

Solutions To The Most Common Ethical Challenges

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INTRODUCTION

There are a number of “solutions” to numerous ethical issues which may arise in an attorney’s practice. Ironically, in many instances, merely identifying that certain conduct gives rise to ethical issues is itself a “solution.” Until an attorney views certain conduct as involving the Rules of Professional Conduct, either generally, or regarding some particular limitation, the issue of a “solution” is premature. This would be the corollary rule to the common phrase “If it’s not broken, don’t fix it.” For attorneys, the corollary rule would be “If you don’t know it’s broken, you don’t know to fix it.”

The purpose of the following material is to identify and discuss generally some of the more common ethical challenges which may arise in an attorney’s practice. The Rules of Professional Conduct represent an integrated body of law, and it is important to not take a given Rule out of context so as to give it an interpretation or construction which is inconsistent with the rest of the Rules.

A. Identifying Conflicts of Interest

Applicable Rules of Professional Conduct:

- RPC 1.7 General Rule Regarding Conflict of Interest.

- RPC 1.8 Business dealings with Clients.
- RPC 1.9 Conflict of Interest Regarding Former Client.
- RPC 1.10 Imputed Disqualification.

Discussion

The Rules regarding conflicts of interest, in particular, RPC 1.7 and RPC 1.9, uses some loose language, such as the phrases “reasonably believes,” “materially limited,” and “adversely affected.” The Rules are designed to cover multiple situations, and to not provide overly limited definitions of broad rules of ethics. However, that general language should not be used as a “shield” by an attorney who is charged with a conflict of interest. Technical interpretations and constructions of the conflict of interest Rules and engaging in “hairsplitting,” have a real potential of creating problems. For example, if you find yourself using the phrase, “Technically, I don’t believe I have a conflict,” chances are there is at least a potential conflict which in some form should be addressed.

Reduced to its basics, if a conflict of interest arises, it is alleged either by the attorney or by another person.

An attorney has an affirmative obligation at the beginning of the representation of a new client to determine if there are existing conflicts of interest with a current client, or, for that matter, the attorney’s own interests.

The conflict of interest issue may also arise after representation has begun when another person, typically an adverse party in litigation, contends that the attorney has a conflict of interest because of some prior dealings between the attorney and the former client, now adverse party. This latter conflict issues may result in disqualification Motions being filed. Such

disqualification Motions have the potential of being viewed as manipulation on the part of the former client and the former client's current counsel, and viewed as an attempt to deprive the current client of his chosen counsel. Moreover, threats that an attorney has committed an ethics violation made by opposing counsel may run afoul of RPC 3.4(f). That Rule prohibits an attorney from pursuing, or threatening to pursue, a disciplinary charge against an attorney "solely to obtain an advantage in any civil or criminal matter."

RPC 1.7 provides that even if there is a conflict, each client may waive the conflict after consultation. The Rule does not state with whom the clients should consult. However, consulting with the attorney who has the alleged conflict is probably itself a conflict. Any client consent should be after the client has either consulted with another attorney, or has been given the opportunity to engage in such consultation.

Most applications of RPC 1.7 concern conflicts between existing clients. However, RPC 1.7 also provides that it would be a conflict of interest for an attorney to represent a client if that representation would be materially limited by the lawyer's responsibilities to a third person or the lawyer's own interests.

The issue of the lawyer's own interests may arise in the issue of business transactions with a client. Business transactions with a client are otherwise covered in RPC 1.8, which generally sets forth a multi part test which the attorney must meet in order to enter into a business transaction with the client.

A conflict of interest may also arise between a current client and former client of an attorney, as addressed in RPC 1.9.

B. The Lawyer/Client Relationship

Applicable Rules of Professional Conduct:

- RPC 1.1 Competence
- RPC 1.2 Scope of Representation.
- RPC 1.4 Communication.

The issues of client selection and retention is a key factor in legal malpractice liability avoidance. Those same issues also drive the ethical duties and obligations of an attorney.

Certain core Rules of Professional Conduct address the general attorney/client relationship. These same Rules, with all too much frequency, are also alleged to have been violated in attorney disciplinary proceedings.

The issue of competence in RPC 1.1 is another way of saying that the right attorney needs to be selected for the right job/client. For example, if the client needs a tax attorney, and you are not a tax attorney, then although you are legally authorized to represent the person since you are an attorney at law, RPC 1.1 would provide that such representation should not occur since the attorney would not have the required “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,” as required under RPC 1.1.

Even if you are competent to represent a client regarding a given matter, it would not be unusual for a client to have more than one legal issue arising from a single transaction. For example, a case involving a civil tort claim may also include issues of federal employment law, worker’s compensation, etc. RPC 1.2 provides that an attorney, in consultation with the client, may limit the task for which the attorney is retained.

