
# A LAWYER'S ETHICAL DUTIES TO PAST, PRESENT AND POTENTIAL CLIENTS

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**Kentucky Bar Association**

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**ETHICAL DUTIES TO PAST, PRESENT, AND PROSPECTIVE CLIENTS: BEST PRACTICES & POTENTIAL PITFALLS**

Richard H.C. Clay, J. Tanner Watkins, and R. Brooks Herrick

## I. INTRODUCTION

While lawyers across Kentucky practice in a variety of different areas, and serve myriad roles to their clients, one common issue we all face, increasingly, on an almost daily basis, are ethical dilemmas. The duties to clients – past, present and prospective – routinely present ethical dilemmas that are universal in practice – whether that be in private practice – large multi-office firms, mid-sized firms, or small firms – or as a government lawyer.

Ethical dilemmas can be particularly distracting. Typically, we can't bill for the time we spend determining whether a conflict exists, and conflicts issues tend to arise when we are in the middle of working on another client's issue. Yet, determining whether conflicts exist can be intrinsically interesting, and is, undoubtedly, indispensable to running a law office. Furthermore, decisions related to conflict issues are often made with a degree of fear and can lead to sleepless nights due to the ripple effect such decisions have on clients and on the colleagues in our firms.

To minimize these fears and the sleepless nights, we recommend that every law firm have a designated ethics partner. Depending upon the size of your firm, a designated ethics committee is also a great way to divide work, as well as having trusted partners to help make decisions. If you are a solo practitioner, this means you, assisted by trusted lawyers of the bar. Furthermore, when assessing conflicts issues, it is important to remember that non-lawyers, such as paralegals, as well as lawyers in your firm, can create conflicts. *See* KBA Opinion E-308 (Sept. 1, 1985) (determining that the hiring of a new paralegal can create a conflict of interest).

What follows is an outline of what we believe are the most recurring ethical issues that arise when dealing with past, present, and potential clients. This is merely intended to be a starting point and refresher course for ethical issues you may face in your practice. To be fully prepared for potential conflicts that may arise, we all must get our annual ethics credits, pay attention to the Kentucky Rules of Professional Conduct (KRPC), the comments to them, as well as all amendments thereto, seek guidance from KBA Ethics Opinions, and, if still in doubt, obtain rulings from the KBA Ethics Hotline.

## II. WHAT IS A CONFLICT?

At the outset, it is very important to understand what constitutes a conflict – or maybe, more importantly – what is not a conflict. For many years, attorneys throughout the Commonwealth did their best to avoid an "appearance of impropriety," so as not to harm the public trust in the legal profession. Indeed, for some time, a mere "appearance of impropriety" was enough to have a lawyer disqualified from representation. *See* Lovell v. Winchester, 941 S.W.2d 466, 469

(Ky. 1997) ("[T]he mere appearance of impropriety is just as egregious as any actual or real conflict.").

However, just last year, in Marcum v. Scorsone, 457 S.W.3d 710 (Ky. 2015), the Kentucky Supreme Court explicitly rejected the "appearance of impropriety" standard as a basis for disqualification, instead finding that an attorney could only be disqualified if an actual conflict could be found. *Id.* at 717-18.

The Supreme Court based its reasoning on the fact that the "appearance of impropriety" standard does not appear in the Rules of Professional Conduct, "except in commentary *condemning* its use," *id.* at 717 (emphasis in original), that the standard represented little more than subjective discomfort on the part of a former client, *id.*, and that a client's choice in representation should be guarded. *Id.* at 718.

Accordingly, the Kentucky Supreme Court announced that "in deciding disqualification questions, trial courts should apply the standard that is currently in the Rules of Professional Conduct, which at this time requires a showing of an actual conflict of interest." *Id.* Further, before counsel can be disqualified, a trial court must hold an evidentiary hearing and state on the record the actual conflict that requires disqualification. *Id.*

## III. PAST CLIENTS

Rule 1.9 deals with ethical duties owed to past, or former, clients. At its simplest, Rule 1.9 provides that, without the former client's written, informed consent, an attorney cannot represent a new client in the same or a substantially related matter to that in which it represented the past client if the new client's interests are materially adverse to those of the past client. While this seems simple enough, Rule 1.9 can present intriguing challenges.

### A. Is This a Past Client?

An initial, crucial question must be asked when dealing with past, or former, clients. Is this really a former client as defined by Rule 1.9? Typically, whether a client is a "former" client will depend on the reasonable belief of the client. Thus, a disengagement letter can be as important as an engagement letter.

For example, a will is written containing a generation skipping trust. No disengagement letter is sent to the elderly client. Over the years, Congress changes the GST exemption in such a manner that the testator's intent may suddenly have been wiped out by the increased exemption, so that suddenly one group of beneficiaries is cut out in favor of a younger generation. In the absence of a disengagement letter, does the lawyer have a continuing obligation to contact the elderly client and advise him of the effect of the changes? More than likely, yes.

Thus, the best practice is to send a disengagement letter when you have completed a matter for a client. This will prevent any argument that you

owe the client the duties owed to a current client under Rule 1.7, rather than the duties owed to a former client under Rule 1.9.

