

And Some Like It Hot - *not so much!*

By A. Alysha Clous

Sometimes, the “Ethics Hotline” feels more like the “Ethics Hot Seat” when questions worthy of the Bar exam or a 3L Professional Responsibility final roll in. One popular subject our callers seem to enjoy confounding me with is conflict of interest.

Twenty-two pages of our Rules of Professional Conduct are devoted to Rules 1.7 and 1.8 and a whopping 76 Advisory Opinions have been issued by the Board of Commissioners on Grievances and Discipline on the subject. However, relatively few ethics cases are ultimately decided on conflict issues. A sparse four cases cite the conflict rules since the new Rules were adopted February 1, 2007.

So, clearly, most attorneys understand enough about these rules to avoid the ultimate hot seat, but there are many sticky situations that give rise to questions. Below is a summary of Rules 1.7 and 1.8. A review of these Rules and of the Advisory Opinions may answer many questions.

Rule 1.7: Conflict of Interest: Current Clients. The rule defines a conflict as a representation of a client that will be directly adverse to another current client or a representation that will create a substantial risk that the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by the lawyer’s own personal interest.

After defining a conflict, Rule 1.7(b) explains how a client or clients can waive the conflict. In order to accept or continue the representation, all three of the following must apply: (1) the lawyer will be able to provide competent and diligent representation to each affected client; (2) each affected client gives informed consent, confirmed in writing; (3) the representation is not precluded by division (c) of this rule.

The following conflicts found in Rule 1.7(c) cannot be waived by the client: (1) the representation is prohibited by law; (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Rule 1.8: Current Clients: Specific Rules

(a) **Business Relationships.** If a lawyer enters into a business transaction with a client, the terms must be fair and reasonable to the client and must be in writing. The client must be advised, in writing, of the opportunity to obtain counsel and give informed consent, also in writing.

(b) **Information Relating to Representation.** Information relating to representation may not be used to the disadvantage of the client unless the client gives informed consent.

(c) **Gifts from Clients.** A lawyer shall not solicit any substantial gift from a client nor prepare on behalf of a client an instrument giving the lawyer, the lawyer’s partner, associate, paralegal, law clerk, “of counsel” attorney or employee of the lawyer’s firm, or person related to the lawyer any gift unless the lawyer or recipient of the gift is related to the client.

(d) **Literary or Media Rights.** Prior to the conclusion of representation, a lawyer shall not make or negotiate an agreement

giving the lawyer literary or media rights based in substantial part on information relating to the representation.

(e) **Financial Assistance to Client.** A lawyer shall not provide financial assistance to a client, except that a lawyer may advance court costs and expenses of litigation (repayment contingent on the outcome of the matter) and may pay court costs and expenses of litigation on behalf of indigent clients.

(f) **Compensation from a Third Party.** The attorney’s fee may not be paid by a third party unless the client gives informed consent; there is no interference with the lawyer’s independence or the client-lawyer relationship, and; client’s information is appropriately protected. Additional rules apply to compensation received from an insurer to represent an insured.

(g) **Settlement for Multiple Parties.** A lawyer who represents two or more clients shall not participate in making an aggregate settlement unless the settlement or agreement is subject to court approval or each client gives informed consent in writing.

(h) **Settling Malpractice Claims.** A lawyer shall not make an agreement prospectively limiting the lawyer’s liability for malpractice or requiring arbitration unless the client is independently represented in making the agreement. A lawyer is also prohibited from settling a claim or potential claim unless the settlement is fair, the client is advised in writing of the option for counsel and the client gives informed consent.

(i) **Proprietary Interest in the Cause of Action.** A proprietary interest is not allowed except to acquire a lien authorized by law to secure the lawyer’s fee or a contract with a client for a reasonable contingency fee in a civil matter.

(j) **Sexual activity.** A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced. And no amount of written consent will cure this one, folks.

The full text of the Rules (with very helpful comments) and the Ohio Supreme Court’s Board of Commissioners on Grievances and Discipline Advisory Opinions are available in pdf format at the Ohio Supreme Court’s website.

¹Incidentally, this article is not an invitation for readers to stay awake at night, dreaming up scenarios to torture me with. Real life is convoluted enough.

²Toledo Bar Assn. v. Baker, 2009-Ohio-2371, 122 Ohio St.3d 45, 907 N.E.2d 1172; Akron Bar Assn. v. Wittbord, 2009-Ohio-3549, 122 Ohio St 3d 394, 911 N.E. 2d 901; Allen County Bar Assn. V. Bartels, 2010-Ohio-1046, 124 Ohio St.3d 527; Columbus Bar Assn. v. Kiesling, 2010-Ohio-1555, 125 Ohio St.3d 36.



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