As with any relationship, (personal, professional or otherwise), communication in

an attorney/client relationship is key. Obviously, the presence of communication generally indicates a good relationship, and the absence of communication indicates either a bad relationship and/or problems with either the attorney or the client.

RPC 1.4 addresses the issue of attorney/client communications. A breakdown in communications between the attorney and the client is frequently an indication that there is some problem with either the attorney's activity in the case, or some problem with the client. In any event, a breakdown in communication is one of the first indications that there may be larger problems out there which need to be addressed, e.g., the client has unrealistic or unreasonable expectations regarding the outcome of the case, the attorney does not have adequate time to do the tasks required for the representation, etc.

The communication obligation is not equal between the lawyer and the client. Under RPC 1.4, the lawyer had an obligation to respond to reasonable requests for information from the client. Moreover, even if the client does not request information, the lawyer has a separate affirmative obligation to keep the client reasonably informed about the status of a matter, even if the client does not ask.

It should be noted that RPC 1.4 states that a lawyer "should" keep a client reasonably informed. The Rule does not say that the lawyer "shall" keep the client reasonably informed. The use of "should" would appear to make the Rule more aspirational rather than compulsory.

C. Ethical Challenges Between the Supervising Attorney and Associates

Applicable Rules of Professional Conduct:

- * RPC 5.1 Partner or Supervising Lawyer.

- * RPC 5.2 Subordinate Lawyer.
- * RPC 5.3 Nonlawyer Assistants.

Violations of RPC 5.1 et seq., do not typically arise in attorney disciplinary proceedings. No doubt, a major reason why RPC 5.1 and RPC 5.2 do not typically arise in a disciplinary proceeding is that most disciplinary cases concern attorneys who are either sole practitioners or who share office space with other attorneys. Attorneys who merely share office space would not fall within the ethical requirements of RPC 5.1 et seq. Examples of where disciplinary inquiry may arise is where the attorney has not maintained proper oversight over secretaries, paralegals, or other non-lawyer assistants, and some client prejudice or serious issue has arisen.

Partners or Supervising Attorneys

RPC 5.1 places an ethical obligation on a partner in a law firm to make “reasonable efforts” to ensure that the law firm has in place adequate provisions so that all lawyers in the law firm will conform to the Rules of Professional Conduct. Similarly, an attorney who has “direct supervisory authority” over another lawyer must also make “reasonable efforts” to be sure that the lawyer lives by the Rules of Professional Conduct.

Paragraph (c) of RPC 5.1 provides that a partner or supervising lawyer violates RPC 5.1 if the lawyer either:

- (1) Orders, or with knowledge of the specific conduct, ratifies the conduct involved; or
- (2) Lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Subordinate Attorneys

RPC 5.2, concerning the ethical obligations of a subordinate lawyer states the obvious but also contains a safe harbor provision. In particular, RPC 5.2(a) states that a subordinate lawyer is still bound by the Rules of Professional Conduct notwithstanding that the subordinate lawyer acted “at the direction of another person.”

However, this broad ethical obligation on a subordinate attorney is mitigated by the safe harbor provision of RPC 5.2(b). That section contains a “Nuremberg” style defense which provides that a subordinate lawyer who acts in accordance with a supervisory lawyer’s “reasonable resolution of an arguable question of professional duty,” has not violated the Rules of Professional Conduct.

As a practical matter, the ethical challenges between a supervising attorney and the supervised attorney in a medium-to-large firm setting are reduced by the formal or informal mentoring system inherent in a law firm operation. Ethical challenges are further limited by the use of ethics partners in law firms who address and review ethics issues which may arise within the law firm.

Within the attorney disciplinary context, the ethical problems under RPC 5.1 et seq. arise primarily in the use of non-lawyer personnel under RPC 5.3. Although an attorney may delegate certain tasks to non-lawyer personnel, the attorney may not delegate the ethics liability and malpractice liability if the non-lawyer personnel does not properly perform the task. Classic examples of these problems are handling client funds and, in particular, failing to draw the very important distinction between escrow accounts and the attorney’s personal and/or operating accounts.

D. When Confidentiality Conflicts with Personal Responsibilities

Applicable Rules of Professional Conduct:

- RPC 1.6 Confidentiality
- RPC 3.3 Candor to a Court
- RPC 3.4 Duties to Opposing Parties and Counsel
- RPC 1.7 Conflict of Interest between Client and Client's Personal Interests

RPC 1.6 sets out the general rule that an attorney shall not reveal information relating to the representation of the client. There are several exceptions to this confidentiality, the most obvious of which is client waiver.

