Everyday Conflicts, Cont'd
(Rules 1.7, 1.8, 1.9, 1.10 & 1.18)

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2021 Everyday Conflicts

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Everyday Conflicts

A Look at Rules:

KRPC 1.7--Conflict of Interest: Current Clients

KRPC 1.8--Conflict of Interest: Prohibited Transactions

KRPC 1.9--Duties to Former Clients

KRPC 10--Imputed Disqualification: General Rule

KRPC 1.18--Duties to Prospective Client

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KRPC 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.

(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) 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 is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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[10] Screening permitted pursuant to Rule 1.18(d) is to be distinguished from the screening prohibited by the Kansas Supreme Court in the cases of Zimmerman v. Mahaska Bottling Co., 19 P.3d 784 (2001), and Lansing-Delaware Water District v. Oak Lane Park, Inc., 808 P.2d 1369 (1991).

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KRPC 1.18: Duties to Prospective Client

"Significantly Harmful" Information

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Freeman v. Falcon, 2018 WL 1989248 (2018).

Plaintiff sued Defendants over Defendants' departure from Plaintiff's wealth-management partnership. Plaintiff filed a motion to disqualify Defendants' law firm for a Conflict of Interest arising under Rule 1.18.

Plaintiff argued that he shared information about the biggest producing broker in an office, how big the book was, team members, and he kind of business they run. The court noted that all of that is general knowledge within any of the broker branches. The information therefore could not be significantly harmful.

HELD - The Court could not find a Kansas case interpreting **Rule 1.18**'s "significantly harmful" language, but caselaw from around the country required a showing of specific significantly harmful information before a court would disqualify a lawyer under **Rule 1.18**.

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KRPC 1.18: Duties to Prospective Client

"Consultation" Results in "Prospective Client-Lawyer" Relationship

Plaintiff owned 4 nursing homes in financial difficulty. For a promise of a cash infusion he sold the homes to Defendants in exchange for a salary/consulting fee. Soon after, Defendants discharged Plaintiff based on occupancy of the homes falling below 90%, a condition of the sales agreement. Plaintiff sued for breach of contract. Defendants were represented by attorney Schulman.

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Because of the unusual factual situation in this case, the Court clearly states that its present holding is limited to the facts in this case. The Court does not suggest that all of an attorney's relations with friends—even long-term, close relations—will bar all future attorney—client relationships that are adverse to those friends. However…

Plaintiff and Schulman played golf and dined together a least twice a week for 10-12 years prior to Plaintiff's suit. As the situation deteriorated with Defendants, Schulman said to Plaintiff: "*Michael, whatever you need me to do, I will do. Whatever you need me for, I will be there for you***." And then Schulman gave Plaintiff certain advice.**

HELD - *Without doubt, Plaintiff was not a prototypical "prospective client" for Schulman. Plaintiff never met…in Schulman's law office…the two never signed [a]…retainer agreement…they never had a formal discussion concerning Schulman's representation. However, despite the lack of the usual formal "prospective client" aura, the Court finds that the totality of the parties' relationship demonstrates that Plaintiff was a prospective client of Schulman.*
Miness v. Ahuja, 762 F. Supp. 2d 465 (E.D.N.Y. 2010).

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KRPC 1.18: Duties to Prospective Client

"Consultation" + Advice Results in "Former Client-Lawyer" Relationship

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Dalton v. Painters Dist. Council No. 2, 2012 WL 234647 (U.S. Dist.Ct. E.D. Mo 2012).

[10] Screening permitted pursuant to Rule 1.17(d) is to be distinguished from the screening prohibited by the Kansas Supreme Court in the cases of Zimmerman v. Mahaska Bottling Co., 19 P.3d 784 (2001), and Lansing-Delaware Water District v. Oak Lane Park, Inc., 808 P.2d 1369 (1991).

Client called Law Firm Attorneys about her alleged employment-related sexual harassment. Attorneys told Client that she could (or even should) file an internal grievance with the union, did not tell her that she should contact another lawyer to represent her, and then told Client because Law Firm represented the union, the firm could not get involved in disputes between union members.

