

September 2014 NCLAMP Annual CLE

Avoiding Common Ethical Pitfalls

Presented by
Nichole P. McLaughlin, Assistant Ethics Counsel
The North Carolina State Bar



Client-Lawyer Relationship Overview

- Rule 1.6: Confidentiality
- Rule 1.7: Conflict of Interest: Current Clients
- Rule 1.18: Duties to Prospective Clients
- Rule 1.9: Duties to Former Clients
- Rule 1.16: Declining and Terminating Representation
- Rule 1.15-2: General Rules (Client Property)

Confidentiality



- Rule 1.6(a)
- All information learned during the course of the representation
- Cannot disclose unless
 - Client consent,
 - Impliedly authorized in order to represent client, or
 - Applicable exception
- Survives death

Recognize the Distinction! Attorney-Client Privilege

- Precludes testimony about communication between lawyer and client if:
 - Client-lawyer relationship existed at time of the communication
 - which was made in confidence,
 - relates to a matter about which lawyer is being professionally consulted,
 - was in the course of giving or seeking legal advice for a proper purpose, and
 - client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 284 S.E. 2d 289 (1981)

Ethically “Confidential”
Information

PRIVILEGED
INFORMATION

Exceptions to Confidentiality

- Rule 1.6(b)
All exceptions are permissive:
*A lawyer **may reveal** information protected from disclosure...to the extent the lawyer reasonably believes necessary to....*

Justifications for Disclosure

- To obey the law
 - Rule 1.6(b)(1): To comply with Rules, law, court order
 - Rule 1.6(b)(5): To secure legal advice about lawyer's compliance with Rules
- To protect others
 - Rule 1.6(b)(2): To prevent commission of crime by client
 - Rule 1.6(b)(3): To prevent reasonably certain death or bodily harm
- To rectify the consequences of the lawyer's involvement
 - Rule 1.6(b)(4): To prevent, mitigate, rectify consequences of client's crime or fraud committed by using lawyer's services

More Justifications for Disclosure

- Self defense
 - Rule 1.6(b)(6):
 - To establish claim or defense on behalf of lawyer in controversy with client;
 - to defend criminal charge or civil claim against lawyer;
 - to respond to allegations in any proceeding concerning lawyer's representation of client

Trumping



- Confidentiality trumps other duties almost every time:
 - Rule 8.3: Duty to report misconduct
- Duty of candor to court trumps confidentiality
 - Rule 3.3: disclosure to court required to rectify offering of material false evidence

Conflict of Interest

- Rule 1.7: Conflict of Interest: Current Clients
 - Prohibited or
 - Consentable
- Rule 1.18: Duties to Prospective Clients
- Rule 19: Duties to Former Clients
- Rule 1.10: Imputation of Conflicts of Interest

Typology of Conflicts

- **Existing Clients**- When can I represent two clients simultaneously (concurrent conflict)?
- **Former Clients**- When can a former client control who you represent now?
- **Imputed Disqualification**- When does who you work with impact who you represent?

Rule 1.7: Basic Paradigm

- Rule 1.7(a) provides that a lawyer shall not represent a client if it involves a **concurrent conflict** of interest, which exists when:
- (1) representation of one client "will be directly adverse to another client" or
- (2) "significant risk 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."

Conditions for Consent


- Rule 1.7(b): Lawyer can proceed with the representation despite the conflict if:
- (1) the lawyer “**reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client**” **AND**
- (4) each affected client gives **informed consent**, confirmed in writing



More conditions

- (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 in the same litigation

Is the Conflict Consentable?

- Question must be resolved as to each client
 - Will confidential information have to be disclosed 
 - Get client consent to disclose
- Will lawyer be able to provide competent and diligent representation to both?
- Will interests of the clients be adequately protected if the clients are permitted to give consent?