B. Conflict Created by a New Client

Another important issue covered by Rule 1.9 is what happens when a conflict arises for a new client due to a matter that was handled for a former client by another member of the firm. This situation creates two issues. First, is the matter the "same or substantially related matter in which the person's interests are materially adverse to the interests of the former client"? And, if so, will the former client sign a written waiver? Under this scenario, written, informed consent by the former client is required.

Importantly, a waiver is required only if the matters are the "same or substantially related." Comment 3 to Rule 1.9 provides that matters are "substantially related" if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." If you determine, in this highly factual inquiry, that the matters are not substantially related, Rule 1.9 does not require a waiver letter.

## IV. PRESENT CLIENTS

Without a doubt, the majority of our conflict issues arise out of current clients and involve whether a conflict is indeed a conflict, and, if so, whether it can be waived by both sides. Here, we start our analysis with Rule 1.7.

Rule 1.7(a) forces us to analyze factually intensive questions that present grey areas. Is the conflict a concurrent one involving representation of one client directly adverse to another? Is there a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or the lawyer's personal interest? These questions make cross examination of one's partners (and one's self) critical.

If this cross examination reveals a conflict, Rule 1.7(b) provides the circumstances under which a lawyer may represent a client notwithstanding a concurrent conflict. Is the lawyer able to render competent and diligent representation to each affected client? Is the representation not prohibited by law? Does the representation not involve the assertion of a claim by one client against another client represented by the lawyer or the lawyer's firm in the same litigation? Has each client given informed consent, based on an explanation of the facts and ramifications, confirmed in writing?

Too often, attorneys hear "directly adverse" and think of litigation, but it should be remembered that "directly adverse" can apply to commercial negotiations as well. *See* KRPC 1.7 cmt. 26-28. An example of direct adversity in a commercial negotiation is provided by Conrad Chevrolet, Inc. v. Rood, 862 S.W.2d 312 (Ky.

1993). In that case, an attorney represented Rood, her husband, and a car dealership, Conrad. The car dealership was seeking to sell a franchise to Rood and another entity, Blackhorse. Thus, the attorney's clients were both the seller and the purchaser in the transaction at issue.

The Kentucky Supreme Court, interpreting KRPC 1.7(b), stated:

> McKinstry . . . had information with respect to the financial condition of Blackhorse, and disclosure of that information was essential to Conrad, just as it was essential to Blackhorse for it not to be revealed. . . . There could be no consent because McKinstry had an obligation under the rule to withdraw from representing both.

*Id.* at 314.

Thus, this factual situation in a commercial negotiation presented an example where direct adversity resulted in a non-waivable conflict for the attorney, McKinstry.

Additionally, it should always be considered whether cross-examining a current client in an unrelated matter or taking discovery from a current client will create "direct adversity" that could lead to a conflict.

In Jaggers v. Shake, 37 S.W.3d 737 (Ky. 2001), the Kentucky Supreme Court had the occasion to determine whether an attorney cross-examining a client of an attorney in the same firm in a completely unrelated litigation was a conflict that required disqualification under Rule 1.7. The Kentucky Supreme Court determined that, under the facts of this case, disqualification was not required. *Id.* at 740. However, out of an abundance of caution, this case should not be read as always allowing an attorney to cross-examine her own client in an unrelated litigation, without the creation of a conflict. First, in this case, the client was being cross-examined by an associate of the attorney that the client had hired in the unrelated litigation, not the attorney actually representing the witness, and, second, the client whom the associate was representing had expressly waived any conflict. *Id.*

While this discussion focuses on conflicts represented in Rule 1.7, the specific rules for potential conflicts that are set forth in Rule 1.8 should not be forgotten. For example, these rules specify what a lawyer must do if entering into a business relationship with a client; soliciting gifts from a client; and providing financial assistance to a client in relation to litigation, just to name a few.

Rule 1.8(f), which governs an attorney's ethical duties when someone other than the client is paying the attorney's bills, is of particular importance. If someone other than the client is paying the bills, the Rules require that the client give informed consent; that there be no interference with the lawyer's independence; and that the client's information be protected according to Rule 1.6.

While this scenario can occur in any situation, this Rule is most likely to create problems when the client's bills are being paid by an insurance company.

Attorneys representing an insured should always keep Rule 1.8 in mind, and should review the many Ethics Opinions that have been rendered on this relationship. *See*, *e.g.*, KBA Ethics Op. E-416 (Mar. 1, 2001) (setting forth when an attorney may accept a case with guidelines provided by an insurance company); KBA Ethics Op. E-409 (Sept. 1, 1999) (explaining the duties of an attorney if they are aware an insurance company is forwarding legal bills to an outside auditing firm); KBA Ethics Op. E-378 (Mar. 17, 1995) (opining that an attorney may not represent both the insurer and insured when UCSPA claims are made).

A. Corporate Affiliate Conflicts

One increasingly common potential conflict between current clients arises when one lawyer in a firm represents a corporation, while another is asked to represent a subsidiary of that corporation or an otherwise affiliated organization. Comment 34 to Rule 1.7 provides that representation of both the corporation and the affiliated organization is not barred, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, or there is an understanding that the lawyer won't represent affiliates, or the lawyer's obligations to one other client could materially limit her representation of the other. The answers to these questions often lie in the degree of relationship and the amount of control exercised by one client over the other within the corporate umbrella.

Due to the fact that these questions are fact intensive, and courts could analyze these issues in a number of different ways, the best practice when running a conflicts check in this situation is to include the parent corporation and all subsidiaries in the conflict check.