RPC 1.6(b) contains the limited exceptions to the confidentiality of client communications. Unless the attorney considers his or her own health and safety a “personal responsibility,” the express exception regarding client threats of “immediate death or substantial bodily harm” is somewhat outside the concept of “personal responsibility.” However, it should be noted, that client confidentiality will fail in the face of a client who is threatening to commit a criminal act which the lawyer believes may result in “imminent death or substantial bodily harm.”

Although not involving issues of physical safety, the issue of the personal responsibility of the lawyer is more directly implicated in RPC 1.6(b)(2). In particular, this section of the Rules provides that an attorney may reveal client confidences in the following instances:

- (1) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

- (2) To establish a defense to a criminal charge or a civil claim against the lawyer based on conduct in which the client was involved;
- (3) To respond to allegations in any proceeding concerning the lawyer's representation of the client.

What is particularly interesting about the breaching of confidentiality under RPC 1.6(b)(2), is that the breach may properly occur without any client consent or client involvement. For example, if an adverse party or another third person files a Bar Complaint against the attorney, the confidentiality of RPC 1.6 would not preclude the attorney from asserting a defense. However, any breach of confidentiality should be narrowly drawn. Only that confidential information which is necessary to assert a defense should be revealed. Of course, if a Bar Complaint was filed against an attorney by the opposing party during litigation, the mere pendency of that litigation and the confidentiality concern may be grounds for the attorney to seek a stay of the disciplinary matter pursuant to SCR 3.285 while that civil proceeding was pending. Moreover, if the adverse party's attorney participates in the Bar Complaint against the other attorney, the adverse party's attorney may have violated RPC 3.4(f).

Although not necessarily within the context of confidential communications, a conflict regarding the personal responsibilities of the lawyer could arise in the event the attorney because physically or mentally impaired. In particular, RPC 1.6(a)(2) provides that a lawyer may withdraw from representation if the lawyer's "physical or mental condition materially impairs the lawyer's ability to represent the client." Of course, the obvious problem in an attorney relying on this portion of RPC 1.6 is that the attorney might also be subjecting himself or herself to Temporary Suspension proceedings under SCR 3.165.

Under RPC 1.16, an attorney is authorized to withdraw from representing a client if the client is making an improper use of the attorney's services by seeking a course of action which the attorney reasonably believes is criminal or fraudulent, or if the client is pursuing an objective which the lawyer considers to be "repugnant or imprudent."

However, although an attorney may have grounds to withdraw from representing the client, that does not mean that client confidences may be breached. As a result, a withdrawal from representation should be "noiseless," so that the attorney provides as little particular information as can be legitimately provided to support the requested termination of representation.

Sometimes an attorney, after deciding that the representation must be terminated because of some improper conduct of the client, in the heat of the moment, contemplates using the opportunity of the Motion to Withdraw as a chance to take some negative shot back against the client. Such impulses should be rejected as improvident.

A. Handling Client Misconduct

Applicable Rules of Professional Misconduct:

- RPC 1.6 Confidentiality
- RPC 3.3 Candor to a Court
- RPC 1.16 Terminating Representation

The typical example of client misconduct is client perjury. If an attorney is confronted with a client who wants to offer testimony which the attorney knows to be false, the attorney should first attempt to dissuade the client from offering the false testimony. If the client still insists that the false testimony is to be offered, the attorney may not expressly reveal to the

Court or opposing counsel that such testimony will be offered. However, the attorney may not participate in offering the false testimony to the Court. As a practical matter, if an attorney puts a client on the stand, does not ask the client any substantive questions, and merely lets the client offer his or her narrative testimony, the Judge and the opposing counsel will know that the client is offering false testimony.

As provided for in RPC 1.16, if the client pursues an improper goal or is taking a course of conduct which the attorney considers to be improper, the attorney may withdraw from representing the client, if such withdrawal may be accomplished without prejudicing the client.

F. Attorney's Fees

Applicable Rules of Professional Conduct:

- A. RPC 1.5 Attorney's Fees
- B. RPC 1.16 Termination of Representation
- C. RPC 1.8(e) Advancement of Litigation Expenses
- D. RPC 1.8(f) Payment of Attorney's Fees from Person other than Client

Reasonableness

RPC 1.5 addresses the issue of attorney's fees, and separately discusses a number of different issues concerning attorney's fees.

RPC 1.5(a) sets forth the eight factors which should be used in determining the reasonableness of an attorney's fee. These are factors which have long existed in common law regarding the reasonableness of an attorney's fee. It should be noted that the list in RPC 1.5(a) is non-exclusive, and that a Court or a disciplinary authority may properly consider other factors in

determining whether a particular fee in a particular case is reasonable.

Contingent Fees

Contingent fees are well established in the law subject to several important considerations. First, there are cases where contingent fees are ethically prohibited from being used. RPC 1.5(d) states that contingent fees may not be used in the following situations:

- (1) Domestic relations cases in which the fee is contingent upon the securing of a divorce, support award, or property settlement.