"An attorney-client relationship is established when a prospective client seeks and receives legal advice and assistance from an attorney who intends to provide legal advice and assistance to the prospective client." Quoting *Polish Roman Catholic St. Stanislaus Parish v. Hettenbach,* 303 S.W.3d 591, 601 (Mo.Ct.App.2010).

The fact is that Client contacted Law Firm to obtain legal advice, that Client advised the lawyers of the facts of her claim and the nature of her claim, and that Law Firm in fact gave her legal advice regarding her claim. That Law Firm belatedly advised her that they could not represent her in a dispute between union members does nothing to change this.

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KRPC 1.18: Duties to Prospective Client

Reasonable Expectation/Bad Faith Communications

Everyday Conflicts

"If from the beginning, the purported investor's aim was to perpetrate a fraud on the inquirer rather than to obtain legal services, then the purported investor never became even a prospective client within the meaning of the Rules, much less an actual one, and is therefore not entitled to the protection of the confidentiality rules." **NYSBA Ethics Opinion 923, 5/18/2012.**

Missouri Informal Opinion Number 2018-06

Question: May Attorney report to law enforcement authorities a purported prospective client who contacted Attorney with the apparent objective of defrauding the lawyer by sending Attorney a bogus check for deposit in Attorney's trust account?

Answer: If Attorney has formed a client-lawyer relationship with the individual, Rule 4-1.6 prohibits disclosure of the suspected trust account scam unless the client gives informed consent, Attorney is required by law or a court order to disclose the information, or another exception to Rule 4-1.6 exists.

Missouri has no crime-fraud exception in Rule 4-1.6.

Whether a client-lawyer relationship exists is a question of fact and law outside the scope of the Rules of Professional Conduct.

If the individual is a prospective client under Rule 4-1.18, Attorney may not use or disclose information gained in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.

If no client-lawyer relationship was formed and the individual does not qualify as a prospective client under Rule 4-1.18, Attorney has no duty of confidentiality regarding the information and is free to report the information to appropriate law enforcement authorities.

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KRPC 1.18: Duties to Prospective Client

Confidentiality: Limits On Using Or Revealing Prospective Client's Information/Rule 1.9(b) generally known

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Client learned that a deceased person had owned a large number of mineral acres and spent more than 300 hours researching the deceased's potential heirs so he could either negotiate a finder's fee, or lease or purchase the mineral acres.

When that failed, Client and Attorney met and reviewed documents from the research file.

Two days after the meeting Attorney sent Client a letter, in part, “This letter is to confirm what I told you both before and at the beginning of our meeting that I do not represent you in this matter. I also want to inform you that, in the event of further contact from Church representatives about this, I will divulge only public or published information to the Church. I received no confidential information from you at the time of our meeting that was not already communicated to the Church.

Client replied, “I do not recall you ever telling me, either before the meeting or at the beginning of the meeting, that you could not represent me in this matter. Quite to the contrary, I recall that at the end of the meeting I made a statement to you that you were representing me at that point and you replied that you were not representing me. You also stated that you…may be ethically obligated to …to provide [the Church] the information I had given to you.

At the disciplinary hearing, Attorney and Client testified in accordance with their statements in the letters. The Board found that [Client’s] version of the events…was "more credible“. *Disciplinary Bd. of Supreme Court* of N.D. v. Carpenter, 2015 ND 111, 863 N.W.2d 223,

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KRPC 1.18: Duties to Prospective Client

Confidentiality: Limits On Using Or Revealing Prospective Client's Information/Rule 1.9(b) generally known

ABA Formal Opinion 479, 12/15/2017.

The "Generally Known" Exception to Former-Client Confidentiality

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

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The record reflected that the information provided to Attorney had already been divulged to the Church through Client's negotiation efforts with another attorney.

Most of the information was contained in public records and generally would not pose any significant harm.

