



Ethical Challenges for the ENR Attorney

Presented by:

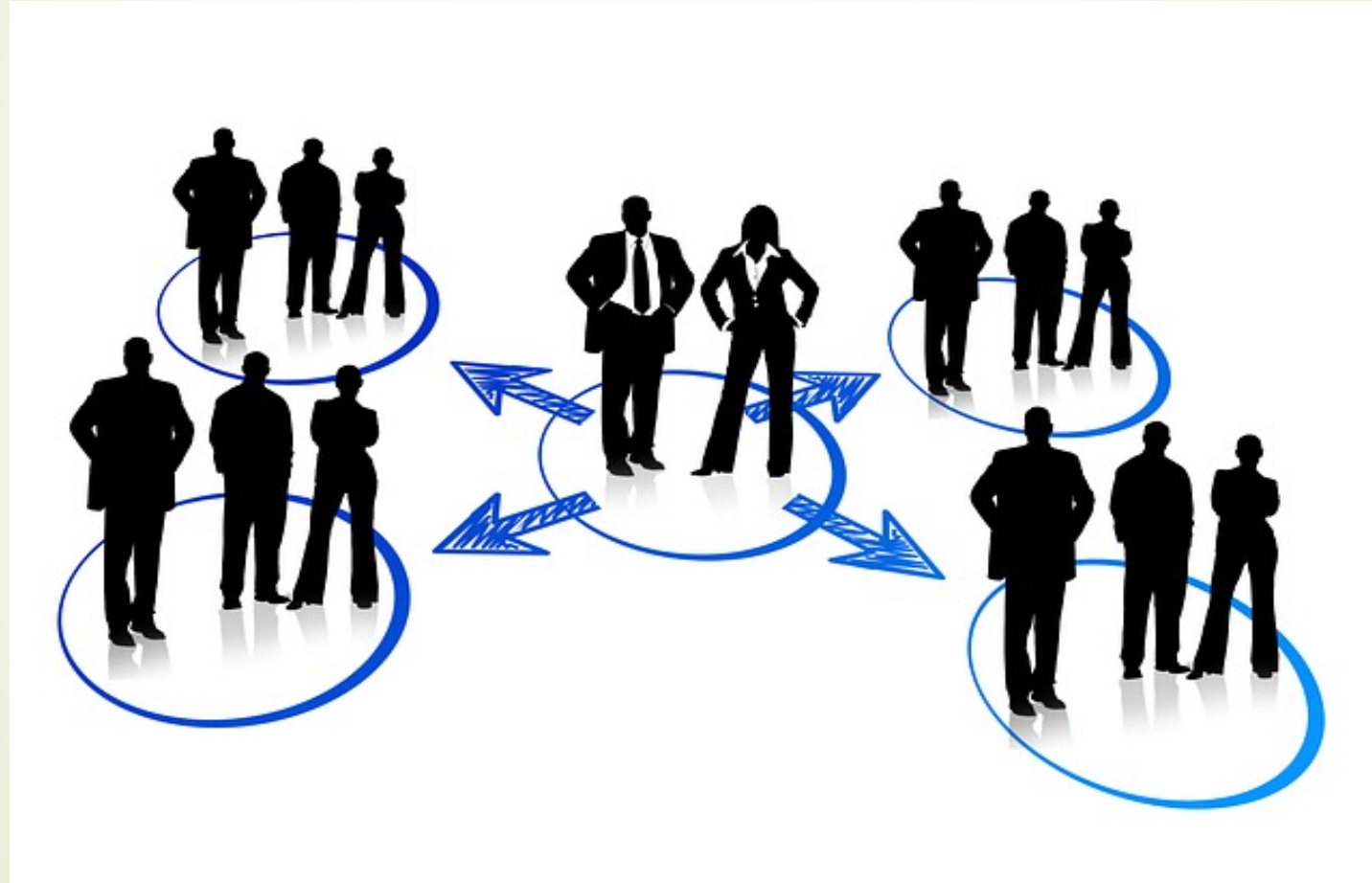
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Are you feeling conflicted?



What is a positional conflict?

A "positional" or "issue" conflict arises when a lawyer's successful advocacy of a client's legal position in one case could be detrimental to the interests of a different client in another case.

Rule 1.7: *It's all about loyalty to the client*

- "*Loyalty and independent judgment* are essential elements in the lawyer's relationship to a client."
- "Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests."

Rule 1.7, comment [1].

Rule 1.7: *It's all about loyalty to the client*

- “Even where there is no direct adverseness, a conflict of interest exists if there is a *significant risk* that the lawyer'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 lawyer's other responsibilities or interests.”
- “The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Rule 1.7, comment [8]

Positional conflicts: What's the big deal?