Importantly, when representing a corporation, it is imperative that you remember that the entity is the client, not its employees, executives, or board of directors, especially if there is a potential that any of these individuals could be adverse to the entity represented. *See* KRPC 1.13. However, if the attorney can competently represent both the entity and an employee, executive, or director, then the attorney may do so, subject to the conflict rules set forth in Rule 1.7. *See* KRPC 1.13(g). In the event there is a waivable conflict, you must ensure that the conflict is waived by an appropriate individual with the entity, and not by any of the individuals that will be represented. As a matter of best practices, we would suggest that the waiver on behalf of the entity be provided by an official of the entity that does not work closely with the individual that will be represented. You should also ensure that any engagement letter includes language related to joint representation, which is discussed below.

B. Joint Representation and Waivers

Frequently, we are asked to represent more than one client in the same litigation. When this occurs, conflicts can easily arise, foreseeable or not. This can create a trap for the unwary, but a carefully crafted joint representation letter can help you avoid a potential ethics violation. For

example, let's assume that a lawyer represents a corporate client and during the course of a litigation is asked to represent an employee whose negligence contributed to the claim. A settlement conference looms. The corporation makes it clear that it wants to settle, but the employee will not. This places the litigator in an insuperable position, especially if settling for the corporation will leave the employee dangling like a participle.

However, a carefully crafted joint representation letter, one signed by a representative of the corporation and one signed by the employee, that is obtained prior to accepting representation of both the corporation and employee can make clear in advance that if a corporation takes one position and the individual client another, the lawyer has the right to withdraw from representing the individual and continue with the representation of the corporation. Absent this agreed upon right to withdraw, you will likely be forced to withdraw from representing both clients.[1] Furthermore, any joint representation letter should also take into account what will happen if a client decides to revoke its consent to the waiver. *See* An Unnamed Atty. v. Ky. Bar Ass'n, 186 S.W.3d 741, 743 (privately reprimanding an attorney where the attorney undertook joint representation without "a full explanation of all foreseeable ramifications").

C. Joint Defense Agreements

Joint defense agreements can be very useful in developing a case by way of exchanging information, building facts, sharing discovery responses, or strategizing for trial. However, if not executed properly, entering into a joint defense agreement can put you into quite the ethical dilemma.

All joint defense agreements should include waiver/non-disqualification provisions so that if a party leaves the litigation through settlement, or simply wants to opt out of the joint defense agreement, the other parties to the agreement will not be prejudiced.

For example, a group of defendants in a trust dispute enter into a joint defense agreement in order to discuss litigation strategy, share documents, and divide up the labor on briefing. For one reason or another, one of the parties opts out of the agreement. Her counsel learned things in the meetings that were subject to the attorney-client privilege and the work product doctrine. The attorney's client wants to use them at trial against the other parties to the agreement in order to prevail on an apportionment instruction. Fortunately for those remaining in the joint defense arrangement, the client leaving the joint defense agreed to the privilege as part of the joint defense agreement and won't be able to use the documents. The other parties remaining in the agreement consider moving to disqualify the departing counsel from representing his client because they claim he is conflicted based on what he learned while under the tent. In the absence of a provision in the agreement waiving

[1] For similar issues related to the representation of aggregate or class plaintiffs, *see* KRPC 1.7 cmts. 29-33.

such a future conflict, they may be on solid ground. These are simply examples of why joint defense agreements, while sometimes useful, need to be carefully considered and written with the future twists and turns of litigation in mind.

D. Storing Confidential Client Information on the "Cloud"

Recent technological advances have provided new and exciting ways for us to better serve our clients. However, the same technology can provide ethical nightmares, especially when attempting to apply ethical rules drafted without these specific technologies in mind. Luckily, applying the Rules with a bit of common sense, and in conformance with KBA Ethics Opinions allow us to ethically use this new technology.

Specifically, using "cloud" storage to store confidential client information can pose specific ethics issues as it relates to the duty to protect the confidential information of your client.

The KBA Committee on Ethics and Unauthorized Practice of Law has opined that:

> Use of this [cloud] technology by a lawyer is ethically proper if the lawyer abides by the Rules of Professional Conduct by safeguarding client confidential information, by acting competently in using cloud computing services, by properly supervising the provider of the cloud service, and by communicating with the client about use of cloud services when such communication is necessary given the nature of the representation.

KBA Ethics Op. E-437, at 4 (Mar. 21, 2014).

Further, the attorney should perform an investigation of the possible cloud storage providers, specifically the provider's qualifications, reputation, and longevity, as well as carefully reviewing the terms of any arrangement to ensure that any agreement entered into complies with the ethical duties owed to clients. *Id.*

## V. PROSPECTIVE CLIENTS

Duties to prospective clients are governed by Rule 1.18 and can be a trap for the unwary. Any person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client – regardless of whether a relationship ensues. Under Rule 1.18, all discussions with the "prospective client" must be kept confidential, unless Rule 1.9 would allow disclosure of the information with respect to a former client. However, comment 5 to Rule 1.18 allows a lawyer to condition conversations 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. And, if the agreement so provides, the prospective client may also

consent to the lawyer's subsequent use of information received from the prospective client.