However, it is another matter when a person devotes more than 300 hours searching public records for pieces of a puzzle in an attempt to locate a deceased's potential heirs.

But for Client giving the information to Attorney, Attorney would not have had the opportunity to represent the Church in obtaining the mineral interests and receiving a portion of those interests.

While Attorney may not have "revealed" significantly harmful information to the Church, Attorney "used" the information for his own personal benefit to the detriment of Client.

Disciplinary Bd. of Supreme Court of N.D. v. Carpenter, 2015 ND 111, 863 N.W.2d 223.

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KRPC 1.18: Duties to Prospective Client

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ABA Formal Opinion 492 6/9/2020 Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information

"Whether information that "could be significantly harmful" has been disclosed by a prospective client is a fact-specific inquiry and determined on a case-by-case basis.

The test focuses on the potential harm in the new matter. The prospective client must provide some details about the time, manner and duration of communications with the lawyer and also some description of the topics discussed, but need not disclose the contents of the discussion or confidential information.

ABA Formal Opinion 497 February 10, 2021, Conflicts Involving Materially Adverse Interests

"Material adverseness" under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on behalf of a current client in the same or a substantially related matter. It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client.

However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.

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KRPC 1.18: Duties to Prospective Client

Everyday Conflicts

- Consult
- Use/Reveal/Rule 1.9(b)/Significantly harmful
- Client must reveal some details of the confidential information
- Lawyer Disqualification/Firm Disqualification/Exception
  - Both clients give informed consent in writing or:
  - Affected lawyer took reasonable measure to avoid/screened/no/notice to client, and
  - 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/screened/no fee/notice to prospective client promptly

COMMENT [4 In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose.

COMMENT [5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(f) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

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Everyday Conflicts

Plus – 35 Comments

KRPC 1.7 Conflict of Interest: Current Clients

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

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

(2) there is a substantial 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.

(b) Notwithstanding the existence of a concurrent 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 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; and

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

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

The Former Client that's Really a Current Client

Everyday Conflicts

Attorney's corporation then purchased Client's corporation.

Attorney represented Client's business. As the business faltered Attorney expressed and interest in purchasing Client's corporation.

Attorney sent and email to Client, stating in part: For this reason you have requested that this office discontinue legal representation of Client and any parties thereto related.

"As stated earlier, I am a member of the organization that may be interested in purchasing part or all of Client or its assets. Any negotiations entered into by this organization and Client must be at arm's length.

Please reply to my email stating that you do or do not wish for my office to disengage in representation of Client and any of its matters. Also, please reply that you do or do not wish to discuss the possibility of a third-party negotiation for the purchase of some or all of Client or its assets."

That same day, Client sent the Attorney an email stating, "Please disengage as legal representation for Client. Please assist with the third-party negations [*sic*] as discussed earlier."

Attorney also inserted waiver language in the purchase offer and a waiver in the corporate minutes (*BE IT FURTHER RESOLVED, that Client hereby waives any and all conflict of interest with Attorney asserted the email exchange terminated the attorney-client relationship.)* ended the attorney-client relationship.

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In re Hodge, 407 P.3d 613 (Kan. 2017).

Attorney argued that 1) the email, (2) the waiver language in purchase offer and (3) the waiver in the corporate minutes ended the attorney-client relationship.

The Hearing Panel concluded and the Court HELD Attorney's actions spoke louder than his words. Following the email exchange, Client continued to request legal advice from Attorney who then provided it, and Client accepted the advice. Attorney continued to possess and exercise great influence over Client and Client's decisions. Attorney never withdrew as attorney of record in original litigation. Client and Attorney executed documents on Attorney's purchase of Client's property in Attorney's law office. Attorney sent more than 20 email messages to Client and others using his attorney signature block.

Court further held that regardless of the language used in the documents, none provide the informed consent required by KRPC 1.0(f). The email did not explain "material risks" nor did it provide "reasonably available alternatives to the proposed course of conduct." The other writings failed to qualify as informed consent for the same reason.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

The Former Client that's Really a Current Client

Everyday Conflicts

Inclusion of Firm as contact under the contract settling the matter

The failure to formally close the matter was evidence that Firm intended to keep Client as clients.

