WORDS TO THE WISE: LAWYER ETHICS AND LOSS PREVENTION REMINDERS

ON
CLIENT QUALITY COMMUNICATIONS
CONFLICTS OF INTEREST

Prepared by:

Deborah G. Shortridge
Loss Prevention Counsel
Attorneys’ Liability Assurance Society, Inc.,
A Risk Retention Group

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I. Program Outline

WORDS TO THE WISE: LAWYER ETHICS AND LOSS PREVENTION REMINDERS
ON
CLIENT QUALITY
COMMUNICATIONS
CONFLICTS OF INTEREST

[Prepared by Deborah G. Shortridge, Loss Prevention Counsel]

I. Introduction

II. Client Quality – 20 minutes (20 minutes ethics)

III. Communications – 20 minutes (20 minutes ethics)

IV. Conflicts of Interest – 20 minutes (20 minutes ethics)

V. Conclusion and Q&A
II. Texas Disciplinary Rules of Professional Conduct

Rule 1.02 Scope and Objectives of Representation

(a) Subject to paragraphs (b), (c), (d), and (e), (f), and (g), a lawyer shall abide by a client's decisions:

(1) concerning the objectives and general methods of representation;

(2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law;

(3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.

(c) A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.

(d) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

(e) When a lawyer has confidential information clearly establishing that the lawyer's client has committed a criminal or fraudulent act in the commission of which the lawyer's services have been used, the lawyer shall make reasonable efforts under the circumstances to persuade the client to take corrective action.

(f) When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(g) A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client.
Comments:

Scope of Representation

1. Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the objectives to be served by legal representation, within the limits imposed by law, the lawyer's professional obligations, and the agreed scope of representation. Within those limits, a client also has a right to consult with the lawyer about the general methods to be used in pursuing those objectives. The lawyer should assume responsibility for the means by which the client's objectives are best achieved. Thus, a lawyer has very broad discretion to determine technical and legal tactics, subject to the client's wishes regarding such matters as the expense to be incurred and concern for third persons who might be adversely affected.

2. Except where prior communications have made it clear that a particular proposal would be unacceptable to the client, a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case.

3. A lawyer should consult with the client concerning any such proposal, and generally it is for the client to decide whether or not to accept it. This principle is subject to several exceptions or qualifications. First, in class actions a lawyer may recommend a settlement of the matter to the court over the objections of named plaintiffs in the case. Second, in insurance defense cases a lawyer's ability to implement an insured client's wishes with respect to settlement may be qualified by the contractual rights of the insurer under its policy. Finally, a lawyer's normal deference to a client's wishes concerning settlement may be abrogated if the client has validly relinquished to a third party any rights to pass upon settlement offers. Whether any such waiver is enforceable is a question largely beyond the scope of these rules. But see comment 5 below. A lawyer reasonably relying on any of these exceptions in not implementing a client's desires concerning settlement is, however, not subject to discipline under this Rule.

Limited Scope of Representation

4. The scope of representation provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined objective. Likewise, representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. Similarly when a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The scope within which the representation is undertaken also may exclude specific objectives or means, such as those that the lawyer or client regards as repugnant or imprudent.

5. An agreement concerning the scope of representation must accord with the Texas Disciplinary Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01, or to surrender the right to terminate
the lawyer's services or the right to settle or continue litigation that the lawyer might wish to handle differently.

6. Unless the representation is terminated as provided in Rule 1.15, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's representation is limited to a specific matter or matters, the relationship terminates when the matter has been resolved. If a lawyer has represented a client over a substantial period in a variety of matters, the client may sometimes assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice to the contrary. Doubt 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. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Criminal, Fraudulent and Prohibited Transactions

7. A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

8. When a client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer may not reveal the client's wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client's unlawful purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required. See Rule 1.15(a)(1)

9. Paragraph (c) is violated when a lawyer accepts a general retainer for legal services to an enterprise known to be unlawful. Paragraph (c) does not, however, preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.

10. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

11. Paragraph (d) requires a lawyer in certain instances to use reasonable efforts to dissuade a client from committing a crime or fraud. If the services of the lawyer were used by the client in committing a crime or fraud paragraph (e) requires the lawyer to use reasonable efforts to persuade the client to take corrective action.
Client Under a Disability

12. Paragraph (a) assumes that the lawyer is legally authorized to represent the client. The usual attorney-client relationship is established and maintained by consenting adults who possess the legal capacity to agree to the relationship. Sometimes the relationship can be established only by a legally effective appointment of the lawyer to represent a person. Unless the lawyer is legally authorized to act for a person under a disability, an attorney-client relationship does not exist for the purpose of this rule.

