

# Conflicts of Interest Update

September 2023

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# Recent Developments Regarding Conflicts

# ABA Opinion 507 (July 2023)

## *Office Sharing Arrangements with Other Lawyers*

“The ABA Model Rules of Professional Conduct permit lawyers to participate in office sharing arrangements, but those doing so must fully consider and comply with their applicable ethical responsibilities, including confidentiality, conflicts of interest, supervision, and communications concerning a lawyer’s services.”

# Imputation of Conflicts

## C. Conflicts of Interest Considerations

Lawyers in shared office arrangements should pay particular attention to (1) avoiding the imputation of conflicts of interest, (2) taking on potential new matters that are adverse to clients represented by other office sharing lawyers, and (3) consulting with fellow office sharing lawyers.

### *1. Imputation of Conflicts*

Model Rule 1.10(a) imputes conflicts of interest to all lawyers “associated in a firm.” Thus, imputation of a lawyer’s conflict of interest to other lawyers in an office-sharing arrangement will pivot on whether the lawyers are, or appear to the public or their clients as, “associated in a firm.”

Under the Model Rules, **office sharing lawyers are not automatically treated as a single law firm for conflicts of interest purposes.** This determination will depend on the **facts and circumstances of each arrangement.** Office sharing lawyers who **do not protect the confidentiality** of their respective clients, **regularly consult** with each other on matters, **share staff who have access to client information, mislead the public about their identity and services,** or otherwise **fail to keep their practices separate,** are more likely to be treated as “associated in a firm” for conflict imputation purposes.

## Rule 4-1.10 – Imputation of Conflicts

While lawyers are **associated in a firm**, **none** of them shall knowingly represent a client **when any one** of them practicing alone would be prohibited from doing so by Rules 4-1.7 or 4-1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

## **2. Representing Clients with Adverse Interests**

Where lawyers in an office sharing arrangement properly shield the confidentiality of their respective clients and do not hold themselves out to the public as members of the same firm, it may be permissible under the Model Rules to represent clients with adverse interests—even in the same lawsuit or transaction. Although this determination will ultimately turn on specifics of the office sharing arrangement and the nature of the proposed representations, Model Rules 1.4 and 1.7 may obligate lawyers to disclose the details of the office sharing arrangement to their respective clients, including their efforts to maintain confidentiality, and to obtain each clients' informed consent, confirmed in writing.

In addition, any staff shared by the lawyers should not possess or otherwise have access to information from both adverse clients. Implementing an adequate ethical screen between shared staff members can be an effective measure in this regard, and to avoid the sharing of client information more generally.

Notwithstanding the ability of office sharing lawyers to represent clients with adverse interests, some state ethics opinions understandably advise lawyers to avoid these situations entirely. Potential pitfalls range from inadvertent disclosures of client information in a shared office to opposing parties coincidentally scheduling meetings at the same time. Before entering an office sharing arrangement, it is prudent for a lawyer to examine the nature of the other lawyers' practices to determine whether conflicts of interest are likely to arise.



# Concurrent Conflict Rule – Rule 4-1.7(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 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.

### **3. Consultations Between Office Sharing Lawyers**

It is natural for lawyers in office sharing arrangements to informally consult one another about their respective client matters. Merely engaging in informal consultations from time to time, however, does not result in the lawyers being “associated in a firm” under Model Rule 1.10(a). At the same time, lawyers who occasionally consult with other lawyers in shared office arrangements should not disclose “client information that may reveal the identity of a client or privileged information.” Lawyers may instead discuss issues using [hypothetical](#) facts. As comment [4] to Model Rule 1.6 explains, “[a] lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”

Consultations between office sharing lawyers can also trigger unanticipated conflicts of interest, restricting a consulted lawyer’s ability to represent a current or future client under Model Rule 1.7(a)(2). For instance, if Lawyer A and Lawyer B share office space, and Lawyer A divulges client information to Lawyer B during an informal consultation to help Lawyer A prepare a case for trial, then Lawyer B may assume a responsibility not to use or reveal the information, which could materially limit Lawyer B’s ability to represent a current or future client. This situation parallels the confidentiality duties that lawyers owe to prospective clients under Model Rule 1.18 and the conflicts problems that can surface if a lawyer receives too much information from a prospective client during an initial consultation.