Firm was paying for the storage of 49 bankers boxes of documents related to the matter in Firm's off-site storage facility, to make itself available to promptly respond to future requests from Client for legal work.

The settlement document signed by Client and Defendant settling the case contained a notice provision containing conditions of proper notice. One condition was that a copy of a notice had to be sent to Law Firm.

Three years later Law Firm accepted a representation of a client that was adverse to the Company, the parent company of Client. Company filed motion to disqualify.

Court noted that whether or not a current attorney-client relationship exists is a question of fact.

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.

Washington courts have held that another key factor that is determinative of whether or not the attorney-client relationship exists is the subjective belief of the client.

However, this belief must be reasonably based on the factual circumstances of a particular case.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

The Former Client that's Really a Current Client

Everyday Conflicts

Other courts have held that "once established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation of the relationship must transpire in order to end the relationship. The Court can find nothing in the record that constitutes an event inconsistent with the continuation of the attorney-client relationship between Firm and Client.

When asked by the Court at oral argument what this event could be, Firm attorney responded, "Silence. Three years of silence." The Court found three years of no contact between an attorney and client, without more, did not constitute an event inconsistent with representation.

Jones v. Rabanco, 2006 WL 2237708 (W.D.Wash.)

Firm argued that it should not be disqualified from representation because the current case is not "substantially related" to the settled matter under RPC 1.9

Firm also argued that the main attorneys at the firm who represented Client had left Firm.

Court noted Comment [4] to ABA Model Rule 1.3, outlining an attorney's duties of diligence, provided that "[d]oubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."

Court found that Firm could easily have sent a letter to Client asking it to amend the contact information, or informing it of a departing attorney's new contact information, if the firm had really not wished to serve as a contact point under the contract.

Without evidence that Firm took steps to amend the notice provision in the contract, the Court found that inclusion of Firm as a point of contact in the contract, along with other circumstances, created a reasonable belief on the part of the client that the firm named in the contract was still representing it on matters related to the contract.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Unpaid Fees

Everyday Conflicts

Attorney's retainer agreement stated: *BILLING*. **I*n the event of default in payment Client will pay reasonable attorney's fees and costs incurred in collecting said amount which may be due, whether by suit or arbitration***. Client authorizes Attorney or his agent to obtain and/or exchange credit reports and information on Client. Client authorizes Attorney to withdraw from any Client funds in his possession, fees and costs which have been billed to Client. Any statement not objected to in writing within thirty days from presentment will be deemed accepted and approved by Client." (Emphasis added.)

Attorney sued Client for unpaid fees. Trial Court awarded some fees, disallowed others, and awarded "collection" fees of $4,625 and "collection" costs of $405, incurred as a result of Attorney's attempts to collect the $1,740.00 in additional fees.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Unpaid Fees

Everyday Conflicts

A key point relied on by the Appellate Court was that the agreement was entered into after the creation of the attorney client relationship.

Lustig v. Horn, 315 Ill. App. 3d 319, 247 Ill. Dec. 558, 732 N.E.2d 613 (App. 1st Dist. 2000),

Held - An attorney should not place himself in the position where he may be required to choose between conflicting duties or where he must reconcile conflicting interests rather than protect fully the rights of his client…

As evidenced from Attorney's conduct, the agreement gives rise to substantial fees for vigorous prosecution of the attorney's own client.

This provision could be used to silence a client's complaint about fees, resulting from the client's fear of his attorney's retaliation for nonpayment of even unreasonable fees.

Such a provision is not necessary to protect the attorney's interests; on the contrary, it merely serves to silence a client should that client protest the amount billed.

Here, such a provision clearly is unfair and potentially violative of the Rules of Professional Conduct barring an attorney from representing a client if such representation may be limited by the attorney's own interests.

