

Confidentiality and Conflicts

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One of the most, if not *the* most, common ethical dilemmas that lawyers face is how to identify and address conflicts in the representation of clients. And one of the most common bases for a conflict is the lawyer's duty to preserve and protect the confidentiality of a client's information. Situations that highlight these particular conflicts are those involving representation of a current or prospective client who is or may be adverse in some manner to a former client, and those involving two current clients becoming adverse to one another, as in the case of one client wanting or needing to testify against or provide information adverse to another current client.

With regard to a conflict with a former client, Rule 1.9 of the Rules of Professional Conduct will control. There are two prongs to the analysis under Rule 1.9. The first is outlined in paragraph (a)¹ of the rule and involves determining whether a new representation involves the same or a substantially related matter as the representation of a former client, and whether the interests of the new client are directly adverse to the former client. Another way of thinking of this is: Does the new representation involve the lawyer switching sides in the same case? If the answer to any of these questions is "yes," then the lawyer has a conflict and cannot undertake the new representation unless consent from both clients involved can be obtained.

The second prong of the analysis under Rule 1.9 is application of paragraph (c),² which operates independently of paragraph (a) and any consideration of whether the matters are the same or substantially related or whether the former client is adverse to the new client. Under Rule 1.9 (c) a lawyer has a conflict with a former client if the lawyer would have to "use" or "reveal" confidential information of a former client to the former client's detriment in order to carry out the representation of the new client. In other words, the confidential information that the lawyer learned while representing the former client is information essential to the representation of the new client and to not use it or to reveal it impairs the representation of the new client. In such a situation, the lawyer cannot take on the new representation. Protection of client confidential information is always the priority.

The other common situation in which protecting client confidential information may create a conflict is when two current clients become adverse. One example that frequently occurs is when a lawyer is representing two criminal clients in unrelated matters and Client A tells the lawyer that he has information that can be used against Client B and Client A would like to provide this information to law enforcement or prosecutors in order to benefit himself in his own case. Legal Ethics Opinion 1882 addressed the conflicts that arise in this situation and how and whether the conflicts can be resolved:

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.³ 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.

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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 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.

Conflicts such as these are challenging and, when they arise, must be addressed and resolved in accordance with Rules 1.7 and 1.9, even if this means the lawyer must withdraw from representation of all clients involved. If withdrawal is necessary, the lawyer must advise the client/s, but likely will only be able to say that a conflict has arisen that requires the lawyer to withdraw. By the very nature of

the conflict, the lawyer cannot disclose the details because to do so would require disclosure of confidential information. The same is true for the content of any motion to withdraw filed with the court. The lawyer cannot disclose confidential information relating to the conflicts even to the court. The lawyer still has the duty of confidentiality and must present the matter to the court in as neutral language as possible. When a lawyer files a motion to withdraw, and before the matter gets before the court, there is no exception under Rule 1.6 to allow disclosure of confidential information without the consent of the client. If, when hearing the motion, the court demands more information and a lawyer's argument to preserve confidentiality is not accepted, then the lawyer can disclose, as necessary, confidential information to comply with the court's order. (Rule 1.6 (b)(1)). ☞

Endnotes:

- 1 (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.
- 2 (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.
- 3 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.")