If you decide not to take on the prospective client as a current client, subsections (c) and (d) of Rule 1.18 discuss whether another member of your firm may represent a client with interests that are adverse to those of the potential client. The answer distills down to whether you received disqualifying information – information that would be "significantly harmful" to the prospective client "in the matter" – obtained when interviewing the prospective client. If so, another attorney in your firm can only represent a party adverse to the prospective client if (1) both the affected client and the prospective client give written, informed consent; you, the lawyer interviewing the prospective client, took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary; the disqualified lawyer is screened from the matter and apportioned no fee therefrom; and the prospective client is provided written notice of the screening measures taken.

To protect yourself and your firm, if possible, the best practice is to have an initial call or meeting with the prospective client where you only obtain enough information to run a conflicts check. Only after the conflict check has cleared should you interview the prospective client. Further, in the initial interview it is important to set guidelines and parameters so that you make clear to the client that you only intend to learn enough information to determine whether you intend to represent the prospective client. Setting out these guidelines, preferably in written communication can help alleviate the risk that the client will think an attorney-client relationship has been formed, and will minimize the risk to you based on the fact that an attorney-client "relationship may be established by the client's reasonable and detrimental reliance on the lawyer to provide legal services." KBA Opinion E-316 (Jan. 1, 1987).

## VI. IMPUTATION OF CONFLICTS

Under Rule 1.10, conflicts of a single lawyer are imputed to an entire firm. Thus, the avoidance of conflicts is key. At its simplest, Rule 1.10 provides that if any one attorney in a firm would be precluded from representing a client under Rule 1.7 or 1.9 the entire firm is disqualified, unless the conflict is due to a personal interest of the attorney. However, the affected client may waive any such conflict if it complies with Rule 1.7.

Furthermore, if an attorney is conflicted due to representation of a former client, the firm itself is not disqualified from representation if the affected attorney is screened from participation in the matter; is apportioned no part of the fee from the representation; and written notice is given to the former client.

You must be especially cognizant of an imputation of a conflict when you are considering hiring a new attorney. If your firm is considering adding new lawyers, we believe best practices not only consist of very thorough conflicts checks, but also a great deal of conversation with potential new hires – and not just for actual or potential client conflicts, but also for the more esoteric issues conflicts. Such as, has the lawyer or the group represented clients traditionally hostile to a firm's

existing clients, or argued key issues that are antithetical to issues currently being handled by the firm?

The imputation of conflicts and negotiation for employment of a new attorney becomes especially important if the potential new hire represents a client that is directly adverse to a firm client, or currently works for a firm that represents a client directly adverse to one of your firm's clients.

KBA Ethics Opinion E-399, which governs employment negotiations for attorneys in private practice, opines that a "lawyer who is actually involved in the representation of one of the adverse clients or who has actual knowledge of information protected by Rules 1.6 and 1.9(b) should not participate in such negotiations without the consent of the lawyer's client obtained after appropriate consultation." KBA Opinion E-399 (May 1, 1997).

Even if a lawyer does not represent a client and has no confidential information, best practice is still to take steps to ensure that a conflict cannot be alleged. In fact, KBA Ethics Opinion E-399 suggests that, in some situations, disclosure may also be required in this situation. "If the lawyer is not involved in the matter and has no actual knowledge of information protected by Rules 1.6 and 1.9(b), there may still be an arguable question of professional duty, depending on the size of the firms involved, the importance of the matter, or other circumstances." *Id.* Accordingly, disclosure of the move should likely be made as a matter of best practice, and, at the very least, "the lawyer seeking employment should consider consulting with [another] member of his or her firm." *Id.*

## VII. CONTRACT LAWYERS

As clients become more and more cost conscious, and we as lawyers look for ways to keep our quality of work high and the costs to our clients low, ethical issues surrounding the use of lawyers or non-lawyers on a contract basis will likely increase. For example, in litigation with a large volume of documents, more and more document review services are popping up, and more law firms contract with lawyers to perform discrete tasks related to litigation.

It is very important to note that when contract lawyers or non-lawyers are used, the ethical rules governing lawyers still apply in full force. Guidance for how to deal with these situations can be found in Oliver v. Bd. of Governors, Ky. Bar Ass'n, 779 S.W.2d 212 (Ky. 1989), which provided an outline of ethical issues surrounding the use of temporary lawyer services.

Oliver makes clear that even when using temporary lawyers, the ethical rules governing conflicts still apply. *Id.* at 217-219. Thus, prior to entering into any contract with a party to perform services that would typically be handled by the firm, it is imperative that you ensure the party with whom you are contracting does not have a conflict, either with a current or former client. Furthermore, if there is a conflict, careful consideration should be paid to whether waiver of the conflict is possible, and whether Rule 1.10 would impute any such conflict to the entire firm, which could ultimately lead to you and/or your firm being disqualified from the matter. Moreover, as a matter of best practice, it is always imperative to

consult with your client and get their blessing, preferably in writing, to hiring an outside contractor to perform services on their case.

## VIII. CONFLICT RULES FOR JUDGES, ARBITRATORS, AND MEDIATORS

If you are a former judge, or serve as an arbitrator or mediator to a matter, Rule 1.12 provides special conflicts rules that must be followed. First, and foremost, any adjudicative officer, or a law clerk to such a person, may not represent any party in a matter in which he or she participated "personally and substantially," unless all parties give written, informed consent.[2] Rule 1.12(a).