Attorney's fees and costs incurred in collecting on his bills must be denied in the instant case where such a request is premised upon a void provision of the retainer agreement.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

Arbitration Agreements

Missouri Informal Opinion 990130

QUESTION: Attorney would like to put a binding arbitration provision in Attorney´s fee agreement providing that all disputes between Attorney and Attorney´s client would be arbitrated. Is this prohibited?
ANSWER: Attorney may include a binding arbitration agreement in Attorney´s fee agreements without violating Supreme Court Rule 4. However, under Rules 4-1.4(b) and 4-1.7(b), Attorney has an obligation to orally point out this provision and to explain it, to the extent necessary for the individual client.

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COMMENT [14] This paragraph [1.8(h)] does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

KRPC 1.7(b) Notwithstanding the existence of a concurrent 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 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; and

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

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts

Arbitration Agreements

Attorney's retainer agreement stated that "any dispute (including, without limitation, any dispute with respect to the Firm's legal services and/or payment by you of amounts to the Firm), will be submitted to and finally determined by Arbitration" and "any disputes arising out of or relating to this engagement agreement or the Firm's engagement by you will be conducted pursuant to the JAMS/Endispute Arbitration Rules and Procedures."

A link to the JAMS Rules was provided in the agreement

Neither the retainer agreement nor the lawyer advised the client that:

In arbitration a single arbitrator presides over the disputed issues. In a trial a malpractice lawsuit could be filed in Superior Court in the county where Client resides or where Attorney maintains its offices, and have a jury representing a cross-section of the county's citizens sit in judgment of the case;

In a future malpractice action against the firm, costs and expenses of arbitration could be awarded against the plaintiff (which would be contrary to Rule 1.8(h)(1);

The advantages and disadvantages of arbitrating a malpractice claim;

- In the judicial forum client would have access to broad discovery,
- The right to a jury trial in an open courtroom,
- The right to speak freely on the subject matter without confidentiality restrictions,
- The right to appeal an erroneous ruling
- No high filing fees or payments for the services of the judge.

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RULE 4-1.0. TERMINOLOGY

(f) "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.

Delaney v. Dickey, 242 A.3d 257 (N.J. 2020).

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KRPC 1.7 Conflict of Interest: Current Clients

Everyday Conflicts

If the representation ends before representation is completed, the attorney must analyze the factors set out in Rule 4-1.5(a) to determine the extent to which the attorney must refund all or a portion of the fees paid in advance. Because an attorney may not charge or collect an unreasonable fee, the attorney must determine that the fee was reasonable, even in completed representations. Regardless of the terminology if the ultimate fee is unreasonable, the unreasonable portion must be refunded.

Creating Your Own Conflicts
Charging an Unreasonable Fee

Attorney required clients to pre-pay him a portion of his fees and specified that the advance fee payments were “nonrefundable.”

Notwithstanding this nonrefundability provision in the contracts, it was the Attorney's intention and practice to refund any unearned portion of the advance fee payments. That is, even though the contracts stated that the advance fee payments were “nonrefundable,” they were in fact refundable.

HELD - We hold that the assertion in an attorney fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee “shall be reasonable.” *In re Kendall,* 804 N.E.2d 1152 (Ind. 2004).

Missouri Supreme Curt Advisory Committee Formal Opinion 128.

Sometimes the attorney will describe all or part of the flat fee or initial payment as a “nonrefundable” or “minimum” fee. The second example is the criminal case in which the attorney charges a flat fee and describes the entire fee as nonrefundable.

In these situations and others, the description of the fee as “nonrefundable” is misleading.

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Charging an Unreasonable Fee

Everyday Conflicts

Consolver v. Hotze, 395 P.3d 405 (Kan. 2017). "An overwhelming majority of states, including Kansas, have held that an attorney employed under a contingency fee contract who is discharged without cause is limited to a quantum meruit recovery for the reasonable value of the services rendered."

And see, *Moore v. BPR,* 576 S.W.3d 341 (Tenn. 2019), regarding attorney's liens and charging an unreasonable fee.