Prospective Client Conflicts

- Who
 - Rule 1.18(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a **prospective client**.
- Some protection
 - prospective clients entitled to some but not all protections of a client. Comment [1]
 - if no reasonable expectation or intent to form a client-lawyer relationship, person is **not** a "prospective client." Comment [2]
 - lawyer "shopping" solely to create a conflict not protected
- Rule 1.18 applies to free consultation (Rule 1.9 applies if consultation fee paid) → 2006 FEO 14

Protection

- What is the Protection
 - Rule 1.18(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client **shall not use or reveal information learned in the consultation**, except as Rule 1.9 would permit with respect to information of a former client.
 - information provided during consultation is confidential. Rule 1.6
 - duty exists regardless of duration of consultation
 - avoid acquiring disqualifying information
 - limit consultation to collect only information needed to run conflict check

Prohibited Representation

- What Causes the Conflict
- Rule 1.18(c) A lawyer subject to paragraph (b) shall not
 - represent a client with interests materially adverse to those of a prospective client in the **same or a substantially related matter**
 - if the lawyer received **significantly harmful** information about the person in the matter, except as provided in paragraph (d).

Prohibited Representation Facts

- Jane Doe meets with solo Lawyer A for free domestic consultation. Jane discloses that she is married to Joe Doe, she is a dependant spouse, they have two children and the assets include the marital home, vacation home, savings and retirement accounts. Jane wants divorce, primary custody, child support, the marital home, her share of savings and retirement and permanent alimony. Jane also discloses that she has been having an affair for the last 5 years and is leaving Joe for her lover. A quotes Jane a fee and gives legal advice about collecting permanent alimony and the affair. Jane is not sure she can pay A's fees. Jane leaves without paying A a retainer or signing a fee agreement.

- Two months later, Joe consults with A re the same domestic issues and gives all the same information Jane provided except does not mention Jane's affair. Joe says Jane is educated and capable of supporting herself and therefore does not want to pay permanent alimony. Joe wants to sign a fee agreement and is prepared to pay A a \$10,000 retainer. Can A represent Joe?

The Answer

- No
- Jane is a prospective client
- Jane and Joe met with A about the same matter
- A obtained **significantly harmful information** → Jane's affair
- A cannot use or reveal the affair because
 - affects Jane's ability to collect permanent alimony
 - materially adverse to Jane in the same matter

Exception

- Conflicts under (b) **imputed** to all lawyers in firm, **except**
- Rule 1.18(d) Representation is permissible if both the affected client and the prospective client have given informed **consent**, confirmed in writing, **or**:
 - (1) the disqualified lawyer is timely **screened** from any participation in the matter; **and**
 - (2) **written notice** is promptly given to the prospective client.

Change the Facts: Permitted Representation

- Assume the same facts except A is a member of a firm and Joe met with Lawyer B. Can B represent Joe?
- Yes, if Jane and Joe give informed consent confirmed in writing **OR**,
 - not likely to obtain informed consent
- Lawyer A is timely screened and Jane is given prompt written notice
- **EXPECT** Jane's lawyer to object to B representing Joe

Former Client Conflicts

- Rule 1.9(a) provides that a lawyer who formerly represented a client shall not 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, former client gives **informed consent confirmed in writing**

Key Questions

- What does it mean to be **substantially related**?
 - Only the same transaction or legal dispute?
Or substantial risk that confidential information will be used to advance the interests of the new client?
- What does generally known mean?
 - Rule 1.9, Comment [8]

Substantial Relationship

- Better approach: the potential utility of the confidential information obtained
- In other words, the subsequent legal matter itself need not be "related."
- Focus on the facts
- E.g., lawyer can represent Wife #2 in divorce/custody from Husband #1 even though lawyer previously represented Husband #1 in custody action against Wife #1

Information Learned During Former Representation

- Rule 1.9(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 the representation to the **disadvantage** of the former client **except** as these Rules 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 these Rules would permit or require with respect to a client.

Generally Known

- Whether information is "generally known" depends on
 - how the information was obtained
 - former client's reasonable expectations
 - information on the public record does not necessarily deprive the information of its confidential nature
 - if the information is known or readily available the parties involved, the information is probably considered "generally known."

Imputed Conflicts

- Rule 1.10(a): Concurrent and former client conflicts are imputed to all lawyers in a firm
 - unless conflict is based on a personal interest of lawyer and does not present significant risk of materially limiting the representation of the client

Lawyers Moving Between Firms The Firm Left behind

- Rule 1.10(b) When a **lawyer has terminated an association with a firm**, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
 - (1) the matter is the **same or substantially related** to that in which the formerly associated lawyer represented the client; **and**
 - (2) any lawyer remaining in the firm has **information protected by Rules 1.6 and 1.9(c)** that is material to the matter.