Furthermore, the conflict of the former adjudicative officer will be imputed to his or her law firm, unless the former adjudicative officer is screened; apportioned no fee from the representation; and written notice is promptly given to all parties and *any* appropriate tribunal. Rule 1.12(c).

## IX. MAKING A CONFLICTS DECISION

A majority of state and federal courts hold that oral and written communications with a firm's ethics partner are privileged under the attorney-client privilege and the work product doctrine. Thus, we believe the best practice is to have the potentially conflicted lawyer outline, in writing, the facts and circumstances about which they inquire, even if it has already been explained orally. Frequently, a decision must be made on an emergency basis, and sometimes the determination must be made orally. However, it is best practice to give a written response to an inquiring attorney (or justify your reasoning if a solo practitioner) and retain a copy of all of your notes and decisions.

Then, if you determine a waivable conflict exists, a carefully crafted conflicts letter must be drafted to ensure that all affected parties are aware of the conflict. Without a doubt, you should ensure that you keep a copy of the letter sent to all of the affected parties and that you keep a copy of the signed letter that is returned to you.

Furthermore, we believe that, if a conflict exists, it is best practice to utilize an ethical screen, even in situations when it is not required by the KRPC. Screens should be both physical and electronic, and the lawyers and staff involved should be instructed in writing not to discuss.

## X. DECLINING OR TERMINATING REPRESENTATION

We all want more clients. We all love to be loved by our clients. However, sometimes, due to conflicts, or otherwise, we are required to decline or terminate representation of a client. To avoid potential headache, it has become increasingly necessary to become more careful about screening potential clients for potential problems. These precautions notwithstanding, occasionally withdrawal is necessary either because of a client's lack of cooperation that renders the representation unreasonably difficult; failure to pay a fee; asking a

[2] The Rules do create an exception for an arbitrator selected as a partisan of a party in a multimember arbitration panel. *See* KRPC 1.12(d).

lawyer to further work that is ostensibly criminal or fraudulent; or insisting on a course of conduct the lawyer finds repugnant.

In these circumstances, Rule 1.16 provides the ethical duties of a lawyer. Particular attention should be paid to subsection (d) of Rule 1.16, which provides the steps that should be taken for the client's protection when terminating the representation. For example, failure to surrender the client's papers can lead to a suspension of one's license to practice law. *See* Ky. Bar Ass'n v. Leadingham, 329 S.W.3d 679 (Ky. 2011).

In circumstances where withdrawal is required, we believe the best practice is to withdraw in the form of a very carefully drafted withdrawal letter, with ample notice to the client and ensuring that appropriate motions are filed before any tribunal. *See* KRPC 1.16(c).

Significant issues with terminating the representation of a current client can also be raised when an attorney changes law firms. In Ky. Bar Ass'n v. An Unnamed Atty., 205 S.W.3d 204 (Ky. 2006), the Kentucky Supreme Court rejected the broad duty of notification set forth in KBA Ethics Op. E-424, and adopted "the ABA view that such a duty of notification arises when the departing attorney 'is responsible for the client's representation or . . . plays a principal role in the law firm's delivery of legal services currently in a matter." *Id.* at 209 (*quoting* ABA Formal Op. 99-414).

While the Kentucky Supreme Court may have rejected the broad duty of notification set forth in KBA Ethics Op. E-424, we believe the Opinion sets forth good guidelines for notification when an attorney leaves a law firm. For example, when giving notice to current clients, notice should likely be in writing; the communication should not urge the client to terminate his or her relationship with the law firm, but may indicate that the departing lawyer is willing to continue representation; the communication should clearly state that the client retains the decision to determine who will represent him or her in the future; and the communication should not be disparaging in any way. KBA Ethics Op. E-424, at 7 (Mar. 1, 2005).[3]

Another issue that can arise from ending the client-attorney relationship is retention of the client's file. KBA Ethics Opinion E-436 advises that all closed client files should be retained for at least five years. However, the Opinion also notes that there may be situations where a closed file should be retained for longer than five years. KBA Ethics Op. E-436 (May 17, 2013).

As a matter of best practices, the client should be advised before a file is destroyed, either through an explanation of the file retention policy in an engagement letter or by providing adequate notice to the client before destruction of the file. Furthermore, before destruction of the file "a lawyer must ensure that the file contains no original wills, trust documents, deeds, or other documents that cannot be replaced." *Id.*

[3] It should be noted that similar notification is not required to be given to former clients, although attorneys or law firms may choose to give notice to former clients, while keeping Kentucky's advertising rules in mind. KBA Opinion E-424, at 8-9 (Mar. 1, 2005).

## XI. CONCLUSION

While we started by acknowledging the fear and sleepless nights that conflicts issues can cause, we cannot understate the importance of timely and competently addressing conflicts issues. The ramifications of failing to address conflicts issues run much deeper than potential sanctions that could face a negligent attorney. Our daily professional decisions are quite real and it is through these decisions that we build a lifelong sense of professional integrity. The guidance of the Kentucky Rules of Professional Conduct, which contain a profound degree of wisdom, safety, and comfort, allow all of us to exercise careful, considered, independent judgments that will enhance and maintain the integrity we have all worked so hard to achieve.

**Index 1**
**Disengagement Letter**

Effective Date: _____

Re: ABC Litigation

Dear [*client name(s)*]:

This letter is to confirm that we have concluded our work for XYZ Corporation on the lawsuit referenced above. Enclosed for your file is a copy of the Stipulated Order of Dismissal as entered by the court.