13. If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, paragraph (g) requires a lawyer in some situations to take protective steps, such as initiating the appointment of a guardian. The lawyer should see to such appointment or take other protective steps when it reasonably appears advisable to do so in order to serve the client's best interests. See Rule 1.05 (c)(4), d(1) and (d)(2)(i) in regard to the lawyer's right to reveal to the court the facts reasonably necessary to secure the guardianship or other protective order.

Rule 1.03 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comments:

1. The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps to permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel either an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Comment 2 to Rule 1.02.

2. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. Moreover, in certain situations practical exigency may require a lawyer to act for a client without prior consultation. The guiding principle is that the lawyer should reasonably fulfill client expectations for information.
consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

3. Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impractical, as for example, where the client is a child or suffers from mental disability; see paragraph 5. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

4. In some circumstances, a lawyer may be justified in delaying transmission of information when the lawyer reasonably believes the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Similarly, rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.04(d) sets forth the lawyer's obligations with respect to such rules or orders. A lawyer may not, however, withhold information to serve the lawyer's own interest or convenience.

Client Under a Disability

5. In addition to communicating with any legal representative, a lawyer should seek to maintain reasonable communication with a client under a disability, insofar as possible. When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children's opinions regarding their own custody are given some weight. The fact that a client suffers a disability does not diminish the desirability of treating the client with attention and respect. See also Rule 1.02(e) and Rule 1.05, Comment 17.

1.06 Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

Comments:

Loyalty to a Client

1. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer must take effective action to eliminate the conflict, including withdrawal if necessary to rectify the situation. See also Rule 1.16. When more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by this Rule and Rules 1.05 and 1.09. See also Rule 1.07(c). Under this Rule, any conflict that prevents a particular lawyer from undertaking or continuing a representation of a client also prevents any other lawyer who is or becomes a member of or an associate with that lawyer's firm from doing so. See paragraph (f).

2. A fundamental principle recognized by paragraph (a) is that a lawyer may not represent opposing parties in litigation. The term opposing parties as used in this Rule contemplates a situation where a judgment favorable to one of the parties will directly impact unfavorably upon the other party. Moreover, as a general proposition loyalty to a client prohibits undertaking representation directly adverse to the representation of that client in a substantially related matter unless that client's fully informed consent is obtained and unless the lawyer reasonably believes
that the lawyer's representation will be reasonably protective of that client's interests. Paragraphs (b) and (c) express that general concept.

Conflicts in Litigation

3. Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation are not actually directly adverse but where the potential for conflict exists, such as co-plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist or develop by reason of substantial discrepancy in the party's 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. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 1.07 involving intermediation between clients.

Conflict with Lawyer's Own Interests

4. Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b)(2) addresses such situations. A potential possible conflict does not itself necessarily preclude the representation. The critical questions are the likelihood that a conflict exists or will eventuate and, if it does, whether it will materially and adversely affect the lawyers independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. It is for the client to decide whether the client wishes to accommodate the other interest involved. However, the client's consent to the representation by the lawyer of another whose interests are directly adverse is insufficient unless the lawyer also believes that there will be no materially adverse effect upon the interests of either client. See paragraph (c).

5. The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.01 and 1.04. If the probity of a lawyer's own conduct in a transaction is in question, it may be difficult for the lawyer to give a client detached advice. A lawyer should not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Meaning of Directly Adverse

6. Within the meaning of Rule 1.06(b), the representation of one client is directly adverse to the representation of another client if the lawyer's independent judgment on behalf of a client or the
lawyers ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests. Even when neither paragraph (a) nor (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and in those situations a wise lawyer would forego the dual representation.

Full Disclosure and Informed Consent

7. A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However, as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer 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 lawyer cannot properly ask the latter to consent.

8. Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

9. In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

10. A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

11. Ordinarily, it is not advisable for a lawyer to act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated and even if paragraphs (a), (b) and (d) are not applicable. However, there are circumstances in which a lawyer may act as advocate against a client, for a lawyer is free to do so unless this Rule or
another rule of the Texas Disciplinary Rules of Professional Conduct would be violated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in a matter unrelated to any matter being handled for the enterprise if the representation of one client is not directly adverse to the representation of the other client. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

**Interest of Person Paying for a Lawyer's Service**

12. A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.08(e). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

**Non-litigation Conflict Situations**

13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

15. Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration it may be unclear whether the client is the fiduciary or is the estate or trust including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

16. A lawyer 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. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If
there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

_Conflict Charged by an Opposing Party_

17. Raising questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with great caution, however, for it can be misused as a technique of harassment. See Preamble: Scope.

18. Except when the absolute prohibition of this rule applies or in litigation when a court passes upon issues of conflicting interests in determining a question of disqualification of counsel, resolving questions of conflict of interests may require decisions by all affected clients as well as by the lawyer.

**Rule 1.07 Conflict of Interest: Intermediary**

(a) A lawyer shall not act as intermediary between clients unless:

1. the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;

2. the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the client's best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

3. the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.
(d) Within the meaning of this Rule, a lawyer acts as intermediary if the lawyer represents two or more parties with potentially conflicting interests.

(e) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

Comments:

1. A lawyer acting as intermediary may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis. For example, the lawyer may assist in organizing a business in which two or more clients are entrepreneurs, in working out the financial reorganization of an enterprise in which two or more clients have an interest, in arranging a property distribution in settlement of an estate or in mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

2. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship; hence, the requirement of written consent. Moreover, a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. See also Rule 1.06 (b).

3. The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint Committee of the American Bar Association and the American Arbitration Association.

4. In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations, the risk of failure is so great that intermediation is plainly impossible. Moreover, a lawyer cannot undertake common representation of clients between whom contested litigation is reasonably expected or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients interests can be adjusted by intermediation ordinarily is not very good.

5. The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.
Confidentiality and Privilege

6. A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation, except as to such clients. See Rules 1.03 and 1.05. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the general 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 clients should be so advised.

7. Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

8. In acting as intermediary between clients, the lawyer should consult with the clients on the implications of doing so, and proceed only upon informed consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

9. Paragraph (b) is an application of the principle expressed in Rule 1.03. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

10. Under this Rule, any condition or circumstance that prevents a particular lawyer either from acting as intermediary between clients, or from representing those clients individually in connection with a matter after an unsuccessful intermediation, also prevents any other lawyer who is or becomes a member of or associates with that lawyer's firm from doing so. See paragraphs (c) and (e).

Withdrawal

11. In the event of withdrawal by one or more parties from the enterprise, the lawyer may continue to act for the remaining parties and the enterprise. See also Rule 1.06 (c) (2) which authorizes continuation of the representation with consent.
Rule 1.08 Conflict of Interest: Prohibited Transactions

(a) A lawyer shall not enter into a business transaction with 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 in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(c) Prior to the conclusion of all aspects of the matter giving rise to the lawyer's employment, a lawyer shall not make or negotiate an agreement with a client, prospective client, or former client giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, 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.

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

(1) the client consents;

(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 1.05.

(f) 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 to guilty or nolo contendere pleas, unless each client has consented after consultation, including
disclosure of the existence and nature of all the claims or pleas involved and of the nature and extent of the participation of each person in the settlement.

(g) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(h) 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 granted by law to secure the lawyer's fee or expenses; and

2. contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04.

(i) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member of or associated with that lawyer's firm may engage in that conduct.

(j) As used in this Rule, "business transactions" does not include standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others.

Comments:

Transactions between Client and Lawyer

1. This rule deals with certain transactions that per se involve unacceptable conflicts of interests.

2. As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

3. A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.
Literary Rights

4. An agreement by which a lawyer acquires literary or media rights concerning the conduct of representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.04 and to paragraph (h) of this Rule.

Person Paying for Lawyer's Services

5. Paragraph (e) requires disclosure to the client of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.05 concerning confidentiality and Rule 1.06 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. Where an insurance company pays the lawyer's fee for representing an insured, normally the insured has consented to the arrangement by the terms of the insurance contract.