Lawyers Moving Between Firms The New Firm

- Rule 1.10(c) When a lawyer **becomes associated with a firm**, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
 - (1) the personally disqualified lawyer is **timely screened** from any participation in the matter; **and**
 - (2) **written notice** is **promptly** given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Rebutting presumption

- Presumption is that lawyers carry their brother's conflict on his/her back, but
- Migratory lawyer not actually privy to any confidences of party seeking disqualification or
- *Timely and effective* screen employed in new firm to prevent disclosure of confidential information

Conditions of Effective Screen

- Rule 1.0, Terminology: "Screened"
 - "the isolation of a lawyer from any participation in a professional matter through the **timely** imposition of procedures within a firm that are **reasonably adequate** under the circumstances **to protect information** that the isolated lawyer is obligated to protect under these Rules or other law."
- Allowed to participate in the fee

Conditions Continued

- Written notice is promptly given to affected former client to enable client to ascertain compliance with the provisions of the Rule
- Rule 1.10, Cmt [6]: Courts may impose more stringent obligations in ruling upon motions to disqualify
- Rule 1.0, Cmt [9]: Written understanding by screened lawyer; written instructions to all personnel; periodic reminders; prohibited access/secret codes to files, etc.

Problems with Screens?

- Will employment negotiations before lawyer withdraws affect representation?
- How will the client know that lawyers are complying?
- How can the client prove non-compliance without disclosure of confidences?
- How should the fee be allocated?
- Is perception that the lawyer abandoned the client for the other side mitigated by a screen?

Consent is Always an Available Cure

- Rule 1.10(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
 - Rule 1.7(b)
 - (1) the lawyer can provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representations are unrelated; and
 - (4) each affected client gives informed consent, confirmed in writing.

Withdrawal

Rule 1.16 Declining or Terminating Representation

- Must withdraw if:
 - Required by RPC (conflict)
 - Discharged
 - Physical or mental impairment
- May withdraw if
 - No material adverse effect on client
 - Client consent, or
 - Client failures (crime/fraud, failure to pay fees, won't follow advice, frivolous)

Requirements of Withdrawal

- Rule 1.16(c) - must seek court permission in litigation matters
- Rule 1.16(d) – Protect client's interests
 - Reasonable notice
 - Refund unearned fee
 - Return file

Client File

- File consists of EVERYTHING except attorney work product (notes, incomplete pleadings) → Rule 1.16(d), cmt. [10]
- Original file belongs to client
 - Return to client at end of representation, or
 - Keep in storage for 6 years → Rule 1.15-2, RPC 209
- Lawyer pays for her copy
- Can charge client for duplicates or storage retrieval fee → 98 FEO 9

Interacting with Your State Bar

- Grievance
- Ethics

The Grievance Process

- Birth of a Grievance
- SOL-esque Rule
- Investigation
- Letters of Notice
- Reports of Counsel
- Grievance Committee Disposition

Examples: Dismissal by Chair

CONFLICT OF INTEREST (PERSONAL) More Forthcoming

NOTE: In the space below, tell us what your complaint is about. Be sure to include all facts that you want the State Bar to consider, including names, dates, and places. Use additional sheets if necessary. Attach copies (not originals) of any papers that support your complaint.

I, I improvised Ethical Destruction = Conflict of

In disciplinary process states cleave, consent to drive together, collect more at agent having power to compel or constrain appealing forcibly to the mind or reason convincing.

Used knowledge of law against me in divorce.

Disposition of Grievances



- ☒ Dismissal by Chair (no LON)
- ☒ Dismissal by Chair & Vice-Chair
- ☒ Referral to Lawyer Assistance Program
- ☒ Dismissal with Letter of Caution
- ☒ Dismissal with Letter of Warning
- ☒ Admonition
- ☒ Reprimand
- ☒ Censure
- ☒ Referral to DHC for disability and/or disciplinary hearing

NOT What to do if you get a Letter of Notice



- ☒ Request more time if you need it
- ☒ Respond, no matter how baseless the allegations are
- ☒ Explain and provide relevant documents
- ☒ Don't panic
- ☒ Don't assume NCSB believes allegations are well-founded
- ☒ Don't attack the client/complainant
- ☒ Don't unload on the State Bar

Examples: "What Not to Do"



Dear [client]

The North Carolina State Bar has recently stated that I have violated no Rules of Professional Conduct. By writing standerous letters to the North Carolina Referral Service and the Judge, I do have an action for libel against you. Also there may be malicious prosecution by filing a frivolous grievance. If you will pay the enclosed bill I will not pursue and further action against you.