We consider this matter closed. We are returning herewith the originals of the documents and materials you supplied to us. Unless otherwise requested, we will retain for at least ___ years any files concerning this matter that belong to XYZ Corporation. After that time, we reserve the right to dispose of them without further notice.

I am pleased that we were able to represent XYZ Corporation. It has been a pleasure working with you. If there are other matters in the future on which our firm can be of assistance, please do not hesitate to contact us.

Very truly yours,

_____
[*Firm Lawyer*]

**Index 2**
**Waiver Letter for Past Client**

FIRM

DATE

Counsel | Law Department
NAME
ADDRESS

Re: _____

Dear _____:

It has been brought to my attention that one or more of my partners may have represented one or more of the various entities in which the parties have an interest, or had an interest in the past. In particular, 2 has mentioned that Bob X of my law firm did some corporate work in the past for the entities.

Out of an abundance of caution, I believe it would be wise to address this squarely now. The Kentucky Rule of Professional Responsibility relating to duties to former clients is as follows:

> SCR 3.130(1.9) Duties to former clients
>
> (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.

One of the applicable comments to the Rule states in relevant part:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a business person and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce…Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

I am not aware of any conflict. I identify no conflict of interest for me or my law firm to represent 2 in this dissolution proceeding. Bob X has not represented any of the various entities for a number of years, and we understand that they are in whole or in part represented by John Y of Y, Y and Y.

There is no information that Bob X would have gained from the former representation that can be used to anyone's disadvantage. He and I have agreed not to discuss his prior representation. Whatever files he has have long since been closed. We can have any such files completely screened if Spouse 1 or his counsel believes that we should.

The purpose of this letter is to identify any issue which may exist with conflict of interest early in this representation, and to seek a formal waiver of any conflict by both parties pursuant to Section (b)(2) of the Rule.

2 has indicated that she knows of no conflict of interest, and wants to waive any conflict. Any waiver should be in writing. I expect she would sign this letter.

I send this letter to you, with the request that if your client agrees, you sign as indicated below.

Please respond at your earliest convenience.

Very truly yours,

I HAVE READ THE ABOVE LETTER. I ELECT (PLEASE INITIAL YOUR SELECTION):

____ I WAIVE ANY CONFLICT OF INTEREST FOR Lawyer for 2 and his firm

OR

____ I DO NOT WAIVE ANY CONFLICT OF INTEREST FOR Lawyer 2 and his firm

_____

Name DATE

_____

Name DATE

**Index 3**
**Standard Litigation Waiver Letter**

FIRM

Date _____

Counsel | Law Department
NAME
ADDRESS

Re: Waiver of Consent

Dear _____:

You have retained _____ (the "Firm") to represent ABC in a _____ dispute with XYZ ("XYZ") and ABC. As I mentioned to you previously, the Firm represents XYZ in other matters from time to time, including _____.

Even though you have agreed to waive this conflict, under the Kentucky Rules of Professional Conduct, we believe it is necessary to disclose to you and XYZ that our representation presents a waivable conflict of interest in view of our representation of XYZ on separate, unrelated matters. Accordingly, we need to bring this conflict to your attention as well as the applicable rules that would govern such a conflict.

Specifically, the Firm cannot represent one client who is adverse to another client or potentially adverse to another client without obtaining each client's written consent. Because ABC and XYZ would be "current clients," Supreme Court Rule 3.130(1.7) is the applicable conflict rule under Kentucky law. SCR 3.130 (1.7) of the Kentucky Rules of Professional Conduct provides as follows:

> (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 significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding 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 the tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implication of the common representation and advantages and risks involved.

As you can see, this rule permits the Firm to represent both ABC and XYZ even though there is a conflict if (1) we believe we can provide competent and diligent representation to you and XYZ (1.7(b)(1)); (2) the representation is not prohibited by law (1.7(b)(2)); (3) the representation does not involve the assertion of claims between you and XYZ if both of you are represented by the Firm in the same litigation (1.7(b)(3)); and (4) both you and XYZ consent (1.7(b)(4)).

We believe that the Firm can provide competent and diligent representation to ABC. We have learned nothing from the separate issues handled for XYZ that would have any bearing whatsoever on this _____ dispute. The Firm's representation of ABC and XYZ is not prohibited by law. As such, we believe SCR 3.130(1.7) is satisfied.

XYZ is not represented by the Firm in the _____ dispute. We understand that Mr. A.M. Bush of Maim and Slaughter LLP will represent XYZ in this litigation.

This letter is intended to confirm that we have discussed the conflict of interest with you and that you consent to the Firm's engagement despite our separate representation of XYZ in other matters. This letter will also confirm that the Firm has notified XYZ of these same potential issues and obtained XYZ's consent to our representation of ABC in this matter.

Please verify your consent on behalf of ABC by signing below and returning the original to me.

Please feel free to call me if you would like to discuss any aspect of this letter. Thank you for your consideration.

Very truly yours,

Date

Name
Counsel

**Index 4**
**Standard Waiver Letter with Ethical Screen**

FIRM
Date _____

Counsel | Law Department
NAME
ADDRESS

Re: _____

Dear _____:

Thank you for allowing me to continue representation of this matter through my new firm, _____. This letter will confirm our discussion regarding your engagement of the Firm and will describe the basis upon which we will provide legal services to you.

