

# **BUILDING AN ETHICAL FOUNDATION**

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**A. Confidentiality and Disclosure Issues**

Confidentiality and disclosure are governed by the Rules of Professional Conduct (“the Rules”), the needs of the client, and, in some cases, by various statutes.

The Rules address confidentiality in Rule 1.6. A lawyer “shall not reveal” information protected by the attorney-client privilege “or other information ... that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client” unless the client consents after consultation. Such other information may include business proprietary information, personal medical issues, financial information, or even historical information about a client. Of course, there is an exception for information used in defense of an action brought by the client against the attorney. There is also an exception wherein the lawyer “may (not shall) reveal” information that the client has perpetrated a fraud on a third party during the course of and regarding the subject matter of the representation. A lawyer “shall” reveal information in three cases: (1) when the client is about to commit a crime, after urging the client not to commit the crime and advising the client that the information will be revealed; (2) information that the client has committed a fraud on the court during the course of the representation, after advising the client to correct the conduct; and (3) information concerning the misconduct of another attorney, provided there is client consent if the information is protected.

Disclosure of business and personal information may impact the second part of the rule (information that would be detrimental or embarrassing to the client). Of course, such information may have to be disclosed in discovery during litigation, but the attorney should then ask the court for a protective order that limits the disclosure to that necessary for the case, and sets limits on the use of disclosed information.

Non-attorneys also face disclosure issues. Personal information, and especially medical information, is protected by many different laws. Companies that maintain employee medical records must keep them in a separate file, with limited access, under the requirements of the Family and Medical Leave Act, the Americans with Disabilities Act, and state workers compensation laws. Companies should also use care regarding

employee evaluations. A recent case by the Virginia Supreme Court permits a defamation claim to go forward based on allegations of the imminent release of a false statement in an employee evaluation, such as the employee's failure to meet business objectives. See Raytheon Technical Services Co. b. Hyland, 641 S.E.2d 84 (2007).

**A. Adhering to the Code of Professional Conduct**

The Rules of Professional Conduct, or “ethics rules” as they are sometimes called, are an attempt to codify good practices to protect the integrity of the profession. The key concept here is that the law is a profession, not just a job with rules. As attorneys, we are licensed by the state, and we are given great powers by that license. We can bring legal actions, compel the production of documents, compel people to appear and give testimony, and provide the basis for many business, financial, real estate, family, and contract matters, as well as bring and defend actions for personal wrongs (torts) and public wrongs (crimes). As such, it is reasonable for our professional to be regulated. We can regulate ourselves, or we can have the government regulate us. Most of us would prefer the former. Therefore, the “ethics rules” should not be seen as arbitrary proscriptions on improper conduct, but as a guideline for proper conduct.

Of course, the term “ethics rules” is really a misnomer. “Ethics” has to do with morality. The Rules of Professional Conduct may have some basis in moral concepts, but they are not an attempt to introduce any particular moral code. Instead, they are rules designed to instill confidence and integrity to the profession.

Professional zeal, communication, and honesty are probably the three primary foundations on which the rules of professional conduct are built. In each area, however, competing interests must be balanced.

Zeal must be balanced with effectiveness. Rule 1.3<sup>1</sup> provides that a lawyer “shall act with reasonable diligence and promptness.” The comment to the rule balances “commitment and dedication” and “zeal in advocacy” with “professional discretion” and a recognition that “a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client’s needs and interests.” In other words, a fight

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<sup>1</sup> All rule citations in this section are to the Virginia Bar’s Rules of Professional Conduct.

to the death is not always in the client's best interest, so it is not always the proper strategy for the attorney.

Communication requirements depend on with whom you are communicating. Rule 1.4 requires that a lawyer keep a client informed of events in his case. That makes sense. It also requires that the lawyer explain things to a client in a way the client can understand. That may be easy if you represent a well-educated business executive. But the requirement carries over to the less educated, clients who may be very emotional, and even clients with mental illnesses.

Some specific communications are required as well. A lawyer must advise the client if he receives a settlement proposal. He *must* also advise the client of the availability of alternative dispute resolution processes. This latter requirement is often overlooked or even intentionally disregarded. But, just as with the observation that, sometimes, a collaborative approach serves a client's best interests, sometimes alternative dispute resolution procedures are better for the client, even if not preferred by the attorney.

