Understanding California’s New Conflict of Interest Rules

Reference Materials
January 2021
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January 2021

About Mary Grace

• Mary Grace Guzmán of Guzmán Legal Solutions advises lawyers, law firms, and law students on their professional responsibilities and risk management needs. Ms. Guzman graduated from University of California, Berkeley in 1996, receiving a Bachelor of Arts degree in anthropology and a minor in Chicano/a Studies. In 2008, she received her J.D. from Santa Clara Law with a Public Interest certificate with an emphasis in Critical Race Theory. She also teaches legal ethics and professional responsibility at Thomas Jefferson School of Law. Ms. Guzmán regularly provides MCLE programs throughout California and has been a monthly blog contributor for the Continuing Education of the Bar (CEB), writing about legal ethics and risk management.
Learning Objectives

• Understand foundational attorney ethical duties
• Learn how to identify types of conflicts of interest
• Understand available solutions when a conflict of interest arises

Agenda

• Introduction
• Foundational concepts
• Conflicts with current clients
• Conflicts with past clients
• Conflicts with prospective clients
• Preventing conflicts and solving a conflict once it arises
• Types of conflicts of interest
Current Developments

• *Understanding Conflicts of Interest Part 1*
• *Understanding Conflicts of Interest Part 2*
• *Understanding Conflicts of Interest Part 3*
• *Understanding Conflicts of Interest Part 4*

Foundational Concepts

• Conflicts of Interests involve the following ethical duties
  – Duty of loyalty
  – Duty of confidentiality
  – Duty of competency
  – Duty of communication to client
  – Duty to exercise independent judgement
Where do these duties come from?

- Business Professions Code Section 6068(e) an attorney must “maintain inviolate the confidences and at every peril to himself or herself to preserve the secrets of his or her client.”
  - Duty of loyalty and duty of confidentiality
- Rule 1.1-Duty of competency
- Rule 1.2 and 1.2.1 Creates a duty that the attorney must consider their client’s goals and objectives
- Rule 1.6 Confidential information of a Client
- Rule 2.1—A lawyer **shall** exercise independent professional judgement and render candid advice. Duty of independence

Conflicts of Interest –Overview

- The disciplinary rules have always prohibited conflicts of interest. Case law holdings have disqualified attorneys from litigation if the present client’s matter is “substantially related” to a past client’s representation or found that an attorney committed malpractice in representing a client whose interests are substantially related to a current or past client’s interest. The new rules import substantial relationship into the disciplinary rules.
Conflicts of Interest – Rules

- **Rule 1.7** – Conflict of Interest between current clients
- **Rule 1.10** – Imputation of Conflicts of Interest, General Rule. If an attorney has a conflict of interest it is imputed to all of the attorneys in the law firm, but an ethical screen may be implemented.
- **Rule 1.9** – Duties to former clients.
- **Rule 1.18** – Duties to prospective clients – The duty of confidentiality extends to prospective clients.
Conflicts with Current Clients

• **Rule 1.7 (a)**- when an attorney represents two clients with **adverse interests** in the same or a separate matter, the attorney shall obtain informed written consent from each client “in compliance with paragraph (d).”

• **Rule 1.7(b)**- prohibits representation without **written consent**, “if there is significant risk the lawyer’s representation will be materially limited by the lawyer’s responsibilities to or relationships with another client, former client or a third person or by the lawyer’s own interests.”

Rule 1.7(d)

• (d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), 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**; and
  – (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**.
Conflicts with Former Clients

• Rule 1.9 applies to former clients. Former clients means former client of the attorney’s present firm and client of the attorney’s former employment.
  – Key concept: Attorney confidences and duties to former clients follow the attorney even after they have left the firm.

Rule 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 written consent.*
• (b) 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
• Written informed consent is required
Conflicts of Interest – Rule 1.10 flow chart

1.10 (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 or 1.9, unless.

1.7 or 1.9

- Refer to Rules 1.7 or 1.9 to determine if a lawyer is prohibited from practicing

Conflict of Interest – Rule 1.10 cont’d

1.10 (a) (2)

"The prohibition is based on Rule 1.9 and arises out of the prohibited lawyer’s association with a law firm..."