Client signed a fee agreement under which Attorney would be paid $195 an hour, payable only upon receipt of Client's distribution from the estate, plus 25 percent of Client's distribution. After being discharged by Client, Attorney filed a "Notice of Intent to Hold Attorney's Lien" on Client's distribution from the estate for his hourly fee plus 25 percent of the distribution.

Attorney conceded that once discharged, his fee had to be based on *quantum meruit.* Thus, he had no colorable basis to assert a lien for 25 percent of Client's distribution. And even after he eventually dropped this claim, the record shows that he asserted a *quantum meruit* claim of $60,000 when he conceded that a fee based on his hourly rate would be around $7,000.

HELD - Rule 1.5(a) prohibits not only making an agreement for an unreasonable fee, but also *charging or collecting* an unreasonable fee. Even if a fee agreement is initially reasonable, subsequent events may render collection of the fee unreasonable. *In re Newman,* 958 N.E.2d 792 (Ind. 2011).

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KRPC 1.7 Conflict of Interest: Current Clients

Creating Your Own Conflicts
Confidentiality Agreements

Everyday Conflicts

Illinois RPC 8.4(h) Misconduct to enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission

KRPC 8.4(d) engage in conduct that is prejudicial to the administration of justice.

Attorney's retainer agreement stated: Client agrees to make all matters of said representation confidential between client(s), his/her agents, assigns and principals and to refrain from reporting any phase of said representation to any external agency, including but not limited to the Missouri Bar, ARDC etc.

Attorney explained at her hearing:

I got this contract just specifically for this case and put this together by the time Client was referred to me, and it came to the situation where after Client received the replevin I found out that he would even go and say all this about his case.

I believed the non-disclosure provision was appropriate just in situations like - in my gut, I know it's wrong, but where clients want all my work and then I hand it over to them, and then another lawyer just puts their name on it and try's to get credit, just what Client said he was going to do to me, which he did.

In re Laura Lee Robinson
Attorney-Respondent
Commission No. 2016PR00126, ***Filed August 16, 2017***

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KRPC 1.7 Conflict of Interest: Current Clients

Everyday Conflicts

Significant risk/materially limited/by a personal interest of the lawyer.

"In addition, an attorney has the basic fiduciary obligations of undivided loyalty and confidentiality." *Klemme v. Best* , 941 S.W.2d 493 (Mo. 1997).

Do fee agreement clauses attempt, or appear to attempt, to chill or limit a client's right to object to fees or services?

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KRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

Everyday Conflicts

(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 to the client in a manner which can be reasonably understood by the client; and

(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

(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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(l) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.

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Everyday Conflicts

Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 726 N.W.2d 397, Iowa 2007

KRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

Creating Your Own Conflicts

Unpaid Fees

"If you have any questions concerning the invoice, you agree to contact the finance manager within ten (10) days. If you do not you will be deemed to have agreed that the invoice is accurate and valid, and to have waived any claims as to the accuracy or sufficiency of the work performed on your behalf."

"You agree to pay all fees, including those of Law Firm proceeding pro se, relating to collection of amounts due under this agreement including any complaints caused by client relating to the services performed by Law Firm before any agency, department, court or branch of any government, or any bar association which renders a decision favorable to firm."

The ten-day provision substantially limits the time in which a client can bring a legal negligence action against Attorney.

By shifting the burden of litigation costs and attorney's fees to his clients, Attorney limited his future liability to only those clients who can afford to bear these costs if they bring suit and lose.

Accordingly, Attorney's conduct in placing provisions in his attorney fee contract requiring a client to contest the sufficiency of his work within ten days and providing him indemnity when a client loses a legal negligence claim the client might bring because of his representation violated [current Rule 1.8(h)

THE BAR PLAN FOUNDATION

KRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

Creating Your Own Conflicts

Unpaid Fees

Everyday Conflicts

In re Bulen, 375 B.R. 858 (Bankr. D. Minn. 2007).