There are restrictions on communications with those other than the client. An attorney may not communicate with an opposing party or other party represented by counsel. See Rule 4.2. That rule is pretty straightforward when the opposing party is an individual. But, when the party is an organization, the matter is more complex. The comment to the rule states that a lawyer cannot communicate with a member of a represented organization's "control group," as defined in Upjohn v. United States, 449 U.S. 383 (1981), or any other person who may "bind" the corporation. The prohibition does *not* extend to former employees. That is, it is permissible to speak with former employees of the opposing party, even if they were members of the organization's control group. But, be careful. Some federal cases suggest a different rule, and it is not always clear in the beginning of a case if the case may end up in federal court. This subject itself could be the subject of an entire C.L.E.

Honesty is the third foundation and, like the others, sometimes requires some balancing. Despite the obligation to represent a client with "zeal," it is improper to make

a false statement to a court (Rule 3.3) *or to an opposing party or third party* (Rule 4.1). In other words, a lawyer cannot misstate the facts to the opposing party during the course of settlement negotiations, in discovery responses, or in the course of a business transaction. Now, that requirement does not extend to requiring the divulgence of all facts. You need not disclose to the other side facts that hurt your client (except for discovery responses). You are only prohibited from making a false statement of those facts you do discuss. A thin line, perhaps. But this is part of the balance required by the profession. We owe two duties – one to the client and one to the profession.

**B. Maintaining Independence, Integrity and Objectivity**

Maintaining independence, integrity, and objectivity is what separates someone with a law degree from a lawyer – that is – a person who can advise, counsel, and represent an individual or a business which faces a difficult legal challenge. It is not difficult to take a case and simply fight it through – raise any argument, spurn all efforts at compromise, wait for “whatever the jury does” in place of conducting reasoned analysis. In short, it is the “professional” side of the profession.

First, a lawyer must be willing to walk away from a case if it is necessary. If the client is unethical, insists on a detrimental course of action, or simply does not have a case that should be pursued, a lawyer should be prepared not to engage representation or to cease representation already begun. Of course, after a lawsuit is filed it is sometimes too late to withdraw. But, each lawyer should develop his or her own set of principles and values, and not be afraid to walk away from cases and clients contrary to those values. That is what is meant by “independence.”

Objectivity is the ability to see a case from different perspectives. If a lawyer can only see the case from his or her client’s perspective, then he/she cannot properly represent the client. An attorney must be able to see a case from the opposite side. Why? Both to anticipate claims and arguments from the other side and to assess realistically the strengths and weaknesses of the case. An attorney must also be able to see a case from the point of view of a third party. Why? Because at trial a case will be decided by a judge and jury, neither of which, hopefully, has any preconceived bias on behalf of either

party. One must be able to see the case from that third person perspective in order to make effective arguments to those third parties.

Integrity, or the absence thereof, is what will determine an attorney's reputation. Some attorneys have it. When they tell you something, you can take it to the bank. Some do not – they cannot be trusted to do anything, including what they promise to do. Most attorneys fall somewhere in between. To the extent you develop a reputation for integrity, it will be easier to resolve matters, easier to litigate when necessary, and you will grow your practice with referrals from those who respect you. Absent integrity, you will only attract clients just like you – ones who are always looking to gain the upper hand by whatever means necessary – and who can be expected to deal with you with the same lack of integrity with which they deal with others.

### **C. Avoiding Conflicts of Interest**

Every lawyer needs to be concerned about conflicts of interest. In large law firms, there is often a formal, complex structure for review of matters to ensure that the firm does not create conflicts. In smaller offices, however, the system may be more informal, leading to a greater chance of running into conflicts unintentionally. Conflicts may be personal or office conflicts, and may be “hard” or “soft.”

Rule 1.7 is the general rule regarding conflicts. It provides as follows:

- (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.
- (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.

#### Rule 1.7.

Under this rule, it is obvious that a lawyer cannot represent one client in a lawsuit against another current client in litigation, even in unrelated matters. But, the rule doesn't necessarily bar such representation if the client being sued by the first client is not a client represented "before a tribunal." Such representation opens a can of worms, however. Representation in litigation and business transactions often involves knowledge of the client's financial circumstances, for example, and such information would often be useful to an opposing party in a different circumstance. Representation of adverse parties can also create tension between attorney and client. Consequently, such representation should be avoided.

On the other hand, once representation ends, a lawyer can represent a party adverse to the first client, as long as he does not use confidential information from the first client against him. See Rule 1.9. That rule provides that a lawyer may not represent another person in the same or substantially related matter as a prior client, without consent. But, a lawyer may represent a new client against a former client in a new matter, as long as the lawyer does not use confidential information gained in the initial representation against the former client.