- If both cases are being argued in the same court, will the impact of the lawyer's advocacy be diluted in the eyes of the judge(s)?
- Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer's effectiveness?
- If so, can the lawyer (or the lawyer's firm) avoid favoring one client over the other in the "race" to be first?
- Will one or both of the clients become concerned that its lawyer(s) have divided loyalties?

Formal Opinion 93-377: Positional Conflicts

- Issued by the Standing Committee on Ethics and Professional Responsibility, October 16, 1993.
- Addresses situations in which the issue on which conflicting positions are to be taken is one of substantive law.
- Opinion is focused upon pending matters that are being litigated in the same jurisdiction, and
- There is a substantial risk that either representation will be adversely affected by the other.

Formal Opinion 93-377: Positional Conflicts

“When a lawyer is asked to advocate a position with respect to a substantive legal issue that is *directly contrary* to the position being urged by the lawyer (*or the lawyer’s firm*) on behalf of another client in a different and unrelated pending matter *which is being litigated in the same jurisdiction*, the lawyer, *in the absence of consent by both clients after full disclosure*, should refuse to accept the second representation if there is a *substantial risk* that the lawyer’s advocacy on behalf of one client *will create a legal precedent* which is likely to *materially undercut* the legal position being urged on behalf of the other client.”

What if the two pending matters are in different jurisdictions?

- Lawyer should consider whether the issue is one of such importance that a determination is likely to affect the ultimate outcome of at least one of the cases.
- Will there be any inclination by the lawyer, or her firm, to “soft-pedal” or de-emphasize certain arguments or issues so as to avoid impacting the case?
- Will there be any inclination within the firm to alter any arguments for one, or both clients, so that the firm’s position in the two cases can be reconciled?

If so, the lawyer should decline the second case in the absence of informed consent by both clients.

New comment [24] to Wyoming Rule 1.7

- In 2012 as part of the ABA's "Ethics 2020" initiative, Model Rule 1.7 was amended to include a comment that more directly addresses positional conflicts than previous versions.
- Wyoming adopted the comment, which is found in WRPC Rule 1.7 at comment [24], effective October 6, 2014.
- Comment [24] essentially codifies ABA Formal Opinion 93-377 and provides a more extensive list of factors the lawyer should consider before taking on concurrent cases that involve a positional conflict.

New comment [24] to Wyoming Rule 1.7

Factors relevant in determining whether the clients need to be advised of the risks posed by a positional conflict 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 lawyer.

New comment [24] to Wyoming Rule 1.7

“If there is a significant risk of material limitation [on the lawyer’s effectiveness in representing another client in a different case], then absent informed consent by the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”

Screening for positional conflicts

Rule 1.7, comment [3] provides in relevant part:

- “To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate to the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons *and issues* involved.”
- “Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule.”

Revoking consent

Rule 1.7, comment [21] provides, "A client who has given consent to a conflict may revoke the consent *** at any time." Whether revoking consent precludes the lawyer from continuing to represent other clients depends upon 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 lawyer would result.

Standing your ground



The organizational client: Who is the client?

- Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."
- Rule 1.13(f): "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."
- Rule 1.13(g): "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7."

Rule 1.13(b): *Whose interests are being served?*

- "If a lawyer for an organization *knows* that an *officer, employee or other person* associated with the organization *is engaged in action, intends to act or refuses to act* in a matter related to the representation
- that is a *violation of a legal obligation* to the organization, *or a violation of law* which reasonably might be imputed to the organization,
- *and* is likely to result in *substantial injury* to the organization,
- *then* the lawyer shall proceed as is reasonably necessary in the best interest of the organization."

Rule 1.13(b): *Whose interests are being served?* (*cont'd*)

- Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so,
- the lawyer shall refer the matter to higher authority in the organization,
- including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Lesson: Always keep the organizational client's best interests in mind.

Rule 1.2: *What decisions must be made by the client?*

- Rule 1.2(a): "Subject to paragraphs (c), (d), and (e), a lawyer *shall abide* by a client's decisions concerning the *objectives* of representation ***."

Exceptions:

- 1.2(c) authorizes limited-scope representation.
- 1.2(d) prohibits a lawyer from assisting a client in criminal or fraudulent conduct.
- Rule 1.2(e) requires a lawyer who is acting as guardian ad litem to act in the best interests of the client.

Rule 1.2: *What decisions must be made by the client?*

- In a *criminal case*, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to whether to: take a plea; waive a jury trial, and testify.
- In a *civil case*, the lawyer may not settle a case without the client's consent.
- **Practice tip:** Specify the objective(s) of the representation in your written engagement agreement.

