

Detecting and Navigating Imputed Conflicts of Interest

DISCIPLINARY COMMISSION
OPINION #3-22

Question

When is a firm prohibited by Rule 1.10 of the Rules of Professional Conduct from representing a client based on the conflict of one of its current, future, or former members?

Short Answer

The duty of loyalty dictates that a law firm should decline to represent or withdraw from representing a client when any individual lawyer at the firm (or joining the firm) is conflicted from the representation. This is the situation unless the conflict is personal to that lawyer, or unless the affected clients have provided informed consent. When a lawyer departs a firm, the firm can represent parties adverse to the departing lawyer's client unless the matter is the same or substantially related to the one the departing lawyer worked on while at the firm, or others remaining at the firm have information that would preclude representation under Indiana Professional Conduct Rules [1.6](#) and [1.9](#). A firm is not required to withdraw from a case if a lawyer joining the firm worked on behalf of an adverse party if the lawyer was not the primary lawyer on the case; the lawyer is effectively screened from the case at the firm; and sufficient written notice is provided to affected clients.

Recommended Rules for Review

[Indiana Rules of Professional Conduct: 1.7, 1.8, 1.9, 1.10, 1.18, and 2.2](#)

Summary

While realized and potential conflicts inevitably arise in the practice of law, it is important that law firms have effective conflict check procedures in place. This includes carefully screening matters against the client matters of incoming and outgoing lawyers; taking steps to avoid entering an appearance on a case when a Rule [1.10](#) conflict exists; and, when possible, avoiding disqualification of the firm from current matters. Lawyers associated in a firm owe a duty of loyalty to the clients of the firm and should not represent clients that might impugn the loyalty to other firm clients. Law firms should be mindful that each client of the firm is treated as a client of each lawyer associated with the firm. Thus, principles underlying Rules [1.7](#), [1.9](#), and [2.2](#) apply to all lawyers associated with the firm.

The following general rules should be considered during this analysis:

1. It is unlikely that any lawyer in a firm can represent a party when any lawyer in that firm is prohibited from doing so under [Indiana Professional Conduct Rules 1.7, 1.9, or 2.2](#), unless the firm can meet the standards of ethically obtaining a waiver under [Indiana Professional Conduct Rule 1.7\(b\)](#) or unless the lawyer's conflict is strictly personal to that lawyer.
2. The firm of a departing lawyer can represent parties who oppose the client of that departing lawyer, but not in the same or substantially related matter and not when remaining lawyers have confidential information that is material to the matter.
3. If a lawyer entering a firm can be successfully screened from a matter so the firm does not need to be disqualified under [Indiana Professional Conduct Rule 1.10\(c\)](#), notice must still be provided to any affected client in a manner that the client can determine compliance with the Rule.

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Duties to Current Clients

Hypothetical #1: Lawyer A regularly provides legal advice to the local school board. Lawyer B is leaving his previous firm to form a partnership with Lawyer A. Lawyer B represents Client X, who has a child that attends said school district, and Lawyer B has initiated proceedings against the district to require it to send Client X's child to a private school for children with learning disabilities. Client X sought a due process hearing, and a hearing officer was appointed. The hearing officer's decision may subsequently be appealed to the Circuit Court by the losing party. Lawyer A initially advised the board regarding the matter but then facilitated the hiring of counsel experienced in that subject matter and has not been involved in the matter since that referral.

Under this set of facts, and absent informed consent from the affected parties, neither Lawyer A nor Lawyer B can continue representation in the matter once the two have formed a partnership.

While Lawyer A hired independent counsel for the board, it is likely that Lawyer A has information protected by Rules [1.6](#) and [1.9\(c\)](#) that is material to the matter. Moreover, the board remains a current client of the firm, and, as such, there is a [Rule 1.7\(a\)](#) conflict in this matter.

Conflict analysis is nuanced. If the facts are changed to reflect that instead of Lawyer A, it is Lawyer A's spouse that represents the school board in the suit against Client X, Lawyer A likely would be prohibited from becoming involved in the suit pursuant to [Rule 1.7 \[Comment 11\]](#).¹ However, Lawyer A's personal conflict would not be imputed to the new firm, and Lawyer B could continue to represent Client X.

Ethical Minefield #2 – Law Firm's Duties to Former Clients of the Firm

Hypothetical #2: Former Associate A in Partner B's law firm negotiated and assisted in the execution of the settlement agreement of the marital dissolution of Former Client X and Prospective Client Y. Client X hired a different firm years later to enforce the settlement agreement provisions, specifically the payment for certain parcels of real estate that were valued within the settlement agreement. Prospective Client Y wants to hire Partner B to have the settlement agreement voided, based upon fraudulent valuations of the couple's real estate that was divided in the agreement. Former Associate A's files, including Former Client X's files, remain in common storage at the firm.