Sometimes, however, it is not clear to a client when the lawyer's representation ends. A client may refer to an attorney, who represented him in a past matter, as "my lawyer." To avoid this potential problem, when a lawyer represents a client only on a particular matter, that fact should be set forth in the lawyer's retainer agreement. The lawyer should also send a letter to the client at the end of the representation, thanking the client for the opportunity to represent him and confirming that the representation is over.

Conflicts of one attorney extend to all attorneys in the firm. That is, all attorneys in the firm are considered together in determining conflicts, and one lawyer may not undertake representation if a different lawyer in the firm would be unable to undertake

representation due to a conflict. See Rule 1.8(k), Rule 1.10. Therefore, it is important to have an effective conflicts check mechanism in the firm. A good conflicts check system will capture not only corporate and individual clients, but also key individuals working for a corporate client and key witnesses in a case. For example, if an attorney has a conflict with XYZ company, that conflict may preclude representation of Mr. Smith, the sole owner and CEO of XYZ. Case management software programs that identify individuals in a data base provide a good mechanism for catching conflicts. A card catalog or other manual system can also be effective. But, like any system, it only works if the attorneys use it and input the necessary data. A conflicts check system which is not kept up to date may be worse than no system at all, because it can give a false sense of security that the firm is protected from conflicts.

Lawyers must also watch out for conflicts that arise out of their personal lives. A lawyer who is a member of a board of directors or trustee of an organization may have a conflict with a party adverse to that organization. A lawyer who does part-time work for an entity, such as paid mediation services for a court or work for a department of a governmental entity, may create a conflict for the entire governmental unit. Consequently, attorneys should enter into their conflicts check system personal contacts as well as professional ones. Each situation that arises must be addressed based on the particular circumstances involved.

Another area ripe for conflicts is the representation of multiple clients in the same, similar, or related litigation. For example, two or more people may have the same or similar claims against the same defendant arising out of the same or similar transactions – a single car accident with two or more victims, two employees of the same employer both subject to sexual harassment, two people harmed by illegal business practices, etc. Rule 1.8 permits such multiple representation. However, the lawyer cannot engage in aggregate settlement discussions without consent of all clients affected. Such representation creates potential conflicts if the clients have different claims or are competing for limited assets of the defendant. Potential conflicts can be waived, but the waiver should be in writing.

Many conflicts can be waived, and even if there is not an actual conflict between parties, an attorney should play it safe and get a waiver of any potential conflicts of interest. A sample waiver is attached as Exhibit A.

**D. Lawful Communication with the Co-Workers in Class Action Suits**

Class actions can trigger ethical issues involving communications by parties in a case with third parties who are potential class action participants. For example, factory worker plaintiffs in a discrimination case may seek class action status which would permit other workers in that factory, or others owned by the defendant company, to join the case. Both plaintiffs and defendant may wish to communicate with those third party workers.

In Gulf Oil Company v. Bernard, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981), the trial court ordered the parties in a discrimination case not to communicate with other employees of the defendant factory. The court followed a form order from the Federal Manual for Complex Litigation. The case went all the way to the U.S. Supreme Court. The Supreme Court recognized that “[c]lass actions serve an important function in our system of civil justice ... [but also] present ... opportunities for abuse as well as problems for courts and counsel in the management of cases.” Id., 452 U.S. at 99-100, 1010 S.Ct. at 2199-2200. The Court recognized the First Amendment implications of restricting the ability of attorneys and parties to communicate with non-parties. In balancing the two competing interests, the Court ruled that any restrictions on such communications “should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.” Id., 452 U.S. at 101, 101 S.Ct. at 2200. Further, any restriction must be “carefully drawn” and limit speech “as little as possible.” Id. 452 U.S. at 102, 101 S.Ct. at 2201.

Companies and their counsel should be careful in their communications with corporation employees who are potential class members. Such communications can be restricted if those communications are misleading, coercive, or improperly attempt to

persuade potential members not to join the class. See Burrell v. Crown Central Petroleum, Inc., 176 F.R.D. 239 (E.D. Tex 1997).

**E. If a Harassment Claim is Filed Against Employer and Manager – Can you represent both?**

The issue of representing both an employer and an employee, usually a management employee, is as tricky as it is common. Whether it can be done at all depends on the circumstances, but even if such joint representation can be done, certain protections must be in place.