Attorney's Fee Agreement says: "WITHDRAWAL OF ATTORNEY: Client understands and expressly agrees that Attorney may withdraw from representation of Client at any time if Client fails to honor the fee arrangement herein set forth including, but not limited to, payment of fees and expenses on a timely basis; fails to cooperate in the preparation of the case; or otherwise takes any action which impedes the ability of Attorney to provide adequate and ethical representation."

Court says - "A provision in a retainer purporting to give the attorney the right of withdrawal and nonappearance is at best misleading, intimidating, and it works to prevent a [client's] objection to a motion to withdraw or to a failure to appear."

Attorney's New Fee Agreement, written by Court, says: - "WITHDRAWAL OF ATTORNEY. Attorney reserves the right, upon nonpayment by Client of any fees or costs incurred pursuant to this agreement, to request that Client obtain alternative counsel and, if Client fails to do so within a reasonable time, to apply to the Bankruptcy Court for permission to withdraw. Until substitute counsel or Bankruptcy Court permission to withdraw is obtained, Attorney will continue to provide legal services to Client in connection with Client's bankruptcy case to the extent required by Local Bankruptcy Rules…"

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KRPC 1.8: Conflict of Interest: Current Clients: Specific Rules

Creating Your Own Conflicts

A Receipt That's Really a Release

Everyday Conflicts

In re Darby, 426 N.E.2d 683 (Ind. 1981).

Attorney was employed by a to recover property damages resulting from an automobile accident and was given by his client documents relating to the accident. No lawsuit was filed so client informed Attorney that another attorney had been retained and requested the return of his documents.

Attorney informed his client that he would return the documents if the client signed a release promising not to sue the Attorney. On the advice of new counsel, the client refused to sign the release. A lawsuit was filed by the newly obtained counsel and Attorney was named as a defendant. During the course of the lawsuit, Attorney delivered the documents pursuant to a subpoena.

THE BAR PLAN FOUNDATION

KRPC 1.8 Conflict of Interest: Current Clients: Specific Rules

Attempts to limit liability.

Everyday Conflicts

Business transactions with clients include changing terms of fee agreement during representation.

Attempts to suspend working while not being paid.

Onerous Arbitration Terms/Insufficient explanation of process.

Improperly characterizing lawyer's withdrawal process from the representation.

THE BAR PLAN FOUNDATION

KRPC 1.9: Duties to Former Clients

Everyday Conflicts

(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 consent, confirmed in writing.

(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 the former client gives informed consent, confirmed in writing.

(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.

THE BAR PLAN FOUNDATION

KRPC 1.9: Duties to Former Clients

Creating Your Own Conflicts/When Imputations Strike

Presenting to the Public as a Law Firm

***Monroe v. City of Topeka*, 988 P.2d 228 (Kan. 1999).**

Everyday Conflicts

Factors district court considered as indicia of Attorney's and Law Firm's presenting themselves to the public in ways strongly suggesting that they conduct themselves as a firm: 1) shared office space, telephone and facsimile numbers, and mailing address; 2) Attorney used the Law Firm name on her entry of appearance; 3) Law Firm letterhead listed Attorney as "Of Counsel,"; 4) Attorney used Law Firm letterhead for numerous communications during the case.

Client brought suit against City. City hired Attorney to defend. Client moved to disqualify Attorney because Attorney was Of Counsel at Law Firm that had previously represented Client.

The Court observed that while Rule 1.9(a) would prohibit Law Firm from representing City in a matter substantially related to its previous representation of Client it does not apply directly to Attorney. Further Subsection (b) might prohibit Law Firm from using information relating to its representation of Client to Client's disadvantage but does not apply directly to Attorney.

Also, as with Rule 1.9, subsection (b) of Rule 1.10 does not fit the circumstances in this case. The former representation of concern in 1.10(b) is Attorney's rather than Law Firm's.