You have engaged us to represent the Bank in its fiduciary capacity as Trustee of the above-referenced trust regarding actions by the beneficiaries to remove the Bank as Trustee. In addition, there are certain tax matters affecting the Trust, for which we will provide counsel.

We have disclosed to you that certain attorneys of this firm have previously provided counsel to Ms. _____, a remainder beneficiary of this Trust, on matters related to her late grandfather, _____, and in advising her on her expectancies under the _____ Trust under Will. Ms. _____ has agreed to waive any conflict of interest on the condition that an ethical screen is erected between me, the members of my team, and the attorneys who previously represented Ms. _____. In addition, _____ _____ has also waived any conflict arising from this firm's prior representation of Ms. _____, subject to the same ethical screen described above.

Our legal services will be billed to you based on the Firm's standard hourly rates. Those rates currently are $_____ per hour for partners, $_____ per hour for associates, and $_____ per hour for paralegals. We bill our time in 1/10th hour increments. These hourly rates are reviewed and adjusted annually at the beginning of each calendar year.

Additionally, to the extent we incur other expenses for such items as special postage, express mail or deliveries, travel expenses and court costs, the actual costs for these items will be billed to you. No charges for local telephone calls, and fax paper or machine operators are billed to clients. Long distance telephone calls are billed to clients at MCI's standard undiscounted basic plan rates, which are provided by a third party vendor. We use LexisNexis for computer-assisted research, but will not undertake any research which would be billable to you without your prior approval. Postage costs for regular mailings are not charged, unless you ask us to undertake a mass mailing on your behalf. Photocopies will be charged at $.15 per page.

Bills for our legal services, including expenses, will be sent to you on a monthly basis. Payment is due upon receipt of each invoice. You will be responsible for payment

regardless of the outcome of the matter. It is understood that Dinsmore & Shohl reserves the right to withdraw from representing you upon reasonable notice, if its statements for fees and expenses are not paid in accordance with these expectations.

Please review this letter carefully. If it meets with your approval, please sign it and return it with the required retainer, if any, so that we may begin work.

Again, let me thank you for retaining us in connection with this matter. I look forward to working with you.

Very truly yours,

AGREED AND ACCEPTED:

_____
Name

By: _____

Date: _____

**Index 5**
**Letter to Insured Explaining the Tripart Relationship**

FIRM

Date _____

Counsel | Law Department
NAME
ADDRESS

Re: Statement of Insured Client Rights

Dear Mr. _____:

The insurer for the Insurance Company has retained my firm (Dinsmore & Shohl LLP) to represent xxx in defending a claim filed against the plan by xxx in the above-listed case.

Your insurer has agreed to pay the legal fees and expenses to defend the plan in this matter at this point. Your insurer has also notified you separately of its position (a reservation of rights letter noting pertinent limits or restrictions on its payment obligations). To the extent that you have any dispute with your insurer about its payment or policy obligations, neither my firm nor I should represent you or your insurer in that dispute. Rather, we are simply representing you in defending the claim referenced above. For a statement of your rights as an Insured Client, please see the attached Statement of Insured Client rights.

Please contact me if you have any questions. I look forward to working with you to defend the above-listed matter.

Very truly yours,

## STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. Your Lawyer: Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.

2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you – guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.

3. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are

responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring Your Own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

**Index 6**
**Joint Representation Waiver Letter**

FIRM

Date _____

Counsel | Law Department
NAME
ADDRESS

Re: _____

Dear _____:

This letter shall serve to confirm the engagement of _____ LLP to represent XYZ and Pretty Brands, Inc. ("Pretty") in the above referenced Action. As part of our representation, each of you has consented to permitting our firm to act as counsel to both of you at the same time, and also consented to the fact that the representation would change in the event that a conflict should arise.

In order for our firm to represent each of you jointly, it is necessary that each client consent to the multiple representation after communication to you of information reasonably sufficient to permit you to decide whether to grant such consent. This letter will present such information to you.

Joint Representation Agreement and Waiver. As we discussed, each of you could choose to be represented by separate counsel in this matter. You have advised us that there are considerations of cost, as well as strategic advantages for each of you in joint representation. You have also advised us that you have agreed on all material issues concerning this matter.

During the course of our representation, a conflict might arise that would preclude you from having the same counsel. From the information that has been presented to us thus far, it appears that no issues have arisen over you having common counsel. We also understand that XYZ has agreed to indemnify Pretty in connection with any liability Interline may incur for damages related to the product at issue in the above-referenced Action. However, you are aware that the possibility exists that you may have divergent interests in the future (*e.g.* due to a substantial discrepancy in testimony, or differences related to settlement). We are obligated to advise you of the possibility that such conflicts may arise.

You agree that in the event a conflict of interest arises, we may withdraw from the representation of one or more of you as necessary to resolve the conflict. In such event, you agree that we may continue to represent the other, even if, as a result of such withdrawal, we may take positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.