To prevent these issues, Lawyer B can conduct a [standard conflict check](#) prior to any informal consultation or collaboration with Lawyer A.

# *Elmore v. Maries County*

## (E.D. Mo. July 7, 2023)

- Plaintiff's husband died in county's custody
- Represented by Lawyer, Plaintiff sued county and certain officers (jailers)
- Defendants claimed husband slipped in the shower, later admitted he was assaulted by another inmate
- Lawyer suggested defendants may have orchestrated attack
- Lawyer then represented inmate assailant in proffering about his possible testimony
- Defendants moved to disqualify Lawyer for representing both [Plaintiff](#) (wife) and [key witness \(assailant\)](#)

# Concurrent Conflict Rule – Rule 4-1.7(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 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.

# Consent to Conflicted Representation – Rule 4-1.7(b)

Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:

- (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) each affected client gives **informed consent, confirmed in writing**.

# “Unwaivable Conflict”

- Represented plaintiff and key witness/ potential defendant
- Not resolved by Lawyer offering to withdraw from representing assailant

# *Stewart v. Waldrop* (ED Mo. January 2023)

- Stewart was charged with possession of controlled substance in March 2016
- In August 2016, a warrant was issued for Stewart's failure to appear
- (Entering an appearance her boss,) [Lawyer sought to have Stewart's warrant for failure to appear recalled](#). Lawyer also filed a motion for discovery
- Stewart was stopped in October 2016, leading to Stewart's civil rights claim against City
- [Lawyer left firm and joined firm now defending City and its officers against Stewart's civil rights claim](#)
- Stewart sued claiming stop was without justification. Police report said outstanding August 2016 warrant was one reason for stop

Lawyer questioned [Stewart] about whether he was aware of the August 31, 2016 failure to appear warrant in the possession case:

Q. Do you remember if any attorney told you, hey, you've got a warrant for your arrest for not showing up for your court back in August of 2016?

A. I do not.

Q. All right. So it sounds like you weren't aware whatsoever that there would have been a warrant out for your arrest if these documents are accurate back in 2016; is that right?

A. If that's the case, my lawyer would inform me, so –

[Lawyer] then circled back to the October, 2016 traffic stop and asked Stewart whether he believed that the officer had any reason to stop him. When Stewart stated there was no reason, [Lawyer] followed by asking “[d]espite having a felony warrant out?” (Id. 10).



# Former Clients – Rule 4-1.9

- (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; an
  - (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.

# Timeliness of Motion to Disqualify

“A motion to disqualify should be made with reasonable promptness after the party becomes aware of the conflict.”

- Lawyer only realized conflict when she was preparing for Stewart’s deposition – did not inform Stewart
- Stewart promptly sought disqualification after learning of conflict post-deposition

# Substantially Related – ~~Carey~~ Factors

In re Carey, 89 S.W.3d 477, 494 (Mo. 2002), provides a non-exhaustive list of six factors:

- (1) the case involved **the same client** and the matters or transactions in question are **relatively interconnected** or reveal the client's pattern of conduct;
- (2) the lawyer had interviewed a **witness who was key in both cases**;
- (3) the lawyer's knowledge of a **former client's negotiation strategies was relevant**;
- (4) the **commonality of witnesses, legal theories, business practices** of the client, and location of the client were significant;
- (5) a **common subject matter, issues and causes of action** existed; and
- (6) information existed on the former client's **ability to satisfy debts** and its **possible defense** and **negotiation strategies**.

# Substantially Related – Presumption Regarding Confidences

“Rule 4–1.9(a)’s primary concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation. The Rule is prophylactic, aimed at preventing even the potential that a former client's confidences and secrets may be used against him. Thus, when representations are substantially related, we will presume that confidences were disclosed for conflict-of-interest purposes.”