HELD - Rule 1.10(a) would prohibit Attorney from representing City in this case if Law Firm would be prohibited from doing so. Rule 1.9(a) would prohibit Law Firm from representing City in a matter substantially related to the matter in which it previously represented Client because in the present case City's interests are materially adverse to Client's. Thus, if the present case is substantially related to the matter in which Law Firm previously represented Client, the Attorney, being associated with Law Firm, cannot represent the City in the present matter.

THE BAR PLAN FOUNDATION

KRPC 1.9: Duties to Former Clients

Take an act inconsistent with the Attorney-client relationship. Make a current client a former Client in writing with unambiguous, forthright language.

Everyday Conflicts

"This concludes my representation of you. I will take no further action on your behalf."

Screening is not permitted.

THE BAR PLAN FOUNDATION

KRPC 1.10: Imputation of Conflicts of Interest

Everyday Conflicts

(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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9 (c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

THE BAR PLAN FOUNDATION

KRPC 1.10: Imputation of Conflicts of Interest

Creating Your Own Conflicts
When Imputations Strike

Everyday Conflicts

A motion to disqualify must be decided on the unique facts of the case, and the Court must balance competing considerations, including:.

1)The privacy of the attorney-client relationship, 2) the prerogative of parties to choose its own counsel, and 3) the hardships disqualification would impose upon the parties and the judicial process.

At some time during her employment at Predecessor Firm, Attorney assisted another attorney in representation of Client in an ethics matter during which Client confided information to Attorney about a career as a prosecutor, employment at the City, and intent to work as a prosecutor over the course of her career. Client believed Attorney used all of the information provided to her to advocate that Client acted properly and ethically.

Four years later Attorney left Predecessor Firm for Current Firm. The Current Firm became involved in the current case 10 years later. Attorney formally entered her appearance for Defendants 2 years after that, three weeks prior to the scheduled jury trial. Ten days prior to trial Client filed her motion to disqualify Attorney and Current Firm.

In an affidavit Attorney swore she did not recall any details of her representation of Client, did not recall any meetings or conversations with Client, and asserted she did not retain any notes or materials related to the matter. Attorney stated she has no information regarding the prior matter beyond that stated in the published opinion, and she had no information regarding Client's career aside from the evidence gathered in this case. Attorney swore no confidential or material information she may have learned in the prior representation of Plaintiff would be used in the current matter.

THE BAR PLAN FOUNDATION

KRPC 1.10: Imputation of Conflicts of Interest

Creating Your Own Conflicts
When Imputations Strike

Everyday Conflicts

The Court found no harassment or dilatory motive present on either side. The conflict issue escaped Client's notice until Attorney appearance. Similarly, Attorney's representation of Client occurred several years prior during her work with another firm and likewise eluded her attention.

McDonald v. City of Wichita, 2016 WL 305366

The Court found the information divulged by Client to Attorney in the prior representation could reveal Client's pattern of conduct as a prosecutor. Specifically, given the sensitive nature of Attorney's prior representation of Client, the Court found it highly likely the information divulged was of the most confidential nature. In both the prior and current representations Client's career as a prosecutor were at issue. Despite the differences between the two cases, "the underlying concern is the possibility, or *appearance of the possibility*, that Attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought."

Upon a finding that Attorney was disqualified under KRPC 1.9, the Court examined the requirements of KRPC **1.10**(a) which states: "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 KRPC 1.9 (emphasis added).

The purpose behind the imputation is that "a *firm* of lawyers is essentially *one lawyer* for purposes of the rules governing loyalty to the client. Because Attorney was disqualified, the presumption arose that she shared information with her current law partners at Current Firm and Current Firm was disqualified from representing Defendants.

THE BAR PLAN FOUNDATION

KRPC 1.10: Imputation of Conflicts of Interest

Everyday Conflicts

All attorneys should maintain a portable Conflicts of Interest checking data base.

No single attorney in the firm should be able to unilaterally decide whether or not a prior representation creates a current conflict.

THE BAR PLAN FOUNDATION

Thank You

The Bar Plan Mutual Insurance Company

Christian A. Stiegemeyer
Director of Risk Management

Whittney A. Dunn
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