

Oregon
State
Bar

CLE
Seminars

Hands on Ethics: Conflicts of Interest and Confidentiality



Thursday, October 6, 2016
9 a.m.–12:15 p.m.

3 Ethics credits

HANDS ON ETHICS: CONFLICTS OF INTEREST AND CONFIDENTIALITY

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SCHEDULE

Presented by Peter Jarvis, *Holland & Knight LLP, Portland*

8:00 Registration

9:00 Hands on Ethics: Conflicts of Interest—Confidentiality

- ◆ Duty of confidentiality, attorney-client privilege, and work product privilege
- ◆ Permissive and mandatory disclosures
- ◆ Current and former clients versus prospective clients
- ◆ Motions to disqualify or to withdraw

10:30 Break

10:45 Hands on Ethics: Conflicts of Interest

- ◆ The duty of undivided loyalty in both litigation and transactional settings
- ◆ What former clients can stop you from doing
- ◆ Personal and economic
- ◆ Waivable versus nonwaivable
- ◆ Conflicts waiver letters

12:15 Adjourn

FACULTY

Peter Jarvis, *Holland & Knight LLP, Portland*. Mr. Jarvis practices primarily in the area of attorney professional responsibility and risk management. Mr. Jarvis advises lawyers, law firms, corporate legal departments, and government legal departments about the law governing lawyers, including matters relating to conflicts of interest, duties of confidentiality, other legal or professional ethics issues, advice on the avoidance of civil or criminal liability, law firm breakups, and questions relating to law firm or legal department structure and operation. Mr. Jarvis also serves as an expert witness and is an avid lecturer for public and private/in-house continuing legal education seminars.

HANDS ON ETHICS: Conflicts of Interest & Confidentiality

By Peter Jarvis

October 6, 2016

Holland & Knight

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Session 1 : Conflicts of Interest – Confidentiality

TOPICS:

- » Differences and similarities between the duty of confidentiality, attorney-client privilege and work product privilege
- » Permissive and mandatory disclosures: when you may and when you must disclose otherwise confidential information
- » Information that is generally known, information about the law and other information that clients do not own or control
- » Current and former clients versus prospective clients
- » Confidentiality and motions to disqualify or to withdraw



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Confidentiality versus Attorney-Client Privilege

- » **RPC 1.6(a)**: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or *** permitted by paragraph (b).”
- » **RPC 1.0(f)**: “Information relating to the representation of a client’ denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

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Permissive versus Mandatory Disclosures

- » **RPC 1.6(b)**: “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 - »(1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
 - »(2) to prevent reasonably certain death or substantial bodily harm;
 - »(3) to secure legal advice about the lawyer's compliance with these Rules;

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Permissive versus Mandatory Disclosure

- »“(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
- »(5) to comply with other law, court order, or as permitted by these Rules; or
- »(6) in connection with the sale of a law practice under Rule 1.17 ***
- »(7) to comply with the terms of a diversion agreement, probation, [etc.]”

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Permissive versus Mandatory Disclosure

- »**RPC 4.1:** “In the course of representing a client a lawyer shall not knowingly:
 - »(a) make a false statement of material fact or law to a third person; or
 - »(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an illegal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”
- »See also Oregon Formal Opinion 2005-34.
- »Compare “noisy withdrawals” to affirmative disclosures.

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What Clients Don't Own

- » Information that is “generally known,” see Oregon Formal Op 2005-11, 2005-17 and 2005-120.
- » Knowledge about the law and the legal system
- » See *also* RPC 1.8(b) and 1.9(c) re use of information to client's detriment and revelation of confidential information.

- » Question: What about *Hunter v. Virginia State Bar*, 285 Va. 485, 77 S.E. 2d 611 (2013)?

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Extra Credit

- » **RPC 1.6(c)**: “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

- » **RPC 4.4(b)**: “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”

- » **RPC 1.18** and prospective clients.

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Session 2 : Conflicts of Interest

TOPICS:

- » Current client conflicts: what the duty of undivided loyalty really means in both litigation and transactional settings
- » Former client conflicts: what former clients can stop you from doing
- » Personal and economic conflicts: doing business with clients, personal interests, and other miscellaneous conflicts
- » Waiveable versus non-waiveable conflicts
- » Good conflicts waiver letters: what to say and how to say it



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Current/Concurrent Client Conflicts

- » **RPC 1.7(a):** “Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
 - »(1) the representation of one client will be directly adverse to another client;
 - »(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; or
 - »(3) [related lawyers on opposite sides of a matter].”

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Waivers and Limitations

- » **RPC 1.7(b):** “Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:
 - »(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;
 - »(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
 - »(4) each affected client gives informed consent, confirmed in writing.”

Definitions

- » **RPC 1.0(b):** “‘Confirmed in writing,’ when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of ‘informed consent.’ If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.”

Definitions

- » **RPC 1.0(g):** “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.”
- » *Compare* “informed consent” in RPC 1.2 and 1.6.

Specific Conflicts Rules

- » **RPC 1.8(a):** “(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

Specific Conflicts Rules

- » “(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.”
- » See also rules re aggregate settlements, etc., in RPC 1.8(b) to (j).

“Undivided Loyalty” Means . . .

- » Absolute veto power.
- » Consideration of what can't be waived.
- » Consideration of scope limitations under RPC 1.2.
- » Consideration of “conflicts counsel.”
- » Related entities potentially included.
- » Officers and employees potentially included. See RPC 1.13.
- » Beware the “Hot Potato” Rule.
- » Beware firm-wide attribution under RPC 1.10(a), etc.
- » Beware personal interest and economic conflicts.
- » End of engagement emails/letters are your friends.
- » More, versus less, time on writing good waiver letters.

Former Client Conflicts

» **RPC 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 each affected client gives informed consent, confirmed in writing.”

Former Client Conflicts

» **RPC 1.9(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 each affected client gives informed consent, confirmed in writing.”

Former Client Conflicts

- » **RPC 1.9(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.”

Former Client Conflicts

- » **RPC 1.9(d):** “For purposes of this rule, matters are “substantially related” if (1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s position in the subsequent matter.”
- » Matter-specific and information-specific conflicts under Oregon Formal Ethics Opinions 2005-11 and 2005-17.

PROSPECTIVE CLIENT

»RPC 1.18 DUTIES TO PROSPECTIVE CLIENT

- »(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

PROSPECTIVE 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).

PROSPECTIVE CLIENT

- »(d) When the 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(ii) written notice is promptly given to the prospective client

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Conflicts Waiver Letters 101

- »You are writing Exhibit A in your own defense.
- »The definition of materiality.
- »Who you are and are not representing.
- »What you are and are not proposing to do.
- »What you really need.
- »Why the clients should care: zealousness.
- »Why the clients should care: confidentiality.
- »Recommendation or insistence on consultation with independent counsel.
- »Risks with future waivers.
- »What cannot be waived.

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