

LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET V
INTRODUCTION TO CONFLICTS OF INTEREST

Worksheet V is intended to facilitate a discussion about how to screen for, recognize and avoid conflicts of interest.

* * *

- Review the conflict of interest rules. See Prof. Cond. Rules 1.7 – 1.10 and 1.18.
- If the new lawyer is a government employee (or has been in the past), discuss Prof Cond. Rule 1.11.
- If the new lawyer served (or is serving) as a law clerk to a judge or other adjudicative officer, see Prof. Cond. Rule 1.12.
- Discuss the importance of adequately screening for conflicts of interest. If in an in-house mentoring relationship, share with the new lawyer the firm's procedure for screening for conflicts. If in an outside mentoring relationship, describe the mentor's office procedure for screening for conflicts.
- Explain the importance of including prospective clients and declined clients in a conflicts database. Are these clients treated like former clients in terms of conflicts? What does this mean if another client comes along with interests adverse to the prospective client that never hired the lawyer?
- Discuss different types of conflicts of interest that can arise - particularly in the new lawyer's practice area(s) or office setting.
- Give examples of conflicts which can be waived with informed consent. Explain how to document your clients' consent to conflicts.
- Discuss the substantial relationship test which, when met, prohibits a lawyer from representing a client against a former client. Discuss whether informed consent by the former client can cure the conflict.
- Discuss screening walls, when they apply and practically speaking, how a law office manages them.
- Discuss how conflicts are handled when a lawyer changes firms. Should a lawyer be concerned about the same issues when hiring non-lawyer personnel who come from another firm?
- Discuss the propriety of working on a case where opposing counsel is a spouse, close relative, or any person with whom the lawyer shares a close personal relationship. Does client consent cure the potential problem?

- If the new lawyer works in a small firm or has a solo practice, discuss the conflict of interest rules articulated in the attached materials excerpted from the Louisiana State Bar Association's *Practice Aid Guide: The Essentials of Law Office Management* and compare it to Indiana's disciplinary rules. Louisiana State Bar Association, *Practice Aid Guide: The Essentials of Law Office Management*, 2007
<http://www.lsba.org/2007Publications/index.asp>. Also review the Louisiana State Bar Association's sample conflict of interest forms and letters and discuss whether they are good samples to use in Indiana. Share with the new lawyer ideas for other conflict forms and letters. Louisiana State Bar Association, *Practice Aid Guide: The Essentials of Law Office Management*, 2007
<http://www.lsba.org/2007Publications/index.asp>

- If the new lawyer works in a small firm or has a solo practice, discuss the attached article that gives tips on effectively managing conflict checking. Todd C. Scott, *Conflict-Checking Systems: Three Great (and Cheap) Ways to effectively Manage Conflict Checking*, GP/SOLO LAW TRENDS & NEWS Vol. 2, No. 2.
<http://www.abanet.org/genpractice/newsletter/lawtrends/0602/ethics/conflictchecking.html>

- Read and discuss these attached articles: Harry H. Schneider Jr., *An Invitation to Malpractice: Ignoring Conflict-of-Interest Rules Can Open Pandora's Box*, ABA Standing Committee on Lawyers' Professional Liability On-Line Resources, <http://www.abanet.org/legalservices/lpl/downloads/invitation1.pdf>. Harry H. Schneider Jr., *An Invitation to Malpractice (Part II): Once a Conflict of Interest Is Spotted, Take Action Promptly*, ABA Standing Committee on Lawyers' Professional Liability On-Line Resources, <http://www.abanet.org/legalservices/lpl/downloads/invitation2.pdf>.

- Read and discuss the article by Don Lundberg *A Firm by any other name is just as Conflicted: Quasi-law Firms and Imputed Conflicts of Interest* RES GESTAE, September 2009

RESOURCES

INDIANA RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

Rule 1.7. Conflict of Interest: Current Clients

- II. (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:
 - III. (1) the representation of one client will be directly adverse to another client; or
 - IV. (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.
- V. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - VI. (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - VII. (2) the representation is not prohibited by law;
 - VIII. (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
- IX. (4) each affected client gives informed consent, confirmed in writing.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572244

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

- (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.
- (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.
- (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.
- (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.
- (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, 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.
- (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 1.6.
- (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 of the participation of each person in the settlement.
- (h) A lawyer shall not:
 - (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
 - (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.
- (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.
- (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.

- (k) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) and (l) that applies to any one of them shall apply to all of them.
- (l) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572255

RULE 1.9: DUTIES TO FORMER CLIENTS

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (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.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572246

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

- (a) 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 1.7, 1.9, or 2.2 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.

- (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.
- (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 did not have primary responsibility for the matter that causes the disqualification under Rule 1.9;
 - (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this rule.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572247

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

- (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 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 paragraph (a), no lawyer in the 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.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a

public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to Rules 1.7 and 1.9; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (e) As used in this Rule, the term “matter” includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572248

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR, OR OTHER THIRD-PARTY NEUTRAL

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding give informed consent, confirmed in writing.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to any such person may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the law clerk's employer.
- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the 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 parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572249

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

- (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.
- (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.
- (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 information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

View comments at:

http://www.in.gov/judiciary/rules/prof_conduct/#_Toc244572255