CONFLICTS OF INTEREST

For several reasons, conflicts of interest are one of the professions most vexing issues. Often a lawyer won’t timely recognize the conflict; especially when it involves the lawyer's own conduct and interests. If the conflict is recognized, often the lawyer does not understand the appropriate way to handle the matter. And since a conflict of interest may mean declining a representation, lawyers may be less than eager to engage in the analysis necessary to determine the proper way to handle the conflict.

The risks from conflicts of interest are clear, however. Conflicts of interest may force the lawyer to withdraw from representation, forgo or disgorge a fee, or result in an ethics complaint and discipline.

Conflicts of interest are governed under Missouri Rules of Professional Conduct 4-17: Conflicts of Interest; 4-1.8: Conflicts of Interest: Prohibited Transactions; and 4-1.9: Duties to Former Clients.

Conflicts of interest can arise in a variety of contexts. For example, as noted above in the section on the attorney-client relationship, the ideal number of clients in a representation is ordinarily one. However, if an attorney does end up representing multiple parties, issues regarding ownership of the file, joint waiver or the attorney-client privilege, acceptance/rejection of global settlement offer, etc., must be kept in mind.

Other areas to be on watch for conflicts include:

- Referring clients to a business that the attorney has an undisclosed interest in, Rule 4-1.7 Comment and Schaffer v. Terrydale, 648 S.W.2d 595 (Mo.App. 1983);
- Insurance defense counsel being paid from insurer rather than client, Rule 4-1.8, 1.7 Comment and Informal Opinions 980124, 980188 and 970132;
- Being counsel to a corporation and a board member, Rule 4-1.7 and Informal Opinion 970050; and,
- Representation against former clients (on the same matter is prohibited, if substantially related, test is whether the attorney was so involved in matters of that type that such representation can be regarded as changing of sides), Rule 1.9 Comment; e.g. automobile accidents and representing both the driver and a passenger; situations where the attorney represents opposing theories of law for similarly situated clients representation of opposing sides of an issue, even if clients are not involved in same case.

Lawyers often want to use waivers as means to avoid the ramifications of a conflict of interest. The M.R.P.C. 4-1.0 requires conflict of interest waivers to be confirmed in writing after the client gives informed consent. For the waiver to be effective, the lawyer must adequately explain the potential risks and advantages of the conflict on the representation. If a potential conflict is appropriately waived, and it later becomes an actual conflict, the lawyer must again explain all ramifications of the conflict on the representation and get informed consent,
confirmed in writing, before continuing with the representation. The previous waiver of the potential conflict of interest is not a valid waiver as to a later arising actual conflict of interest.

**Issues to Consider When Counseling a Client on Waiving a Conflict of Interest Include:**

- Extensive and detailed information as to the nature of the conflict and the implications on the representation;
- What procedures will need to be taken to ensure that secrets and confidences are not compromised;
- The ramifications if either a client or the lawyer change positions regarding consent to the conflict;
- The extent of the client’s reliance on or waiver of independent counsel;
- Confirmation that the affected clients will receive the written waiver information; and
- The client’s signature to indicate an informed consent, confirmed in writing.

Even if the lawyer fully explains the risks and advantages to continuing representation, a client may later contest the validity of the waiver by arguing the lawyer failed to:

- advise the client of a specific conflict;
- fully inform the client of the true nature of the conflict in terms that the client understood;
- advise the client to retain separate counsel; and/or
- obtain the waiver in a timely manner.

**Some conflicts of interest cannot be waived in any circumstances, including:**

- devising a document giving the attorney a gift, *Rule 4-1.8(c)*;
- Negotiating literary rights to a client’s case prior to concluding the representation, *Rule 4-1.8(d)*;
- Providing financial assistance to a client in connection with pending litigation, *Rule 4-1.8(e)* and *Informal Opinions 980116 and 940122*;
- Representing an opposing party even if in a wholly unrelated matter, *Terre Du Lac Prop Owners Ass’n v. Shrum*, 661 S.W.2d 45 (Mo.App. 1983), and *Rule 4-1.7 Conflict of Interest: Current Clients, Comment 6*, (the consequences of representing multiple defendants in a criminal case are so grave that ordinarily a lawyer should decline to represent more than one codefendant); and,
- Making an agreement prospectively limiting liability for malpractice without the client being independently represented or settling a claim for malpractice without first advising the client that independent representation is appropriate, *Rule 4-1.8(h)(1)*.

Because a debilitating conflict of interest can arise during the initial interview of a prospective client, regardless of whether the representation is later accepted, the attorney should avoid obtaining any significantly harmful facts regarding the case. The information taken from the prospective client should initially be limited to only that which is necessary to perform a
preliminary conflicts check. When it is determined there is no immediate conflict of interest, additional information may be obtained to enable a more thorough check.

Information to maintain in a conflicts of interest checking system will vary on the nature of the lawyer’s practice and the type of clients represented.

For individual client matters, the system should maintain information on:
- the client name; other professionals serving the client (banks, accountants);
- a description of the matter;
- the date the file was opened and closed;
- the file number;
- the names of the law firm staff members working on matter;
- any other relevant information such as comments, whether the matter is active/inactive/rejected; and
- the date the conflicts check was run and by whom.

For entities, the system should maintain information on:
- the name of the entity;
- the contact person;
- the principal owners;
- all senior officers or directors;
- the parent, subsidiary or related companies;
- other professionals serving the client;
- the subject matter of the representation;
- the scope, extent and nature of the representation; and
- any other relevant information.

Additionally, new matter memos should be circulated to the firm’s attorneys for review for potential conflicts of interest. The memo should contain the names of the parties, identify the intake attorney, provide all relevant administration details, have a statement of the case, and describe the scope of the work to be performed in the representation.

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