# Court's Conclusion

“The possession case and this matter are substantially related and significantly overlap. [Lawyer] actually represented Stewart at the time of the arrest forming the basis of this lawsuit. She also had some involvement in the August warrant that underlies and potentially justifies at least some of Defendants’ actions in allegedly staking out Stewart, being in a position to conduct a traffic stop, detaining him, and searching his residence. While Defendants argue that the August warrant is a small and perhaps tangential issue in this matter, it is in fact central to whether there was reasonable suspicion or probable cause that would justify at least some of Defendant's conduct”

“Moreover, even if this Court were to find that the two matters were not substantially related at the inception of this lawsuit, the matters became substantially related when [Lawyer] questioned Stewart about the possession case and specifically about events during which she was his attorney.

“Finally, [Lawyer’s] potential involvement in this case as a witness became a possibility when she questioned Stewart about whether ‘any attorney’ in the possession case, a reference to herself and her former firm, spoke with Stewart about the very warrant that forms the basis, in part, of the detention in the criminal case underlying this civil rights lawsuit.”

# *In re Estate of Valentino*

(Ill. App. 1<sup>st</sup> July 2023)

- Lawyer represented respondent in guardianship proceeding
- Petitioner was son of respondent
- Dispute over transfers from respondent to respondent's neighbor
- Lawyer later sought c. \$24,000 in attorney fees, including for communications with neighbor
- Petitioner argued Lawyer represented neighbor and had conflict.
- Lawyer claimed he had communicated with and argued for neighbor at request of his client respondent

# Objections to Fees Rejected

First, this does not appear to be a proper objection to a fee petition. *See, e.g., In re Estate of Weber*, (concluding that “the disciplinary system, not a hearing on fee petitions, would be the proper forum in which to deal with the question of a conflict of interest”).

Second, and perhaps more importantly, there was no simultaneous representation of parties with conflicting interests.

- “To form an attorney-client relationship, both the attorney and the client must consent to its formation” and “[c]onsent can be express or implied.”
- Simply because a third party benefitted from an attorney's representation of a client does not create a duty between the attorney and the third party, let alone an attorney-client relationship.
- Petitioner can point to no evidence that either [Lawyer] or Ms. Gutierrez ever consented to an attorney-client relationship.



# *In re HD* (Ill. App. 4<sup>th</sup> July 2023)

- State sought to terminate parental interests over minor child
- Father's appointed lawyer had previously prosecuted Father in 2018 domestic battery case where Mother was alleged victim
- Mother moved to disqualify Lawyer arguing "per se conflict of interest arose in allowing [Lawyer] to represent respondent in that during the prosecution of the domestic battery case, "[Lawyer] was representing the people of Tazewell County, including the victim, [Mother]"
- Later Mother's Lawyer shifted argument saying objection arose from "[Lawyer's] prior prosecution of respondent, not the attorney-client relationship with [Mother] as a victim."
- Aim is permanence and stability, and concern issue could introduce reversible error

# Rule 4-1.11(a) and (b)

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

- (1) is subject to Rule 4-1.9(c); and
- (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under Rule 4-1.11(a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule 4-1.11.

# Issues Before Court

- Mother lacked standing to raise conflict
  - Court found Father had not carried burden of proof (no citations and no cohesive argument)
- Depriving Father of chosen (appointed) counsel analyzed under Sixth Amendment *Ortega* standard for choice of counsel
  - There was an actual or serious potential for conflict because defense counsel was former prosecutor
  - No choice of counsel issue, so interest threatened by conflict not overcome by presumption for choice of counsel

# Rule 4-1.8 Special Conflicts

# Waivable Conflicts

# Rule 4-1.8(a)

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.

# Rule 4-1.8(a) Requirements Reworked

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

# Missouri Informal Opinion 20050041

Attorney A was asked to represent Client on separate felony matters. **Client's Mother and Father own property** which is free and clear.