Rule 1.2: *Means vs. objectives*

- “[A]s required by Rule 1.4, [a lawyer] *shall consult* with the client as to the *means* by which [the objectives of representation] are to be pursued.
- “In some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client – this duty will require consultation prior to taking action.” Rule 1.4, comment 4.
- “In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation.” *Id.*

The role of professional judgment

- Rule 2.1: "In representing a client, a lawyer shall exercise *independent professional judgment* and render *candid advice*."
- Rule 1.2, comment [2]: "Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to *technical, legal* and *tactical* matters."
- **Practice tip:** Rule 1.2, comment [3] says, "At the outset of representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation."

Means vs. objectives: Where is the line?

- Extension of time to answer interrogatories
- Extension of time to respond to requests for admissions
- Extension of time to designate experts
- Extension of time to designate experts in a malpractice case
- Conceding motion for relief from default
- Decision to advance costs – i.e., hiring an expert, taking depositions

When *must* you stand your ground?

- When you are instructed to take action which is not in your organizational client's best interests (Rule 1.13)
- When your client is engaged in criminal or fraudulent activity (Rule 1.2(d))
- When your client is submitting false evidence to the tribunal (Rule 3.3)
- Rule 1.16(a) prohibits a lawyer from representing a client "if the representation will result in violation of the rules of professional conduct or other law."

Withdrawing from representation



Rule 1.16(a) – A lawyer *must* withdraw from the representation of a client if:

- The representation will result in violation of the rules of professional conduct or other law;
- The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- The lawyer is discharged.

Rule 1.16(b) – A lawyer *may* withdraw from the representation of a client if:

- Withdrawal can be accomplished without material adverse effect on the interests of the client;
- The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- The client has used the lawyer's services to perpetrate a crime or fraud;
- The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

Rule 1.16(b) – A lawyer *may* withdraw from the representation of a client if:

- The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services *and* has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- Other good cause for withdrawal exists.

The catch: The Court must let you withdraw

- Rule 1.16(c) provides, "A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."
- *See* Rule 102(c), Uniform Rules for District Courts of the State of Wyoming. ("Except in the case of extraordinary circumstances, the court shall condition withdrawal of counsel upon the substitution of other counsel by written appearance.")

What/how much can you tell the court?

- The problem: The lawyer may be caught between the duty to preserve confidential information (Rule 1.6), the duty of candor to the tribunal (Rule 3.3) and the duty to withdraw (Rule 1.16(a)).
- Rule 1.16, comment [3] notes, "Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct."
- Comment [3] also says, "The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."

What/how much can you tell the court?

- In addition, comment [3] provides, “The court may request an explanation for the withdrawal ***”
- **Practice tip:** If the Court is not satisfied with your statement of “professional considerations,” you should advise the Court that you may reveal more information only if ordered to do so by the Court, and that you would prefer to make the disclosure *in camera*.
- *See* Rule 1.6(b)(6): “A lawyer may reveal [confidential] information to the extent the lawyer reasonably believes necessary *** to comply with other law or court order.”

Rule 1.16(d): Duties upon withdrawal/termination

“Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.”

Rule 1.16(d): Duties upon withdrawal/termination

- In a recent case, the Wyoming Supreme Court issued a public censure to a lawyer who had a “nonrefundable” flat fee agreement but failed to refund the unearned portion of the fee after he was terminated by the client.
- W.S. § 29-9-102 provides for an attorney’s lien for unpaid legal services on “any papers” of the client.
- ABA Formal Opinion 471 (2015) addresses the ethical obligations of a lawyer to surrender papers and property to which a former client is entitled.

Over-promising and under-delivering



Over-promising and under-delivering: What are the costs?

- Client who is unclear about the scope/objectives of the representation – Rule 1.2 violation
- Client who is uninformed or misinformed – Rule 1.4 violation
- Client who will push you to take unreasonable positions
- Client who will be unhappy with any reasonable outcome
- Client who does not pay your bill
- Client who can be counted on to generate negative referrals

Over-promising and under-delivering: What is the antidote?

- Be mindful of your Rule 2.1 obligation: *"In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."*
- There is no substitute for preparation: Draft your jury instructions at the start of the case, and meet with the client to discuss them.
- Keep your client informed as the matter progresses.
- **Lesson:** Clients can understand, weigh, and deal with the uncertainties of the legal process, but they must be informed.

Knowledge of the substantive law – and the facts that will affect the outcome – is key

- For example, in *Legacy Builders, LLC v. Andrews*, 2014 WY 103, ¶¶ 17-18 (Wyo. 2014), the Wyoming Supreme Court laid out how to compute damages to real property. If you do not understand the holding in this case, you cannot accurately advise your client about what they may recover for damages to real property.
- If you are representing a plaintiff you must identify:
 - What insurance coverage is available?
 - Are there liens that need to be satisfied?
 - What is the likelihood of collecting a judgment?



Questions About Professional Responsibility Issues?

Call the Wyoming State Bar's

Ethics Hotline

(307) 432-2106

or email Mark Gifford

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