Prospectively Limiting Liability

6. Paragraph (g) is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Acquisition of Interest in Litigation

7. This Rule embodies the traditional general precept that lawyers are prohibited from acquiring a proprietary interest in the subject matter of litigation. This general precept, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for contingent fees set forth in Rule 1.04 and the exception for certain advances of the costs of litigation set forth in paragraph (d). A special instance arises when a lawyer proposes to incur litigation or other expenses with an entity in which the lawyer has a pecuniary interest. A lawyer should not incur such expenses unless the client has entered into a written agreement complying with paragraph (a) that contains a full disclosure of the nature and amount of the possible expenses and the relationship between the lawyer and the other entity involved.

Imputed Disqualifications

8. The prohibitions imposed on an individual lawyer by this Rule are imposed by paragraph (i) upon all other lawyers while practicing with that lawyer's firm.
Rule 1.09 Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Comments:

1. Rule 1.09 addresses the circumstances in which a lawyer in private practice, and other lawyers who were, are or become members of or associated with a firm in which that lawyer practiced or practices, may represent a client against a former client of that lawyer or the lawyers former firm. Whether a lawyer, or that lawyers present or former firm, is prohibited from representing a client in a matter by reason of the lawyers successive government and private employment is governed by Rule 1.10 rather than by this Rule.

2. Paragraph (a) concerns the situation where a lawyer once personally represented a client and now wishes to represent a second client against that former client. Whether such a personal attorney-client relationship existed involves questions of both fact and law that are beyond the scope of these Rules. See Preamble: Scope. Among the relevant factors, however, would be how the former representation actually was conducted within the firm; the nature and scope of the former client's contacts with the firm (including any restrictions the client may have placed on the dissemination of confidential information within the firm); and the size of the firm.

3. Although paragraph (a) does not absolutely prohibit a lawyer from representing a client against a former client, it does provide that the latter representation is improper if any of three circumstances exists, except with prior consent. The first circumstance is that the lawyer may not represent a client who questions the validity of the lawyer's services or work product for the former client. Thus, for example, a lawyer who drew a will leaving a substantial portion of the testator's property to a designated beneficiary would violate paragraph (a) by representing the testators heirs at law in an action seeking to overturn the will.
Paragraph (a)'s second limitation on undertaking a representation against a former client is that it may not be done if there is a reasonable probability that the representation would cause the lawyer to violate the obligations owed the former client under Rule 1.05. Thus, for example, if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information under Rule 1.05 (b)(1) or an improper use of such information to the disadvantage of the former client under Rule 1.05 (b)(3), that representation would be improper under paragraph (a). Whether such a reasonable probability exists in any given case will be a question of fact.

4A. The third situation where representation adverse to a former client is prohibited is where the representation involves the same or a substantially related matter. The "same" matter aspect of this prohibition prevents a lawyer from switching sides and representing a party whose interests are adverse to a person who sought in good faith to retain the lawyer. It can apply even if the lawyer declined the representation before the client had disclosed any confidential information. This aspect of the prohibition includes, but is somewhat broader than, that contained in paragraph (a)(1) of this Rule. The "substantially related" aspect, on the other hand, has a different focus. Although that term is not defined in the Rule, it primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person. It thus largely overlaps the prohibition contained in paragraph (a)(2) of this Rule.

5. Paragraph (b) extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing. Thus, for example, if a client severs the attorney-client relationship with a lawyer who remains in a firm, the entitlement of that individual lawyer to undertake a representation against that former client is governed by paragraph (a); and all other lawyers who are or become members of or associated with that lawyer's firm are treated in the same manner by paragraph (b). Similarly, if a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyers new firm are treated in the same manner by paragraph (b).

6. Paragraph (c) addresses the situation of former partners or associates of a lawyer who once had represented a client when the relationship between the former partners or associates and the lawyer has been terminated. In that situation, the former partners or associates are prohibited from questioning the validity of such lawyers work product and from undertaking representation which in reasonable probability will involve a violation of Rule 1.05. Such a violation could occur, for example, when the former partners or associates retained materials in their files from the earlier representation of the client that, if disclosed or used in connection with the subsequent representation, would violate Rule 1.05(b)(1) or (b)(3).