Mother and Father are willing to execute a **deed of trust** and a note payable on the property. Attorney A explained to Mother and Father that Attorney A does not represent them and that Mother and Father would execute the note payable and deed of trust.

Attorney A would prepare deed of trust and note payable but would have **Attorney B, from a different firm**, review the documents with Mother and Father.

Legal fees for Attorney B would be advanced by Attorney A's firm but would ultimately be charged to Client. An employment contract outlining the above would be executed by Attorney A and Client.



# Missouri Opinion 20050041 – Answer

**ANSWER:** Attorney A may take a deed of trust as long as Attorney A closely follows the requirements of Rule 4-1.8(a).

Although Attorney B may provide a second opinion regarding the deed of trust, Attorney B would not necessarily be viewed as independent counsel in light of the fact that Attorney A obtained Attorney B's services and will advance payment of fees. Attorney A is encouraged to read *In re Snyder*, 35 S.W.3d 380 (Mo. banc 2001), regarding this issue.

Because the deed of trust is not from Client, Attorney A must also follow Rule 4-1.8(f). Attorney A should explain to any third party who is providing consideration for representation that they do not have any right to information about the representation, that they have no control over the representation, and that what they say to Attorney A is not confidential.

In most circumstances when a third party pays, it is useful to have an agreement about what happens to the funds if: ***(a) the representation is prematurely terminated, or (b) the representation terminates normally, but there are funds left, or (c) the third party demands his or her money back while the representation is ongoing.***

## Rule 4-1.8(b)

A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

# Rule 4-1.8(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 4-1.6.

# Missouri Informal Opinion 2018-12

May Attorney accept payment of a client's fee from someone other than the client?

If so, to whom should Attorney refund any unearned fee at the termination of representation?

# Missouri Informal Opinion 2018-12

Attorney must not accept compensation for representing a client from someone other than the client (including a co-client or indemnitor) unless Attorney complies with Rule 4-1.8(f).

The client must give informed consent, the arrangement must not interfere with Attorney's independence of professional judgment or with the client-lawyer relationship, and the client's confidential information must be protected as required by Rule 4-1.6.

In obtaining the client's informed consent, Attorney should discuss with the client all information that will allow the client to make an informed decision, including, but not limited to:

- to whom any necessary refund should be issued at the termination of representation;
- that Attorney will follow the procedure in Rule 4-1.15(e) and Comment [8] for the handling of disputed funds if both the client and the third-party payer claim an interest in the funds; and
- the possible impact on the representation if the payer demands a return of the funds before the scope of the representation is concluded.

If the fee arrangement creates a conflict of interest for Attorney, Attorney must comply with Rule 4-1.7(b). It should be noted that not all conflicts of interest are consentable. See Rule 4-1.8, Comments [11] and [12].

# Rule 4-1.8(g)

A lawyer who **represents two or more clients** shall not participate in making an **aggregate settlement** of the claims of or against the clients, or in a criminal case an **aggregated agreement as to guilty or nolo contendere pleas**, unless **each client gives informed consent, in a writing signed by the client**.

The lawyer's disclosure shall include

- the existence and nature of all the claims or pleas involved and
- [the existence and nature] of the participation of each person in the settlement.

# Rule 4-1.8(h)

A lawyer shall not:

**NON-WAIVABLE** – (1) **make an agreement prospectively limiting** the lawyer's **liability to a client for malpractice** unless the client is independently represented in making the agreement; or

**WAIVABLE** – (2) **settle a claim or potential claim for such liability** with an unrepresented client or former client unless that person is **advised in writing of the desirability of seeking** and **is given a reasonable opportunity to seek** the **advice of independent legal counsel** in connection therewith.

# Non-Waivable Conflicts



# Rule 4-1.8(c)

A lawyer shall not

- **solicit any substantial gift from a client**, including a testamentary gift, or
- **prepare** on behalf of a client **an instrument giving the lawyer or a person related to the lawyer any substantial gift**

unless the lawyer or other recipient of the gift is **related** to the client.

