

Navigating Conflicts of Interest

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Introductory Matters

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Scenario

- Lawyer asked to represent **ABC**
- Lawyer is trying to determine whether Lawyer's relationship with **XYZ** causes a conflict of interest

Dealing with Potential Conflicts

- 1) **Identify** potential conflicts
- 2) **Assess** whether those conflicts are “disqualifying conflicts”
- 3) Can the conflict be **resolved** by **waiver** or an **ethics screen**?
- 4) **Resolve** any disqualifying conflicts
- 5) **Withdraw/decline** if unresolved conflicts

Question #1

Is XZY a **current** or **former** client of Lawyer?

Question #1 – First Answer

- **No.** XYZ is not a current or former client of lawyer.
- Lawyer still could have a conflict under Rule 4-1.7(a)(2) if there is a “*significant risk that the representation of [ABC] will be materially limited by the lawyer's responsibilities to [XYZ].*”
- **Examples** – Lawyer is related to XYZ, is an (current or former) fiduciary of XYZ, etc.

Guidance

- If you conclude XYZ is not a current or former client, but Lawyer does owe obligations to XYZ that may materially impair Lawyer's representation of ABC, then
- Lawyer may undertake representation of ABC if (1) waivable conflict and (2) ABC waives conflict

Question #1 – Second Answer

- XYZ is a current client of Lawyer
- This means that XYZ would reasonably believe Lawyer is (still) representing XYZ
- Rule 4-1.7 governs

Rule 4-1.7

Except as provided in Rule 4-1.7(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 a **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.

Then consent of both ABC and XYZ will likely be required if

- (1) ABC and XYZ are “*directly adverse*” in matter Lawyer will handle for ABC or
- (2) there is a “*significant risk that the representation of [ABC] will be materially limited by the lawyer's responsibilities to [XYZ].*”

Question #1 – Third Answer

- XYZ is a former client of Lawyer
- This means (a) XYZ was a client of Lawyer and (b) XYZ is no longer a client of Lawyer
- Rule 4-1.9(a) and (b) govern

Rule 4-1.9(a) & (b)

(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 the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

If Former Client, Question #1B

- Did Lawyer (personally) formerly represent XYZ?
- If not, did Lawyer receive confidential information relating to Lawyer's firm's representation of XYZ – and is that information “material” to ABC's matter?

Personally Represented – Rule 4-1.9(a)

A lawyer who has formerly represented a client in a matter shall not thereafter

- represent [a new client] in the *same or a substantially related matter*
- in which that [new client's] interests are *materially adverse* to the interests of the former client
- *unless* the former client gives informed consent, confirmed in writing.

No Personal Representation – Rule 4-1.9(b)

A lawyer shall not knowingly represent a person in the *same or a substantially related matter* in which [the lawyer's former firm] had previously represented a client:

- (1) whose interests are *materially adverse* to that person; and
- (2) about whom the *lawyer had acquired information protected by Rules 4-1.6 and 4-1.9(c)* that is *material* to the [new client's] matter; *unless* the former client gives informed consent, confirmed in writing.

“Substantially Related”

- Matters are "substantially related" for purposes of this Rule 4-1.9 if they involve the **same transaction or legal dispute** or if there otherwise is a **substantial risk that confidential factual information *as would normally have been obtained in the prior representation* would materially advance the client's position in the subsequent matter.**
 - For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a dissolution of marriage or divorce.
 - Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

“Substantially Related”

- Information that has been **disclosed to the public** or to other parties adverse to the former client ordinarily will not be **disqualifying**.
- Information acquired in a prior representation may have been rendered **obsolete** by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.

Pause for Review

No conflict if

- Lawyer did not personally represent and did not receive material confidential information
- Matters are not the “same or substantially related”

Former client conflicts are always (?) waivable. But two questions for former client conflicts:

- (1) Do I need consent from new client – Rule 4-1.7
- (2) Do I need consent from former client – Rule 4-1.9

Note – *Potential Client Not Ultimately Represented*

- Perhaps XYZ approached Lawyer for legal advice, but *ultimately never became a client*
- Look to Rule 4-1.18, which is pretty similar to Rule 4-1.9 . . . Except there is no “representation,” so the key is always whether the lawyer received *material confidences*

Question #3

Can a “disqualifying conflict” be resolved?

1. Conflict waiver -- “informed consent”
2. Ethics screen
 - Unilateral – without client consent
 - Consensual – with client consent

Conflict Waivers

- Is the conflict waivable?
- If so, will the client waive the conflict?

What Conflicts Are Not Waivable?

- **Illegal** to waive -- Rule 4-1.7(b)(2)
 - Example – multiple criminal defendants in conspiracy or domestic abuser/victim
- *Prosecuting and defending* claim in *one case* – Rule 4-1.7(b)(3)
- Reasonable attorney would not believe competent and diligent representation possible – Rule 4-1.7(b)(1)

More Non-Waivable Conflicts In Rule 4-1.8

- Soliciting substantial gift from non-relative
- Negotiating literary or media rights relating to on-going representation
- Financial assistance to litigation clients, except . . .
- Prospective limitations on lawyer's liability
- Acquire proprietary interest in cause of action
- Sexual relations started after attorney-client relationship

Will the Client Consent?