7. Thus, the effect of paragraph (b) is to (a) extend any inability of a particular lawyer under paragraph (a) to undertake a representation against a former client to all other lawyers who are or
become members of or associated with any firm in which that lawyer is practicing. If, on the other hand, a lawyer disqualified by paragraph (a) should leave a firm, paragraph (c) prohibits lawyers remaining in that firm from undertaking a representation that would be forbidden to the departed lawyer only if that representation would violate sub-paragraphs (a)(1) or (a)(2). Finally, should those other lawyers cease to be members of the same firm as the lawyer affected by paragraph (a) without personally coming within its restrictions, they thereafter may undertake the representation against the lawyer's former client unless prevented from doing so by some other of these Rules.

8. Although not required to do so by Rule 1.05 or this Rule, some courts, as a procedural decision, disqualify a lawyer for representing a present client against a former client when the subject matter of the present representation is so closely related to the subject matter of the prior representation that confidences obtained from the former client might be useful in the representation of the present client. See Comment 17 to Rule 1.06. This so-called substantial relationship test is defended by asserting that to require a showing that confidences of the first client were in fact used for the benefit of the subsequent client as a condition to procedural disqualification would cause disclosure of the confidences that the court seeks to protect. A lawyer is not subject to discipline under Rule 1.05(b)(1), (3), or (4), however, unless the protected information is actually used. Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions.

9. Whether the substantial relationship test will continue to be employed as a standard for procedural disqualification is a matter beyond the scope of these Rules. See Preamble: Scope. The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel. See Rules 1.03(b) and 1.06(b).

10. This Rule is primarily for the protection of clients and its protections can be waived by them. A waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate. See Comments 7 and 8 to Rule 1.06.
Prosecutors Pierced Shkreli, Attorney’s Legal Privilege

By Christopher M. Matthews

Documents unsealed this week have offered a glimpse into the government’s investigation of former pharmaceutical executive Martin Shkreli and his one-time lawyer Evan Greebel who were arrested on fraud charges last month.

The documents detail prosecutors’ efforts to get around attorney-client privilege, a powerful legal concept that protects most legal advice, except in certain circumstances including when that advice is in furtherance of a crime. The Brooklyn U.S. Attorney’s office wanted to use that advice to build a criminal case against both men, the documents show.

Days before charging the pair, prosecutors convinced a judge to pierce the legal privilege protecting Mr. Greebel’s legal advice to Mr. Shkreli, and later cited communications between the pair in the indictment that accused them of looting pharmaceutical company Retrophin Inc., where Mr. Shkreli was CEO, to cover losses suffered by in investors in Mr. Shkreli’s hedge funds.
Mr. Shkreli, who resigned as chief executive of Turing Pharmaceuticals shortly after his arrest, faces seven counts of securities fraud and conspiracy, while Mr. Greebel was charged with wire fraud conspiracy. Both men have pleaded not guilty to the charges. Lawyers for both men did not immediately respond to requests for comment.

Mr. Greebel, a corporate partner at law firm Kaye Scholer LLP, advised Mr. Shkreli for five years and also served as a lawyer for Retrophin. Prosecutors have said Mr. Shkreli relied heavily on Mr. Greebel’s advice.

Prosecutors asked U.S. District Judge Jack B. Weinstein in December to compel documents from Retrophin that Mr. Shkreli had claimed to the company were privileged.

Retrophin, which is not accused of any wrongdoing, had earlier waived its own legal privilege and turned over documents from Mr. Greebel that were requested by prosecutors. But it had redacted documents between Mssrs. Shkreli and Greebel on grounds that they might be covered by a separate privilege, because Mr. Greebel had also served as Mr. Shkreli’s personal lawyer.

In a Dec. 3 order, Judge Weinstein ruled the documents were not subject to attorney-client privilege because they may have been part of the two men’s alleged criminal scheme and ordered the company to turn them over.

On Dec. 14, a grand jury indicted the two men.

The indictment cited a series of emails between the two men including several from 2013, when a group of angry investors allegedly demanded their money from Mr. Shkreli. According to prosecutors, the two men ultimately decided to pay the investors back with sham consulting agreements to Retrophin.

In an October 2013 email cited by prosecutors, Mr. Shkreli questioned the approach, “Why would it need to be a consulting agreement???”

Mr. Greebel wrote back, “We can call it a settlement agreement, but given [the auditor’s] recent behavior they may require it to be disclosed in the financials. I was trying to prevent that issue.”

Mr. Shkreli gained notoriety last year when he raised by more than 50-fold the price of a drug that treats a potentially deadly parasitic infection.
IV. Yellow Flag Checklist

Although legitimate clients might display one or more of these characteristics, this list recites warning signs that can indicate potential trouble and generally warrant further investigation.

