

CONFLICTS

PMBR WORKING GROUP #4

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Introduction:

Our Process, and Unresolved Issues

- Conflicts are substantive and require fact-specific analysis. General citations to Colorado Rules of Professional Conduct, comments, and case law are helpful, but are only the starting point of any analysis
- When analyzing conflict-related issues and providing guidance to practitioners, consideration must be given to what the Rules require and then the elevated level of best practices
- How will the legal community use this resource?
 - As a way to flag issues?
 - As a resource to identify weaknesses/gaps in the practitioner's current conflict check system?
 - As a source that will refer practitioners to other sources? If so, how will those sources be kept current?

<p>I. Why should you care about conflicts?</p>	<p>Consider:</p> <ul style="list-style-type: none"> *Fee forfeiture *Disqualification from litigation *Malpractice claims *Discipline
<p>II. Do you have a process by which you identify conflicts?</p>	<p>Colo. RPC 1.7, cmt. [2]</p>
<p>A. Have you clearly identified who is, and who is not, the client – particularly for clients who are business entities?</p>	<p>Colo. RPC 1.7 & cmts. [2], [27], [34]; Colo. RPC 1.13(a) & cmts. [1]-[2], [10]-[11]; CBA Formal Ethics Op. 120</p>

B. Do you have a system for detecting conflicts? Does it include:

- **Names of clients & matters**
- **Names of adverse parties**
- **Names of related parties (witnesses, experts, insurance carriers, family members, co-counsel, opposing counsel, related entities, owners of business entities)**
- **Names of potential/rejected clients & matters**
- **Dates matters were active/closed/rejected**
- **Names of timekeepers who worked on particular matters**

Colo. RPC 1.7, cmt. [3]; Colo. RPC 5.1(a) & cmt. [2]

C. Does an attorney (as opposed to a staff person) review each new matter to identify conflicts?

D. Is the conflicts check updated regularly as new parties are identified and new names are added to the system?

E. Does the firm use engagement letters and disengagement letters appropriately?

F. Are you engaged in any of the following common conflict situations?	
1. Being adverse to a current client in any matter, however unrelated	Colo. RPC 1.7(a)(1) & cmt. [6]-[7]
2. Being adverse to a former client in a substantially related matter	Colo. RPC 1.9(a) & cmts. [1]-[3]; CBA Formal Ethics Op. 57
3. Representing multiple clients in a single matter	Colo. RPC 1.7(a)(2) & cmts. [23], [27]-[33]; Colo. RPC 1.8(g) & cmt. [13]; Colo. RPC 1.13(g) & cmt. [12]; CBA Formal Ethics Ops. 57, 58, 68
4. Conflicts resulting from dealings with prospective clients that do not mature into engagements	Colo. RPC 1.18
5. Personal interest conflicts, including but not limited to: business transactions with clients; gifts from clients; providing financial assistance to clients; sexual relationships with clients?	Colo. RPC 1.7(a)(2) & cmts. [8], [10]; Colo. RPC 1.8 and all related comments; CBA Formal Ethics Ops. 57, 82, 110

<p>G. Do any of your cases involve payment of fees by a third party, including insurance carriers?</p>	<p>Colo. RPC 1.7(a)(2) & cmt. [13]; Colo. RPC 1.8(f) & Cmts. [11]-[12]; CBA Formal Ethics Ops. 43, 91, 107</p>
<p>H. Are you working on any cases in which you might be called as a witness?</p>	<p>Colo. RPC 3.7 & cmts.; CBA Formal Ethics Op. 57;</p>
<p>I. Are you engaged in any matter in which you might have a positional conflict?</p>	<p>Colo. RPC 1.7, cmt [24]</p>
<p>J. Have you considered conflicts that might arise from your use of contract attorneys, outsourcing, or office-sharing?</p>	<p>Colo. RPC 1.9(b) & cmts. [4]-[9]; Colo. RPC 1.10(b), (e) & cmts. [4]-[5]; CBA Formal Ethics Ops. 13, 89, 105, 116, 121</p>
<p>K. Are you engaged in any representation in which conflicts are imputed to you?</p>	<p>Colo. RPC 1.10(a) & cmts. [1]-[2]; see also Colo. RPC 1.8(k) & cmt. [20]</p>

III. If you have a matter involving a conflict, or potential conflict, is the conflict consentable?	Colo. RPC 1.7, cmts. [2], [14]-[15]; Colo. RPC 1.9(a) & cmt. [9]; Colo. RPC 1.10(c) & cmt. [6]
A. Is the conflict a type that is absolutely non-consentable:	
1. Representing two clients on opposing sides in a litigation matter	Colo. RPC 1.7(b)(3) & cmts. [17], [23]
2. Representations prohibited by law	Colo. RPC 1.7(b)(2) & cmt. [16]
3. Ordinarily, representing criminal co-defendants	Colo. RPC, cmt. [23]

B. If not, in your judgment:

1. Do you “reasonably believe[] that [you] will be able to provide competent and diligent representation” despite the conflict? [Colo. RPC 1.7(b)(1)]

Colo. RPC 1.7(b)(1) & cmt. [15]

2. Have you given serious consideration to what could go wrong due to the conflict? Have you resisted the natural desire to accept new work, thus, the natural inclination to minimize conflicts?

IV. If you have a conflict, but it is consentable, have you obtained valid consent?	Colo. RPC 1.7, cmt. [2]
<p>A. Have you obtained “informed” consent, in which the prospective client has agreed to the conflict “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct”?</p> <ul style="list-style-type: none"> ➤ Does the prospective client have the capacity to consent? ➤ Were you able to provide adequate information to obtain an informed consent while complying with Colo. RPC 1.6? ➤ In dual representation, have you explained the effect of the consent on the attorney-client privilege and confidentiality of client information? 	Colo. RPC 1.7(b)(4) & cmt. [18] and [19]; Colo. RPC 1.9(a); Colo. RPC 1.10(e); Colo. RPC 1.7, cmts [22], [30]-[31]
B. Was the consent “confirmed in writing”?	Colo. RPC 1.7(b)(4) & cmt. [20]

V. If you have a conflict, but it is consentable, and you have obtained consent, do you need to erect a confidentiality wall?	Colo. RPC 1.10(e); Colo. RPC 1.11(b)
VI. Are you continuing to assess potential conflicts as the representation progresses?	
A. Are there new circumstances, including: a change in the fee structure; your acquisition of an interest in the client's property; new parties, witnesses, counsel, etc.; or divergence of interests in multi-party representation, that create a new conflict that did not exist at the start?	See above at §II(F).
B. Is the new conflict consentable?	See above at §III.
C. If it is consentable, have you obtained informed consent?	See above at §IV.

D. If the new conflict is not consentable or consent cannot be obtained:

1. Have you taken steps to withdraw?

Colo. RPC 1.7, cmt. [4]; Colo. RPC 1.16(a)(1) & cmt. [2]

2. In a litigation matter, have you obtained court approval?

Colo. RPC 1.16(c) & cmt. [3]

QUESTIONS?