) or is there an ongoing attorney-client relationship? Or if a lawyer is representing a farmer in the sale of property but there have been no offers for over a year, is there still an ongoing attorney-client relationship? The lawyer should usually err on the side of considering the client a present client for conflicts purposes.

What exactly is "substantially related?" The concern here is the transmission of confidential information from the former client to the current client. The test is whether the lawyer possesses information gained from the prior relationship that could be used to the disadvantage of the former client. If so, the lawyer must decline the representation.

One particularly thorny area involves a claim that the lawyer's representation of a client allowed the lawyer to gather "general knowledge" of the client's business practices. For instance, if the attorney was a risk manager at a hospital for ten years and knows how the hospital evaluates claims, what types of cases the hospital likes to settle, and that the hospital does not like publicity, that lawyer cannot subsequently represent a patient in a medical malpractice action against the hospital for some period of time.

Similarly, a lawyer who is representing a client in a slip-fall case at a big box retailer cannot abandon his duty of loyalty to that client and terminate the relationship for an opportunity to represent the retailer on more lucrative corporate matters. Specifically, the "hot potato" doctrine prevents an attorney from switching sides by getting rid of an existing client so that he or she can be treated as a former client for conflicts purposes in order to take on a more appealing client.[8] The lawyer's duty to the original client must remain paramount – even if the attorney misses out on a great business opportunity.

Finally, it should be noted that one attorney's conflict of interest is generally imputed to the entire law firm. ABA Model Rule 1.10 provides that "[w]hile 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."[9] However, there is an exception where a lawyer who has a conflict of interest joins a different firm. The conflict can also be waived if the client gives informed consent and the attorney is screened from paper and electronic files.

Rule # 3: Many conflicts can be waived.

ABA Model Rules 1.7 and Rule 1.9 both require that the lawyer disclose the facts and circumstances surrounding the potential conflict to enable the client to make an informed decision concerning the attorney's representation.

[10] "Informed consent" is defined as a client's agreement to a proposed course of conduct after the lawyer has communicated adequate information about the material risks and benefits.[11]

Thus, a conflict of interest can generally be waived if the lawyer believes that he or she can provide competent and diligent representation, the potential conflict is adequately described to the client, including the risks and foreseeable consequences, and the client gives its informed consent to the representation. Form conflict waivers are available at Lawyeringlaw.com and provide a good starting point. The attorney can just add the individual facts and circumstances in the particular case.

What must be disclosed? Everything. The lawyer may say, "then I won't get the waiver" – but that is the whole point of full disclosure. Although not required in some jurisdictions (including Illinois, where I practice), a conflict waiver should always be in writing. Risk management attorneys like to say that an oral waiver is not worth the paper it is printed on. At the end of the day, as a lawyer who represents defendants in legal malpractice cases, I see very few problems where everything was disclosed to the client and adequately documented.

Conclusion

The consequences of a conflict of interest can be serious. If you are sued, it will not be for mere negligence, but for breach of fiduciary duty – namely violating your ethical duty to your client. And a legal malpractice action that includes a conflict of interest is much more difficult to defend. Just imagine the former client's standard of care expert testifying about the professional negligence being motivated by *your* breach of loyalty to your client.

But that is not all. You could face a lawyer disciplinary proceeding for laboring under a conflict of interest, and, if the conflict is severe enough, it could result in the suspension of your law license. If a conflict of interest arises in a litigation setting, you could face disqualification and have your professional ethics called into question in a public forum. Finally, you could be compelled to disgorge fees earned from conflicted representation or have your undocumented business transaction with a client unwound.

What should you do to avoid conflicts of interest from happening in the first instance? Every law firm should have a comprehensive computerized system to check for conflicts of interest appropriate for the size of firm and type of practice. This system should retain the identity of all clients and adverse parties. However, such a system is only as good as the information that is put into it. A lawyer, not a legal assistant, should determine whether a party is friendly or adverse as this is a legal question. And the system should be updated as the case proceeds and new parties are added, counterclaims are filed, and subpoenas are issued.

If you followed all of the correct procedures and a conflict nevertheless arises, it should be addressed promptly. Get help or advice. Even if your firm does not have a general counsel or an ethics partner, talk to other lawyers at the firm or outside counsel. Again, Lawyeringlaw.com is a great resource and includes a link to obtain a legal ethics "hotline" consultation with an experienced Hinshaw lawyer to get advice in real time. Whatever you do, do not be an "ostrich" by hiding your head in the sand. Trying to avoid the problem will only make it worse.

© 2026 Hinshaw & Culbertson LLP

[1] The genesis of this article was a conflicts speech that Tom Browne, a mentor and friend, used to give at risk management seminars and "defensive driving" classes for lawyers at the Illinois Attorney Registration and Disciplinary Commission.

[2] Model Rules of Prof'l Conduct R. 1.7(a).

[3] Model Rules of Prof'l Conduct R. 1.7(b).

[4] Model Rules of Prof'l Conduct R. 1.8(a).

[5] Model Rules of Prof'l Conduct R. 1.8(b).

[6] Model Rules of Prof'l Conduct R. 1.9(a).

[7] Model Rules of Prof'l Conduct R. 1.9(b).

[8] *See,* Model Rules of Prof'l Conduct R. 1.3 and 1.16(a).

[9] Model Rules of Prof'l Conduct R. 1.10(a).

[10] Model Rules of Prof'l Conduct R. 1.7(b) and 1.9(b).

[11] Model Rules of Prof'l Conduct R. 1.0(e).

Related People

Matthew R. Henderson

Partner

312-704-3650

Related Capabilities

Counselors for the Profession

Lawyers for the Profession®

© 2026 Hinshaw & Culbertson LLP