I. The prospective client’s resources, history, and character

- Companies that lack the financial wherewithal to pay the firm
- Recent or frequent changes in lawyers, accountants, or auditors, especially if in the middle of the pending case or transaction. (This becomes a red flag if the prospective client will not permit the firm to speak with predecessor counsel.)
- An important executive recently resigned unexpectedly or without explanation
- Companies with unusually rapid revenue growth, especially through acquisitions
- Business plans or objectives that call for experience, acumen, personnel, capital, or other resources that seem to be beyond the prospective client’s reach
- Dramatic changes in business strategy or line of work, e.g., from real estate developer/promoter to purchaser/operator of investments, banks, or manufacturing
- Individuals living extravagantly or beyond their apparent means with large, conspicuous purchases (e.g., airplanes, yachts, large homes)
- Companies seeking to avoid SEC registration without appropriate reasons
- Off-shore companies
- Clients that have sued other lawyers
- Clients that discourage lawyer queries or respond with inconsistent, incomplete data
- Clients with criminal convictions, findings of civil liability for financial malfeasance, or consent decrees regarding such allegations
- Clients that are not sophisticated consumers of the desired or anticipated legal services
- Clients that are the subject of a whistleblower complaint

II. The proposed representation

A. Other people’s money

- Clients seeking to raise or manage third parties’ money, including investments from foreign (non-U.S.) residents
- Start-up companies seeking to finance operations by means of an initial public or private offering
- Clients seeking to raise new money to retire old debt

B. Dubious deals
- Transactions that have no apparent business purpose
- Transactions that promise high returns, low risks, or little or no taxes
- Transactions promoting exotic investments (e.g., gold bullion, liquor futures, foreign currencies, off-shore investments)
- Transactions at or near the end of reporting periods, such as back-to-back or round-trip transactions

C. Troublesome transfers
- Transfers or diversions of funds or other assets between related entities outside of the ordinary course of business
- Clients that want the firm to “protect their assets” by transferring assets to foreign trusts or other remote entities

D. Problematic investigations
- Internal investigations, especially investigations that may be within the scope of the firm’s prior representation of a client

E. Unsophisticated parties
- Matters in which one or more parties are unsophisticated, not represented by counsel, or both

F. Exigent matters
- Matters with short pending deadlines, especially where the timing exigency is due to the client’s inattention or conscious delay

G. Possible scams
- Non-U.S. clients that present collection matters and then notify the firm that the matter settled quickly, the funds are being sent to the firm, and the firm should take its fee and send the balance to the client

III. The client’s relationship with the firm
- Clients that seek to use the firm’s escrow or other accounts, rather than a bank, to transfer or hold money or other valuables
- Clients that ask the firm to vouch (that is, make statements or representations) to others about the clients’ financial substance, creditworthiness, reliability, or business plan
IV. The client’s relationship with other professionals

- Companies that seek to make a public offering using a small, undistinguished, or otherwise weak underwriting firm
- Issuers of securities in a transaction in which no underwriter or other financial intermediary is present
- Individuals, companies, or other law firms that request the firm to render an opinion where another law firm (sometimes the requesting firm) has declined to do so
- Individuals and companies that want to use lesser-known law firms to give opinions relative to a transaction
V. Speaker Biography

DEBORAH G. SHORTRIDGE

LOSS PREVENTION COUNSEL

ALAS, Inc.

Debby Shortridge received her undergraduate degree with honors from the University of Baltimore in 1980. She graduated from the University of Baltimore School of Law with honors in 1982. For 21 years Debby practiced in the litigation department of a major firm in the mid-Atlantic region. She was serving as General Counsel and Executive General Member of her firm when it merged into a new firm where she became chair of the Ethics Committee. From 2002 to 2003, she was Chair of the Professional Ethics Committee of the Bar Association of Baltimore City. Until December of 2003, she served as Loss Prevention and Claims Counsel at her firm.

In January of 2004, Debby assumed the position of Loss Prevention Counsel at Attorneys’ Liability Assurance Society, Inc., a Risk Retention Group (ALAS). ALAS is a mutual insurance company that provides lawyers’ professional liability insurance to more than 58,000 lawyers. Debby’s responsibilities include speaking and writing on topics related to professional responsibility and lawyer liability.