Under this set of facts, absent informed consent of Former Client X, Partner B would be unable to represent Prospective Client Y. This is true despite Former Associate A's departure from the firm because the matters are the same and the firm's representation of Prospective Client Y would necessarily undermine the work done on behalf of Former Client X. See [Ind. Prof. Cond. R. 1.10](#).

If the facts are changed so that Prospective Client Y contacted Partner B several years later; no attorney remaining at the firm had disqualifying information; and Former Associate A's files departed with A or were destroyed at the time of A's departure, Partner B could represent Prospective Client Y with notice to Former Client X. Moreover, if the representation involved post-dissolution matters that did not involve undermining the work the firm had previously done on Former Client X's behalf, Partner B could represent Prospective Client Y without notice to Former Client X.

¹ Comment 11 to [Indiana Professional Conduct Rule 1.7](#) provides, in pertinent part, that: When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer...ordinarily may not represent a client in a matter where the lawyer is representing another party, unless each client gives informed consent....

Ethical Minefield #3 – Law Firm’s Duties to Prospective Clients of the Firm

Hypothetical #3: Prospective Client X consulted with Lawyer A about a lawsuit against Prospective Client B. The two met for several hours, and Prospective Client X shared confidential and potentially damaging information with Lawyer A, who subsequently opened a file at his firm and placed all the information provided to Lawyer A in the file. Lawyer A, however, decided the firm should not take on the case, and Prospective Client X hired Lawyer B. Lawyer A then transferred copies of Prospective Client X’s file to Lawyer B and acknowledged that Lawyer A and his firm released all claims to attorney fees generated by the file. Lawyer A left the firm shortly thereafter. The file Lawyer A created remained stored in the firm’s general file storage room behind the secretary’s desk where other attorneys in the firm had access to it. Lawyers in the firm also regularly discuss their prospective cases with each other. Prospective Client Y wants to hire Lawyer A’s former firm to represent him in the suit ultimately brought by Prospective Client X.

Absent informed consent from the affected parties, [Rule 1.10\(b\)](#) prohibits Lawyer A’s former firm from representing Client Y for several reasons. First, it is the same matter about which Potential Client X consulted with the firm. Second, the file containing potentially damaging information to X remains available to all attorneys in the office. Third, the matter was potentially discussed among members of the firm at the time of consultation.

If Lawyer A had taken reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent Prospective Client X, representation of Prospective Client Y by Lawyer A’s former firm would likely be permitted with written notice to Prospective Client X. See [Ind. Prof. Cond. R. 1.18\(d\)\(2\)](#).

Ethical Minefield # 4 – Migratory Lawyer Exception to Rule 1.10

Hypothetical #4 – Lawyer A and Associates are in a ten-day countdown to trial when Associate B announces to Lawyer A that she is leaving the firm on Friday. Worse yet, Associate B is joining the firm that represents the opposing party in the matter. While Associate B has provided important assistance in the matter, Lawyer A always has been the primary attorney in the matter. Associate B

assures Lawyer A that she will be screened from the matter. Lawyer A wonders if he will be able to successfully get Associate B's new firm removed from the case.

While Associate B was actively involved in the matter (and thus may not participate in the matter at the new firm), Lawyer A is the primary attorney on the matter. Therefore, if Associate B is effectively screened from the matter at the new firm, and appropriate notice is provided to Lawyer A's client, Associate B's new firm is not required to withdraw from representing the opposing party in the matter. [Ind. Prof. Cond. R. 1.10\(c\)\(1-3\)](#).²

Effective screening procedures would include directing all attorney and non-attorney staff at the new firm that conversations with Associate B regarding the matter are strictly prohibited. Moreover, protocol would need to be in place that the file and all incoming documents regarding the matter be carefully handled so that Associate B would be unable to access them. Finally, if Associate B was joining the new firm as Partner B, steps would need to be taken so that Associate/Partner B would not be apportioned any fee from the matter. The measures taken to wall off Associate B from the matter should be thoroughly documented in writing to Lawyer A's client so that the client can ascertain compliance with the provisions of [Rule 1.10](#).

Conclusion

It is important for members of law firms to understand the rules pertinent to imputed conflicts of interest. These rules are critical to maintaining attorneys' duty of loyalty to clients. The integrity of the profession is harmed if clients and the public believe lawyers can "switch sides" in a legal matter and use sensitive and vulnerable information of clients against them. Practically speaking, conflicts of interest will arise as lawyers switch law firms in the private sector. However, if the firm has effective screening mechanisms in place, and communicates the measures taken to affected clients, forced disqualification of a firm can often be prevented while maintaining the duty of loyalty to transitioning lawyers' current, prospective, and former clients.

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.

² If Associate B was the primary lawyer on the matter, no amount of screening could be used at the new firm to prevent the conflict, absent informed consent waiver from the affected clients. [Ind. Prof. Cond. Rule 1.10\(c\)\(1\), \(d\)](#).