

In this hypothetical, a lawyer represents two clients, Client A and Client B, in unrelated criminal matters. During the course of the representations, Client A informs the lawyer that he has information about Client B's involvement in the offense for which the lawyer represents B, and that he would like to cooperate with the prosecution and offer to testify against B. When the lawyer discloses to the prosecutor that he believes he has a conflict because A would like to cooperate against another of the lawyer's clients, the prosecutor responds that he is not interested in any information from A, regardless of the nature of the information or the person the information implicates.

QUESTIONS PRESENTED

Is the lawyer required to withdraw from representing both A and B? Does the analysis change if the prosecutor is not interested in accepting A's offer of cooperation?

APPLICABLE RULES AND OPINIONS

The relevant Rules of Professional Conduct are Rules 1.4,¹ 1.7² and 1.9.³

¹ **Rule 1.4 Communication**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- (c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

² **Rule 1.7 Conflict of Interest: General Rule.**

- (a) 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:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is 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.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph(a), a lawyer may represent a client if each affected client consents after consultation, and:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) 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
 - (4) the consent from the client is memorialized in writing.

³ **Rule 1.9 Conflict of Interest: Former Client.**

- (a) 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 both the present and former client consent after consultation.

ANALYSIS

There is no doubt that the lawyer has a conflict in this scenario when A expresses his desire to offer incriminating information against B, and cannot continue to represent both A and B. The lawyer is unable to advise A on this topic because any advice that would further A's interests would be detrimental to B's interests.⁴ Meanwhile, the lawyer cannot satisfy his duty of communication to B because he cannot reveal the important information that A is attempting to offer evidence against B, since that information was learned in the course of the lawyer's representation of A and is therefore confidential. The conflict cannot be cured, both because the lawyer could not provide competent and diligent representation to both clients and because the lawyer could not disclose the information necessary to obtain informed consent from both clients without revealing information that is detrimental to one or both clients.

The more difficult question is whether the lawyer may continue to represent either A or B after withdrawing from representation of the other. According to Comment 4 to Rule 1.7, when a conflict develops between two clients, "whether the lawyer may continue to represent any of the clients is determined by Rule 1.9." In this hypothetical, where A's information involves the matter in which the lawyer is representing B, withdrawing from client A's case does not cure the conflict. The lawyer will still have information from A that he would otherwise be required by Rule 1.4 to communicate to B, but which is confidential as to A, so his ability to fulfill his obligations to B is "materially limited" by his duties to A. The lawyer's duty of confidentiality to A under Rule 1.9(c) will also likely render him unable to cross-examine A if A does ultimately become a witness against B. At first blush, it appears that withdrawing from representation of B, and continuing to represent A, may cure the conflict because, as Comment 4 to Rule 1.7 explains, B would become a "former client" and the conflict would therefore be analyzed under Rule 1.9, which does permit some instances of adversity between a current client and a former client, rather than Rule 1.7. In this hypothetical, though, there would still be a conflict even if B were a former client, because A's offered information involves the same matter in which the lawyer represented B, and Rule 1.9(a) prohibits the lawyer from taking action adverse to B in the same matter in which he previously represented him.

In a different situation in which A's information about B is completely unrelated to the matter in which the lawyer represents B, continued representation might be permissible under Rule 1.9(a), but the lawyer would have to carefully analyze any confidential information obtained from B during the course of the representation; if any of that information were relevant to the lawyer's continued representation of A, there would be a conflict under Rule 1.9(c) notwithstanding the fact that the subject matter of the representation is different. For example, if

(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:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

⁴ See, e.g., *Hoffman v. Leeke*, 903 F.2d 280, 286 (4th Cir. 1990) ("It is difficult for us to understand, and indeed we do not, how advising one client to give a statement and testify to the essential elements of a crime allegedly committed by a second client is not a conflict of interest.")

the lawyer represented A in a robbery matter and B in an unrelated drug matter, and A had information regarding an uncharged homicide committed by B, A's information would be unrelated to the lawyer's representation of B, and therefore would not implicate Rule 1.9(a) if the lawyer withdrew from representation of B on the drug offense and continued to represent A in his robbery matter, including offering information about B's involvement in the homicide. The lawyer would still have to apply Rule 1.9(c) to determine whether his duties of confidentiality to B would limit his ability to continue to represent A.

As for whether the result is different if the prosecutor explicitly disavows any interest in/intent to use any information that A provides, the answer is no, it does not change the fact that the lawyer has a conflict and cannot continue to represent both A and B simultaneously. It may factor into any analysis under Rule 1.9, above, if there is no possibility that A will be a witness against B, because of the prosecutor's disavowal or for any other reason, but it does not reduce the adversity between A and B at the moment when A makes his offer to cooperate with the prosecution of B. The fact that the prosecutor initially refuses to consider A's information about B does not reduce or remove the lawyer's obligation to advise A about how to use the information to his advantage and to continue to pursue cooperation from the prosecutor. Since it is this obligation that the lawyer owes to A that creates the conflict, not whether any particular use will be made of any of A's information, the conflict is not affected by whether the prosecutor is willing to consider using A's information against B.

This opinion is advisory only and is not binding on any court or tribunal.

Committee Opinion
July 23, 2015