Yours truly,

For Legal Services Rendered:

Balance Carried Forward	\$52.50
Preparation of Motion to Withdraw	.25 hr.
Attendance of Hearing (December 6, 2002)	1.00 hr.
Preparation of Letter to State Bar on February 6, 2003 and Review of file	2.00 hrs. 1.25 hrs.

Examples: "What Not to Do"



I am aware of RPC210 and CPR100. Just because these opinions were issued in the past does not mean that they are realistic or that they are, in fact, followed by real property practitioners in actual practice.

We must adhere to the rules of the NC State Bar, who makes rules that do not account for the reality of the practice, and, when furnished with information, do not have staff who understand the practice or the process we deal with everyday.

If I had faith in your process, I would say that I hope & expect this grievance to be immediately dismissed because it is totally without merit. As I have little faith in your process, I can only hope you would inform me of your decision before I retire.

Examples: "What Not to Do"



Henry Babb, Chair Grievance Committee
NC Bar
208 Fayetteville Street Mall
P. O. Box 25908
Raleigh, NC 27611-5908
(919) 828-4620
(919) 834-8156 fax

John B. McMillan, Chair
NC State Bar, Grievance Committee
208 Fayetteville Street Mall
P. O. Box 25908
Raleigh, NC 27611
(919) 828-4620
(919) 834-8156 fax

Re: your file number [redacted] Sent via US Mail & Fax.

CORRECTED COPY

Mr. Babb,
Your premise of the case is b
Re: File Number [redacted]
Mr. McMillan,
I most respectfully respond that, the grievance filed against me is bullshit.

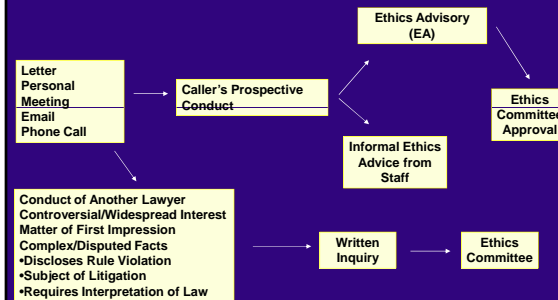
How the State Bar Rules on Questions of Legal Ethics

- Ethics Process
 - Responds to inquiries about professional conduct
 - Interprets and applies the Rules of Professional Conduct
 - Revises the Rules of Professional Conduct

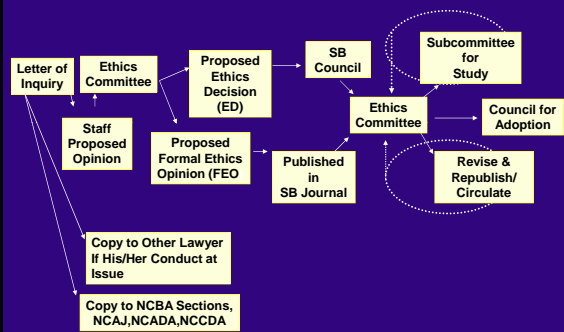
Ethics Committee

- Committee of the State Bar Council
 - 23 councilors; 17 advisory members
 - All members vote
 - Meets quarterly
 - Meetings and records are public
- Staff
 - 3 lawyers (Alice Mine, Suzanne Lever, Nichole McLaughlin)
 - 5000+ calls/year

Informal Ethics Advice & Ethics Advisories



Formal Opinions



Call, Write, or E-mail for Informal Advice

- The Ethics Hotline 8:30 am to 5:00 pm
 - Suzanne Lever
 - Nichole McLaughlin
- Contact us at
 - ethicsadvice@ncbar.gov
 - 919-828-4620, extension 575
 - PO Box 25908, Raleigh, NC 27611-5908