- (2) Representation of a defendant in a criminal case.

Regarding the inability to use a contingent fee in a domestic relations matter, RPC 1.5 does provide an exception. A contingent fee may be used in recovering a liquidated support arrearage. Technically, this would extend to the recovery of a temporary support arrearage which accumulated during the original divorce proceeding. However, as a practical matter, using a contingent fee during an original divorce proceeding is dangerous. For those situations where a contingent fee may properly be used, RPC 1.5(c) sets out a list of the steps which the attorney must satisfy in order to have a proper contingent fee arrangement. These steps are:

- (1) Fee must be reasonable under RPC 1.5(a).
- (2) Contract must be in writing.
- (3) Contract must state method by which fee is determined including percentage in the event of settlement, trial, or appeal.

- (4) Contract must set forth expenses, if any, to be deducted from the recovery.
- (5) Whether such expenses are to be deducted before or after the contingent fee is calculated.
- (6) In the event of a recovery, providing the client with a written statement showing the outcome of the matter, the amount paid to the client, and the method of its determination.

Fee Splitting

RPC 1.5 also addresses the issue of a fee split between attorneys who are not members of the same firm. Before Kentucky's adoption of the current Rules of Professional Conduct, a proper fee split could occur only in proportion to the services performed by each lawyer. However, under the Rule of Professional Conduct in effect since 1990, a fee split may also be based on the joint assumption of responsibility for the case by each lawyer, without regard to the service performed or not performed by any one attorney. However, RPC 1.5 requires that such an arrangement must be with client consent, and the total fee must be reasonable.

By its plain terms, RPC 1.5(e) would not apply to a division of an attorney's fee between attorneys within the same firm. Therefore, if a client is sent a bill for the services performed by one attorney in a firm, that fee may be split among firm members in whatever percentages the firm determines. Under such circumstances, client consent or client knowledge of the fee division among the attorneys with the firm is not relevant.

Litigation Costs and Expenses

An issue related to attorney's fees is litigation expenses. As noted above, the issue of expenses in a contingent fee case is addressed in RPC 1.5(c) regarding what terms must

be set out in a contingent fee contract. However, the issue of financial assistance to a client during pending or contemplated litigation is addressed in more detail in RPC 1.8(e). A significant change from the old Code is that an attorney may advance court costs and expenses in litigation without requiring that the client repay the expenses.

An attorney may advance court costs and litigation expenses, which would include such things as expert witness fees, deposition costs, etc. However that privilege does not extend to living expenses, rental cars, food, etc. These latter prohibited expenses would be considered an improper loan to a client.

Third Party Payment

An attorney's fee need not be paid by the client. RPC 1.8(f) expressly authorizes an attorney to be paid by someone other than the client so long as there is client consent and no interference with the independence of the attorney.

Moreover, merely because a particular person pays the attorney does not mean that the attorney may breach client confidences with the payor. In short, being paid by a family member or friend of the client does not, ipso facto, also make the family member or friend a client of the attorney or entitled to the same information the client may receive.

G. Ethics in Negotiation

Applicable Rules of Professional Conduct:

- A. RPC 4.1 Truthfulness in Statements to Others
- B. RPC 1.6 Confidentiality
- C. RPC 3.3 Candor to a Court
- D. RPC 3.4 Fairness to Opposing Part and Counsel

Comment 2 to RPC 4.1 expressly addresses the issue of negotiations when it states:

“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category,…”

As notes in Comment 7 to RPC 1.6, under RPC 1.6, a lawyer does not breach client confidentiality by making a disclosure in negotiation that “facilitates a satisfactory conclusion.” However, the lawyer’s discretion in this area is somewhat limited. The lawyer may not, even if requested by the Judge, tell the Court the settlement authority which the client has given the attorney. An appropriate example of where client confidentiality would not bar disclosure would be to advise the opposing party that the client has executed the settlement agreement and release documents.

H. Controlling Client Expectations

Applicable Rules of Professional Conduct:

- A. RPC 1.2(e) Scope of Representation
- B. RPC 1.4 Communication

RPC 1.2(e), regarding scope of representation, expressly provides that a lawyer shall inform a client regarding the limitations on what the lawyer may do for the client if the lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct “or other law.”

Obviously, one of the best ways of controlling a client’s expectations is to

maintain a proper level of communication with the client. Although RPC 1.4 speaks in less than mandatory terms by using the word “should,” one of the best ways of controlling a client’s expectations is to keep the client informed of the status of the matter and to explain matters to the client so that the client may make informed decisions about what action should be taken.

Unfortunately, client’s expectations may become unreasonable, not only by what they are told by the attorney, but also what they are not told by the attorney. For example, in a civil tort action, it is important that the client not only know who may be properly sued, but also who may not be sued.