For purposes of this paragraph, **related** persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship

## Rule 4-1.8(d)

Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

# Rule 4-1.8(e)

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may **advance court costs and expenses of litigation**, including medical evaluation of a client, the **repayment of which may be contingent on the outcome of the matter**; and
- (2) a lawyer representing an **indigent client may pay** court costs and expenses of litigation on behalf of the client.
- (3) [Next slide]

# Rule 4-1.8(e)(3)

A lawyer representing an **indigent client pro bono** may provide **emergency financial assistance to the client**, whether monetary or in-kind, for food, housing, transportation, medicine, and other basic necessities. The lawyer:

- (i) **may not** promise, assure, or imply the availability of such emergency financial assistance **prior to retention or as an inducement to continue** the client-lawyer relationship after retention;
- (ii) **may not seek or accept reimbursement from the client**, a relative of the client or anyone affiliated with the client; and
- (iii) **may not publicize or advertise a willingness to provide** such emergency financial assistance to prospective clients.

Emergency financial assistance under this Rule may be provided even if the representation is eligible for fees under a **fee-shifting statute**.

# Missouri Informal Opinion 2018-02

May Attorney **advance the cost of the affidavit and opinion by a health care provider required by statute** to be provided in any action against a health care provider in a medical malpractice case and the cost of evaluation of the case by a medical expert in preparation for litigation?

# Missouri Opinion 2018-02 – Answer

Rule 4-1.8(e) permits Attorney to advance these costs, repayment of which may be contingent on the outcome of the matter.

# Rule 4-1.8(h)

A lawyer shall not:

**NON-WAIVABLE** – (1) **make an agreement prospectively limiting** the lawyer's **liability to a client for malpractice** unless the client is independently represented in making the agreement; or

**WAIVABLE** – (2) **settle a claim or potential claim for such liability** with an unrepresented client or former client unless that person is **advised in writing of the desirability of seeking** and **is given a reasonable opportunity to seek** the **advice of independent legal counsel** in connection therewith.

# Rule 4-1.8(i)

A lawyer shall not **acquire a proprietary interest in the cause of action or subject matter of litigation** the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a **lien authorized by law** to secure the lawyer's fee or expenses; and
- (2) contract with a client for a **reasonable contingent fee** in a civil case.



# Missouri Informal Opinion 20000238

Would it be proper for Attorney to form a partnership with a client in connection with a matter that would otherwise have been handled on a traditional fee basis?

The client would contribute the cause of action and Attorney's firm would contribute its expertise in converting the cause of action into settlements or awards.

Attorney would like to consider the use of such a partnership arrangement in the types of cases where the settlement or award would be considered taxable income to the client.

# Missouri Opinion 20000238 – Answer

As I understand it, the proposed partnership arrangement would involve Attorney's firm acquiring a proprietary interest in the litigation.

Such an arrangement would violate Rule 1.8(j) of Supreme Court Rule 4, the Rules of Professional Conduct.

## Rule 4-1.8(j)

A lawyer **shall not have sexual relations with a client unless** a consensual **sexual relationship existed** between them when the client-lawyer relationship commenced.

## *In re Purdy* (Mo. March 2023)

- Video from jail interview room showed lawyer having inappropriate sexual contact with four female clients
- Lawyer also made inappropriate contact in car while driving client
- No evidence touching was substitute for paying all legal fees
- OCDC and Lawyer stipulated to indefinite suspension with leave to apply after 12 months
- Hearing panel recommended disbarment
- Court accepted indefinite with leave to apply after 12 months over 4 dissents

# Imputation of Rule 4-1.8 Conflicts – Rule 4-1.8(k)

While lawyers are associated in a firm, a prohibition in the foregoing Rule 4-1.8(a) to (i) that applies to any one of them shall apply to all of them.

- Excludes Rule 4-1.8(j) (sexual relations with clients)

# Conclusory Matters

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