- “Informed” about the circumstances giving rise to the conflict
- “Informed” about risks (and benefits)
- “Informed” about alternatives

- Agree to conflicted representation
- Agreement confirmed in writing

Review – Elements of Conflict Waiver

- Circumstances
- Risks and benefits
 - Risk to “zeal”
 - Risk to confidential information
- Alternatives
- Consent confirmed in writing

Special Consent Requirements

- Business transactions with clients – Rule 4-1.8(a)
- Third party paying for representation – Rule 4-1.8(f)
- Aggregate settlements – Rule 4-1.8(g)
- Settling claim against lawyer – Rule 4-1.8(h)(2)

Rule 1.8(a) Waiver

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Ethics Screens

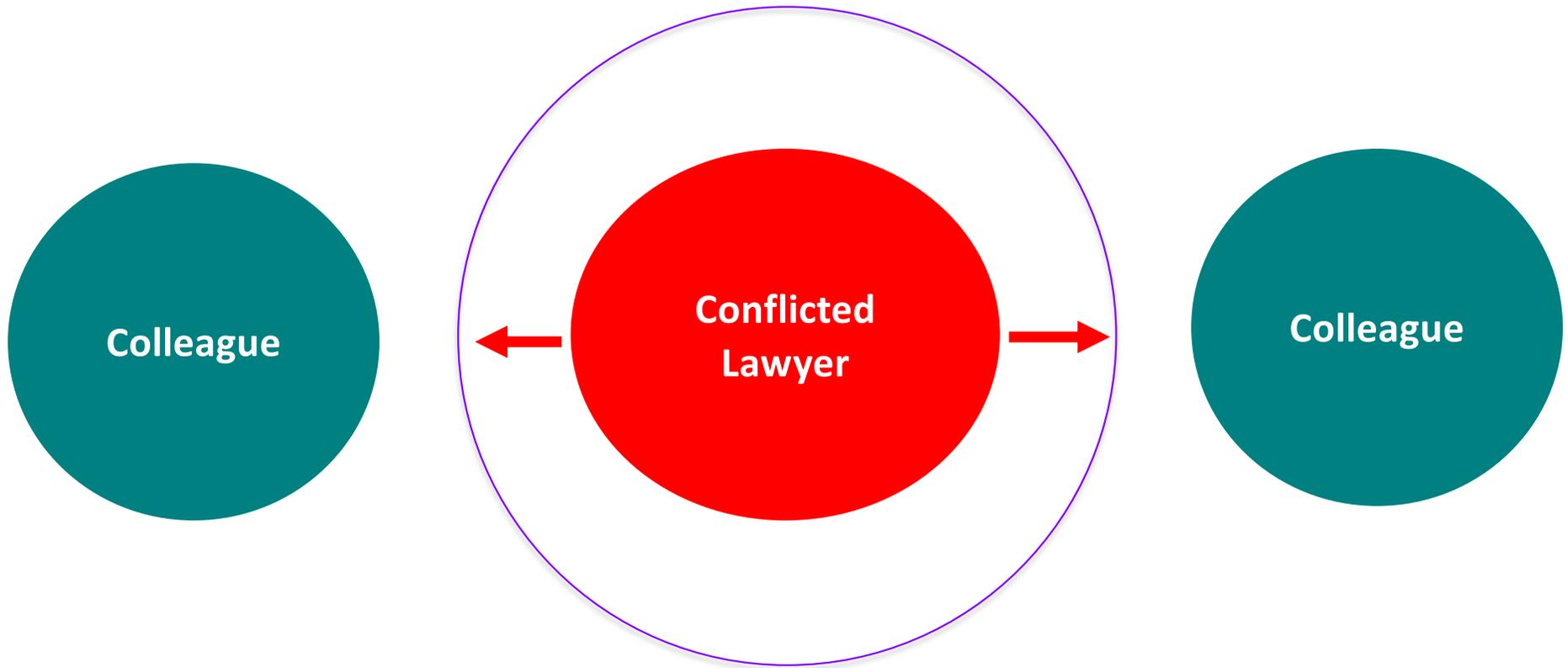
- Arises when Attorneys A and B are in the same firm, and Attorney A has a conflict Attorney B does not
- If they all have the same conflict, a waiver not a screen is needed

Imputation of Conflicts

- Does Conflicted Lawyer's conflict affect Lawyer's colleagues?
 - Rule 4-1.8(k) or 4-1.10 (or 4-1.11 or 4-1.12)



No Imputation With Screen



Consensual Ethical Screen

- “Consensual screen” – element of consent
 - “Will you let us take on this adverse representation if we screen Attorney A and B”
- Covered in conflict waiver – condition of waiver

“Unilateral” Screen

- Lawyer can unilaterally erect screen and take on adverse representation
- Does not need consent from (current or former) client or anyone else
- I also sometimes call these “non-consensual” screens

When Can Unilateral Screens Resolve Conflicts

- Person was not a client
 - Prospective (not represented) clients – Rule 4-1.18
- Person is/was not a lawyer – Rule 4-1.10 cmt [4]
 - Non-lawyer assistant, clerk, etc.
 - Also law student who becomes lawyer
- Person has changed jobs
 - Government to private practice to government – Rule 4-1.11
 - Judge/mediator/arbitrator/neutral to law firm – Rule 4-1.13
 - Private practice – in Illinois, but not Missouri or Kansas

Ethics Screen – Common Elements

- Limit communications – to and from conflicted lawyer
 - Limit paper access
 - Limit electronic access
 - Send reminders not to discuss
- No fee-sharing
- Notice of screen (possibly)
- Education and enforcement

Future Programs

October 6 at 12:00 Noon CT - ***Privilege Law Update***

October 25 at 3:00 PM CT - ***Legal Ethics & Technology***

November 9 at 12:00 Noon CT - ***Ethics of Lawyer Collaboration***

November 30 at 12:00 Noon CT - ***Legal Ethics Update***

December 7 at 12:00 Noon CT - ***Addressing Bias in the Legal Profession - Cultural Competency***

December 15 at 12:00 Noon CT - ***Lawyer Confidentiality and Its Exceptions***



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Conclusory Matters

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Thank you



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