

Rule 1.7. Conflict of interest: current clients.

(a) Except as provided in paragraph (b), a licensed paralegal practitioner shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(a)(1) The representation of one client will be directly adverse to another client; or

(a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the licensed paralegal practitioner's responsibilities to another client, a former client or a third person or by a personal interest of the licensed paralegal practitioner.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a licensed paralegal practitioner may represent a client if:

(b)(1) the licensed paralegal practitioner reasonably believes that the licensed paralegal practitioner will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the licensed paralegal practitioner in the same litigation or other proceeding before a tribunal; and

(b)(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the licensed paralegal practitioner's relationship to a client. Concurrent conflicts of interest can arise from the licensed paralegal practitioner's responsibilities to another client, a former client or a third person or from the licensed paralegal practitioner's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rules 1.0(f) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the licensed paralegal practitioner to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a)(1) and obtain their informed consent, confirmed in

writing. The clients affected under paragraph (a)(1) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the licensed paralegal practitioner obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a licensed paralegal practitioner should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a licensed paralegal practitioner's violation of this Rule.

[4] If a conflict arises after representation has been undertaken, the licensed paralegal practitioner ordinarily must withdraw from the representation, unless the licensed paralegal practitioner has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the licensed paralegal practitioner may continue to represent any of the clients is determined both by the licensed paralegal practitioner's ability to comply with duties owed to the former client and by the licensed paralegal practitioner's ability to represent adequately the remaining client or clients, given the licensed paralegal practitioner's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, ~~such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation,~~ might create conflicts in the midst of a representation, ~~as when a company sued by the licensed paralegal practitioner on behalf of one client is bought by another client represented by the licensed paralegal practitioner in an unrelated matter.~~ Depending on the circumstances, the licensed paralegal practitioner may have the option to withdraw from one of the representations in order to avoid the conflict. The licensed paralegal practitioner must withdraw where necessary and take steps to minimize harm to the clients. See Rule 1.16. The licensed paralegal practitioner must continue to protect the confidences of the client from whose representation the licensed paralegal practitioner has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the licensed

paralegal practitioner-client relationship is likely to impair the licensed paralegal practitioner's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the licensed paralegal practitioner will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the licensed paralegal practitioner's interest in retaining the current client.

[7] Reserved.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a licensed paralegal practitioner's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the licensed paralegal practitioner's other responsibilities or interests. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the licensed paralegal practitioner's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Licensed Paralegal Practitioner's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a licensed paralegal practitioner's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the licensed paralegal practitioner's responsibilities to other persons, such as fiduciary duties arising from a licensed paralegal practitioner's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The licensed paralegal practitioner's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a licensed paralegal practitioner's own conduct in a transaction is in serious question, it may be difficult or impossible for the licensed paralegal practitioner to give a client detached advice. Similarly, when a licensed paralegal practitioner has discussions concerning possible employment with an opponent of the licensed paralegal practitioner's client, or with a law firm representing the opponent, such discussions could materially limit the licensed paralegal practitioner's representation of the client. In addition, a licensed paralegal practitioner may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the licensed paralegal practitioner

has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other licensed paralegal practitioners in a law firm).

[11] When licensed paralegal practitioners representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the licensed paralegal practitioner's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the licensed paralegal practitioners before the licensed paralegal practitioner agrees to undertake the representation. Thus, a licensed paralegal practitioner related to another licensed paralegal practitioner, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that licensed paralegal practitioner is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the licensed paralegal practitioners are associated. See Rule 1.10.

[12] A licensed paralegal practitioner is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the licensed paralegal practitioner-client relationship. See Rule 1.8(j).

Interest of Person Paying for a Licensed Paralegal Practitioner's Service

[13] A licensed paralegal practitioner may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the licensed paralegal practitioner's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the licensed paralegal practitioner's representation of the client will be materially limited by the licensed paralegal practitioner's own interest in accommodating the person paying the licensed paralegal practitioner's fee or by the licensed paralegal practitioner's responsibilities to a payer who is also a co-client, then the licensed paralegal practitioner must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the licensed paralegal practitioner involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the licensed paralegal practitioner is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the licensed paralegal practitioner cannot reasonably conclude that the licensed paralegal practitioner will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3(diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a licensed paralegal practitioner's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(o)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the licensed paralegal practitioner-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the licensed paralegal practitioner represents

different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the licensed paralegal practitioner cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the licensed paralegal practitioner to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the licensed paralegal practitioner promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(p) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the licensed paralegal practitioner must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the licensed paralegal practitioner to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the licensed paralegal practitioner's representation at any time. Whether revoking consent to the client's own representation precludes the licensed paralegal practitioner from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the licensed paralegal practitioner would result.

Consent to Future Conflict

[22] Whether a licensed paralegal practitioner may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The

effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding.

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a licensed paralegal practitioner may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the licensed paralegal practitioner in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a licensed paralegal practitioner's action on behalf of one client will materially limit the licensed paralegal practitioner's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the licensed paralegal practitioner. If there is significant risk of material limitation, then absent informed consent of the affected clients, the licensed paralegal practitioner must refuse one of the representations or withdraw from one or both matters.

[25] Reserved.

Non-litigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other

than litigation. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the licensed paralegal practitioner's relationship with the client or clients involved, the functions being performed by the licensed paralegal practitioner, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] Reserved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a licensed paralegal practitioner may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a licensed paralegal practitioner may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The licensed paralegal practitioner seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the licensed paralegal practitioner act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a licensed paralegal practitioner should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the licensed paralegal practitioner will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a licensed paralegal practitioner cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the licensed paralegal practitioner is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the

clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the licensed paralegal practitioner subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on licensed paralegal practitioner-client confidentiality and the licensed paralegal practitioner-client privilege. With regard to the licensed paralegal practitioner-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the client should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the licensed paralegal practitioner not to disclose to the other client information relevant to the common representation. This is so because the licensed paralegal practitioner has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the licensed paralegal practitioner will use that information to that client's benefit. See Rule 1.4. The licensed paralegal practitioner should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the licensed paralegal practitioner will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the licensed paralegal practitioner to proceed with the representation when the clients have agreed, after being properly informed, that the licensed paralegal practitioner will keep certain information confidential.

[32] When seeking to establish or adjust a relationship between clients, the licensed paralegal practitioner should make clear that the licensed paralegal practitioner's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the

right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the licensed paralegal practitioner as stated in Rule 1.16.

~~Organizational Clients~~

~~[34] A licensed paralegal practitioner who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the licensed paralegal practitioner for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the licensed paralegal practitioner, there is an understanding between the licensed paralegal practitioner and the organizational client that the licensed paralegal practitioner will avoid representation adverse to the client's affiliates, or the licensed paralegal practitioner's obligations to either the organizational client or the new client are likely to limit materially the licensed paralegal practitioner's representation of the other client.~~

~~[35] A licensed paralegal practitioner for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict.~~

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