1.9

Refer these rules in deciding how to apply Rule 1.10 (a)(2)

1.9(a)

1.9(b)
Duties to Prospective Clients

- **Rule 1.18 Duties to Prospective Clients**—formally adds an attorney’s duties to prospective clients
- **Key Concept:** If a Prospective client speaks to an attorney directly or through an agent, does so seeking legal advice and with the expectation of confidentiality, then there is a duty triggered.

Rule 1.18

- 1.18 (b) (The duty) “a lawyer who has communicated with a prospective client shall not use or reveal information protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6 that the lawyer learned as a result of the consultation, except as rule 1.9 would permit with respect to information of a former client.”
- (c) prohibits representation of a client with material adverse interests
Rule 1.18(d) The Exceptions

• (d)(1) Client and PC give written informed consent
• (d)(2) lawyer took measures to avoid exposure to more information than reasonably necessary to determine whether to represent PC:
  – (i) Prohibited Lawyer is timely screened from any participation and
  – (ii) and written notice is given to PC

What to do after a conflict is discovered?

• Determine if you can continue to represent the client or if it is such that you must withdraw.
  – Mandatory withdraw would be instances of client fraud or client is goal is adverse to attorney’s ethical duties
  – Not sure seek outside ethics guidance
• Notify affected parties and seek conflict waivers
  – CEB has sample letters
• If necessary screen affected attorneys and in some cases affected legal staff
Screening an Attorney

- Most practice management software allows an administrator to screen users from a client’s file. Screens should apply to all modes of sharing and storing client confidential information, such as emails, cloud-based storage systems, or document review software.
- Paper documents should be kept in a locked file separate from the firm’s main client file cabinet.
- A memo to the firm advising all lawyer and non-lawyer staff of the implementation of the screen, identifying who is screened, and advising employees not to discuss the matter with or in front of the prohibited attorneys and sometimes paralegals.
- Periodic reminders of the existence of the screen.

Types of Conflicts of Interest

- **Potential Conflict**—Attorney recognizes that the representation of multiple parties may create a conflict of interest.
- **Thrust Upon Conflict**—During the course of the representation, the conflict rises.
- **Waivable Conflict**—The conflict is such that the client can waive the conflict.
- **Incurable Conflict**—The Conflict is such that the client cannot waive the conflict. Example Fraud or two clients whose interests are no longer aligned or divergent.
Potential Conflict

- **When?** Usually identified at the beginning of the representation, especially with joint representation.
- **Interests?** Often interests are aligned.
- **Waivable Conflict?** Often the conflict can be waived at the onset of the representation.

Thrust Upon Conflict

- **When?** At any time during the representation.
  - Examples—new client with a conflict of interest with existing client; new facts that create a conflict.
- **Interests?** Sometimes the interests are aligned, later the interests are in direct conflict.
  - Sometimes the client’s interests are in direct conflict with the attorney’s interests.
- **Waivable Conflict?** Maybe, in the case of a new client provided that the two matters are not substantially related then the conflict can be waivable. This requires a substantial relationship test, or review of other rules (evidence code, privilege, or attorney’s ethics).
Waivable Conflict

• Best time to waive a conflict is as soon as you identify the issue and determine that you can comply with the rules.
  – In the case of Joint Representation, a waiver should be executed before the work begins.
• Mid-representation-
  – Review rules and apply the substantial relationship test.
  – Then immediately seek a waiver.

Incurable Conflict

• A conflict waiver will not apply, even if you have a fully executed waiver when the conflict arises.
• Incurable conflicts generally involve fraud, destruction of evidence, or a conflict between two client’s interests and/or the attorney’s interests or ethical duties.
  – Two client’s with divergent interest, attorney may withdraw from one client and continue with another provided that the former client’s confidences are protected. FYI, very difficult to do.
  – Client wishes to move forward with something that would be unethical for the attorney or attorney’s financial interest is in conflict with client’s
Q&A – Post Presentation

• What two questions do you get the most about this topic?
• What other top issues should you be aware of when dealing with this issue?
• What resources do you recommend for guidance on this topic?
• For new or transitioning lawyers, what tips do you have for someone trying to get started in this area?
• What do you know now that you wish you would have known when you first encountered this issue?
• Who are some of the experts on this topic that you follow?

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