You cannot represent both employer and employee defendant if there is a direct conflict. Such a conflict exists if the employer took, or would take, any disciplinary action against the employee regarding the subject matter of the representation. So, if the employer fired, suspended, or demoted the employee because of the incident at issue in the new litigation, one attorney cannot represent both. This is because the attorney would have information about the incident from both defendant parties, and may have conflicting obligations to each defendant to pass on the information from the other. Obviously, that situation would not work.

You may represent both the employer and employee defendant if there is a potential conflict, but safeguards need to be in place to protect both. For example, if the employer did not take disciplinary action against the employee and would not based on the available information, no direct conflict exists. Before the company attorney represents the employee, he should first tell the employee that he cannot represent him if there is a conflict, so if the employee knows of something related to the incident that could put him in conflict with the employer, he should indicate that he wants separate counsel. Of course, even that indication could harm the employee. The attorney must also tell the employee that anything the employee tells him might need to be passed on to the employer, so he needs to be careful what he says, and if that carefulness would affect the representation adversely, then joint representation is a bad idea.

There is no problem representing both employer and employee if the defense is that the employee did nothing wrong. In that case, not only is there not a conflict but

both parties benefit from the joint representation – the employee gets a free lawyer and the employer gets to have its attorney control the defense for both. It may be best if the employer agrees to indemnify the employee defendant for any damages that may be awarded against him. Then there would not be the potential for conflicts to develop in litigation strategy, such as between an individual who wants to settle to avoid a potential judgment and a company that can pay a judgment and wants to fight out the matter.

## ATTACHMENTS

### Exhibit A

#### WAIVER OF CONFLICT OF INTEREST

**1. REPRESENTATION:**

I, [Client] , have retained as my attorneys the firm of [Firm] (the "Firm"), with respect to certain claims I have against [Defendant]. The terms of that representation are set forth in, and governed by, a separate retainer and fee agreement.

**2. REPRESENTATION OF ADDITIONAL PERSONS:**

I understand that the Firm separately represents [Client 2] with respect to claims she may have against [Defendant].

**3. EACH CLIENT OWED DUTY OF LOYALTY:**

I understand and agree that [Client 2] and I are each separately represented by the Firm; that our claims will be litigated separately, and that each of us are owed a full and complete duty of loyalty by the Firm.

**4. DISCLOSURE OF POSSIBLE CONFLICTS OF INTEREST.**

I understand that the bar disciplinary rules applicable to the Firm govern the Firm's ability to represent multiple clients who may develop a conflict of interest.

In particular, Rule 1.7 of the Virginia Rules of Professional Conduct provides that an attorney shall not continue multiple employment if the exercise of the attorney's professional judgment in behalf of a client will be or is likely to be adversely affected by the attorney's representation of another client, unless a waiver is obtained from each affected client.

I understand that the Firm does not believe that any position taken by me in pursuit of my claims against [Defendant] is likely to be adverse to any position taken by [Client 2] in pursuing her claims against [Defendant]. I also understand that the Firm does not currently anticipate that its professional judgment in my case will be influenced adversely by the Firm's representation of [Client 2].

However, I also understand that unanticipated conflicts may arise in the course of the Firm's representation of me and of [Client 2]. For example, if [Defendant] proves to have insufficient financial resources to pay both my claim and the claim asserted by [Client 2] , it is possible that my interests may conflict with the interests of [Client 2].

It is also possible that other unforeseen conflicts may arise during the course of representation.

**5. WAIVER OF CONFLICT OF INTEREST:**

The possibility of conflicts of interest arising has been discussed with me by attorneys of the Firm, to my satisfaction.

I hereby waive such conflicts of interest as may be waivable, pursuant to Rule 1.7 of the Virginia Rules of Professional Conduct.

Should I at any time withdraw from representation by the Firm, or the Firm withdraw from representation in my case, I agree that the Firm shall remain able to represent [Client 2] with respect to her claims against [Defendant], and that I waive any waivable conflict of interest in the Firm's continuing representation of [Client 2].

**6. JOINT OFFERS OF SETTLEMENT:**

I understand that defendants occasionally make joint offers of settlement to claimants represented by the same attorneys. The Firm has informed me that it is against the Firm's policy to solicit joint settlement offers.

The Firm has also informed me that, pursuant to Rule 1.8 of the Virginia Rules of Professional Conduct, a lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of the lawyer's clients unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement and of the participation of each person in the settlement.

FOR [Firm]

[Attorney]

\_\_\_\_\_  
Date

APPROVED AND ACCEPTED:

Client

\_\_\_\_\_  
Date