

Detecting and Navigating Conflicts of Interest

DISCIPLINARY COMMISSION
OPINION #2-22

Question

When must an attorney decline to represent a client or withdraw from current representation due to a conflict of interest?

Short Answer

Attorneys should decline to represent a client, or withdraw from a current matter, when their advocacy is or will be materially limited by duties owed to another or by self-interest. When an attorney can reasonably provide competent and diligent representation despite a conflict, an informed and written conflict waiver must be obtained from all affected clients, unless waiver of the conflict is otherwise prohibited by law or Rule.

Recommended Rules for Review

[Indiana Rules of Professional Conduct](#): 1.7, 1.8, 1.9, 1.18¹

Summary

While realized and potential conflicts inevitably arise in one's practice, attorneys must be diligent to avoid damaging the interests of those to whom they owe a duty. To that end, it is vitally important that attorneys have a thorough conflicts check procedure in place.

Conflicts analysis is nuanced and fact specific. Attorneys should carefully evaluate who the actors are and what interests are at stake in a matter. Thought should be given as to how potentially far-reaching the effects of the representation are to avoid damaging the interests of someone to whom the attorney owes a duty but who may not even be a party to the instant matter. Finally,

¹ This opinion will focus on rules governing all attorney-client relationships. Please review [Indiana Rules of Professional Conduct](#) 1.10 (Imputation of Conflicts); 1.11 (Former and Current Government Officers and Employees); Rule 1.12 (Former third-party neutral actors); and Rule 1.13 (Organization as Client).

an evaluation should be made as to whether a conflict can be waived.² If so, and if the affected parties agree after proper advisement, a waiver evincing informed consent should be obtained in writing from each affected party. [Rule 1.7\(b\)](#); see also [Rule 1.0](#) (for definitions of informed consent and writing).

The following general rules should be considered during this analysis:

1. Attorneys should not represent a client in instances when their ability to advocate on behalf of that client is materially limited by a duty owed to another. [Indiana Professional Conduct Rules 1.7; 1.9; 1.18](#).
2. Attorneys must avoid putting their personal interests ahead of a client's interests. [Indiana Professional Conduct Rule 1.7\(a\)\(2\); 1.8](#).
3. With certain exceptions, the duty of loyalty owed to clients prohibits attorneys from using information gained during representation to the disadvantage of those current and former clients. [Indiana Professional Conduct Rule 1.8\(b\) and 1.9\(c\)](#).

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Duties owed to Prospective Clients

Hypothetical #1: Client A visits Lawyer's law office for advice about filing for a dissolution. Client A provides Lawyer with material information regarding the dissolution proceeding, including facts that, if exploited, would significantly hurt A's chances for gaining custody over the couple's teenager. Ultimately, A does not retain Lawyer. Three weeks later, Client B, A's husband, visits Lawyer's office and hires Lawyer to represent B in the dissolution proceedings against A.

Under this set of facts, Lawyer is prohibited from representing Client B in the dissolution matter because Lawyer gathered facts that could significantly harm Client A during the prospective client consultation. [Ind. R. Prof. Cond. 1.18](#).

However, it is important to consider how changing a single fact in this scenario can dramatically change the analysis. For instance, if Client A unilaterally shared the material information during a purely social interaction (e.g. at a cocktail party or a chance meeting at a grocery store), when there was no reasonable expectation of an attorney-client agreement forming, there is no

² Some conflicts cannot be waived, as the matters are nonconsentable (meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent). See [Ind. Prof. Cond. R. 1.7, Comment 14](#). Examples of some nonconsentable conflicts are discussed in Comments 16 and 17 to Rule 1.7.

prohibition against Lawyer representing B and using damaging information to the detriment of A. [Ind. R. Prof. Cond. 1.18, Comment \[2\]](#).

Moreover, if Lawyer's intake procedure is carefully limited, Lawyer may be free to represent Client B in the dissolution, despite having consulted initially with A. [Rule 1.18\(c\), Comment \[4\]\[5\]\[6\]](#). Finally, if B retained Lawyer several years later to represent B in a post-dissolution matter, representation is possible if what was material and potentially significantly damaging information to A years earlier has been rendered obsolete by the passage of time and/or because the information has become generally known in the meantime. [Rule 1.18\(b\), Comment \[1\]](#); [Rule 1.9\(c\), Comment \[3\]](#).

Ethical Minefield #2 – Representing Multiple Parties with Potentially Adverse Interests

Hypothetical #2: Lawyer consults with four individuals who are forming a limited liability company in which each will own 25% of the shares. The four members insist that Lawyer represent each of them individually and agree to waive all conflicts. It quickly becomes clear that one of the individuals, A, will contribute the lion's share of monetary funding to start the LLC.

Lawyer could represent all four members in the formation of this corporation if the conditions of Rule 1.7(b) are satisfied. However, before seeking a waiver, Lawyer should consider whether the interests of all four members are indeed aligned and whether Lawyer can truly provide competent and diligent representation to each of the four perspective clients. This may depend significantly on the sophistication of the parties involved. Does A understand the imbalance of contribution coming into the consultation? Perhaps A intends to contribute monetarily while the other three will provide equity in kind, focusing on service aspects. If Lawyer is comfortable that all four individuals' interests are truly aligned, Lawyer could seek a written informed consent waiver from each and proceed.

However, if Lawyer is concerned that A's competence is compromised by either ignorance of the situation or undue influence from the others, or even if A privately expressed concerns to Lawyer about the fairness of the situation, the conflict is likely not waivable. Client A cannot provide informed consent when A is not capable of understanding the risks posed by the joint representation, and Lawyer cannot advocate for Client A to be treated fairly without detrimentally affecting the interests of the other three. [Rule 1.7 \(a\)\(2\), Comment \[8\]](#).

Ethical Minefield #3 – Personal Conflicts of Interest

Hypothetical #3: Lawyer served as Client A's "go-to" for all legal questions and representation needs for many years. A approached Lawyer with an offer— Lawyer would provide legal services to A's business, Widget Corp., for two years in exchange for 5,000 shares of stock in Widget Corp. Lawyer immediately accepted the offer. Lawyer agreed to continue representing A in his individual capacity in addition to representing Widget Corp.

Rule 1.8 is implicated by this fact scenario. Prior to accepting Client A's offer, Lawyer must ensure that the terms of the transaction are fair to Client A, advise A in writing to retain independent counsel, give A an opportunity to follow that advice, and ultimately receive Client A's informed consent in writing to the essential terms of the offer.³ [See In re Davis, 740 N.E.2d 855 \(Ind. 2001\)](#) (Attorney violated Rule 1.8 by failing to advise client to seek independent counsel).

Ethical Minefield #4 – Conflicts that Arise During Representation

Hypothetical #4: Lawyer has represented Client A, a bricklayer, for years and is currently representing A in contract negotiations with a supplier. Lawyer was just hired by Client B, a homeowner, for a potential lawsuit against Client B's builder due to water seeping into B's home. After B's suit against builder is filed, builder files a third-party complaint against A claiming that all damage to the home is due to faulty bricklaying. Client A calls Lawyer and asks him to represent A in B's lawsuit.

Initially it should be noted that a thorough conflicts check, which flushed out all potential defendants at the outset of representation, would have disclosed the potential conflict and allowed the attorneys to take appropriate action. Lawyer clearly cannot represent both A and B in the matter as their interests are materially adverse, and Lawyer's pursuit of damages against builder will negatively affect A. [Rule 1.7\(a\)\(1\); \(b\)\(3\)](#). Additionally, Lawyer will also likely have to withdraw from representing B in the lawsuit because of Lawyer's concurrent representation of A in a pending matter, even though the matters are unrelated. [Rule 1.7\(a\), Comment \[6\]](#).

³ Further, Lawyer must abide by Rule 1.13 prior to assuming representation of both the corporation and Client A.

Before deciding to seek a waiver to continue to represent Client B, Lawyer should consider the potential damage to the relationships Lawyer has with each client and determine whether Lawyer can continue to represent B aggressively and competently in the lawsuit while maintaining a preexisting duty of loyalty to A. *Id.*

Conclusion

The hypotheticals above represent only a few examples when conflict can arise. The Rules of Professional Conduct and associated Comments are extremely instructive and should be carefully reviewed when attorneys are confronting conflict issues.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.