Shared Information. As we discussed, one of the necessary consequences of joint representation of multiple clients by a single lawyer or law firm is the sharing of confidential information concerning the subject matter of the joint representation. You acknowledge and agree that communications between the firm and any or all of you relating to this matter will be treated as confidential and will not be disclosed outside your group without your informed consent or as otherwise permitted by the applicable rules of professional conduct or other law. You also acknowledge and agree that whatever relevant or material communications or information that we receive concerning this matter, including communications from any one of you, will be shared with each of you as we consider appropriate. You further acknowledge and agree that in the event a dispute arises between or among one or more of you, and you are no longer represented by us in this matter, as the result of a conflict of interest or other cause, we may nevertheless use any confidential information we have concerning this matter adversely to you or to the advantage of those we continue to represent in any subsequent negotiation or proceeding relating to this matter.

Withdrawal by Client. Any of you may withdraw from the joint representation at any time for any reason, upon written notice to the firm and the other party to this agreement. You acknowledge and agree, however, that: (1) you will remain responsible for your share of the firm's fees and expenses incurred to and including the date on which notice is received by the firm; (2) you will be responsible for retaining and paying for separate legal representation; and (3) we may continue to represent the others in the group consistent with the other provisions of this letter, even if we may take positions adverse to your interests in any subsequent negotiation or proceeding relating to this matter.

Finally, this confirms that you have been advised and have had the opportunity to consult with a disinterested outside attorney of your choice about the terms and conditions of this agreement.

If this letter does not accurately confirm your understanding of the terms of our representation, please indicate the same to me immediately. Assuming it does accurately reflect your understanding, please so indicate by signing your copy of this letter and returning it to me as soon as possible.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

HAVE SEEN AND CONSENT:

_____ _____
_____ Corp. Date
By:

_____ _____
_____ Date
By:

**Index 7**
**Letter Disengaging from Prospective Client**

Date _____

Mr. John Doe
100 Maple Street
Chicago, Illinois 60603

Re: Declination of Legal Representation

Dear Mr. Doe:

This is to confirm that neither I nor this firm will represent you with respect to the _____ matter. We further confirm that we do not currently represent you in any other matter.

Because we are not representing you on any matter currently, we cannot practically monitor any changes in the law or your circumstances as they might affect the strength of the case we discussed. We must, therefore, disclaim any duty to do so.

Except for the specific information relating to _____, we do not believe that we have obtained any information from or about you or _____ that is confidential. We did no investigation of the facts you described and gave no legal advice with respect to the matter we discussed. If you disagree in any respect with those conclusions, please call me immediately so that we may resolve the point.

[*Alternative*: If you wish to pursue your claim with another lawyer, you will need to act promptly. As we discussed, there may be several important deadlines involved in your claim. Based upon the information you provided to us, the first deadline may be as soon as _____. If you fail to file suit or take other appropriate action in a timely manner, you may lose permanently some, if not all, of your rights.]

We are returning to you the papers and other information that you delivered to us for review in evaluating this matter. As we agreed, there is no charge for our examining the possibility of representing you.

We appreciate your interest in the firm.

Very truly yours,

**Index 8**
**Declined Client Letter/Avoiding Disqualification**

FIRM
Date _____

_____
_____
_____

Re: _____

Dear _____:

This letter follows up on your email to me at _:__ p.m. on _____, 2014, our approximately 25 minute phone call that evening, and my return email to you at _:__ p.m. that same night advising you that my firm will not be able to represent you in your dispute with _____ because my firm has a conflict. Specifically, unbeknownst to me at the time of our conversation in which I, at the outset of our call and once more during our call, requested that you provide me only the information necessary to allow me to run a conflict check, one of my law partners currently represents _____.

This letter will also confirm that during our phone call last night you did not provide me with any "disqualifying information" as defined in Rule 1.18, Rules of the Supreme Court of Kentucky. Also, this will confirm that you did not provide me with any documents related to your dispute and that I advised you that I could not represent you until after our conflict check had cleared.

Please be assured that while I learned nothing disqualifying under Rule 1.18, in an abundance of precaution, both I and my firm are taking prompt steps to erect an ethical screen, both physically and electronically, between me and the lawyer and his team in the firm that are representing _____. In short, I will have no access to any information related to his representation of _____, and he will have no access to any information you provided to me.

Also, be assured that even though none of the information you provided me is disqualifying under Rule 1.18, I have not shared any of the information you provided me with anyone, and I will not share any of the information that you provided me with anyone.

In fact, the only information I shared was the very limited information necessary to run a conflict check and to determine that there was a conflict: That you asked me to represent you in a legal dispute which could be adverse to _____.

Regardless of the instant conflict, I do thank you for your consideration of me and my firm to provide you with legal representation.

Very truly yours,

**Index 9**
**Letter Terminating Representation**

Date _____

Mr. _____
Company
Address

Re: _____

Dear _____:

We are writing to advise you of our firm's decision to withdraw as counsel for Company in the above matter. Our decision is based on an irretrievable breakdown of the attorney-client relationship needed for us to effectively represent Company. Below is a sampling of events that evidence this breakdown:

1. _____.

2. _____.

3. _____.

The above events have eroded the attorney-client relationship between Company and our firm and make it ill-advised if not impossible for our firm to continue representing Company in the above matter. Therefore, our firm intends to withdraw as counsel for Company, and will file a motion to that effect promptly. We will ask that it be heard on Monday, January _, 2016, which should give you ample time to secure new counsel. Under Kentucky Rule of Professional Conduct 3.130(1.16)(b)(1) and (4), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client or if the client takes actions with which the lawyer fundamentally disagrees. We do not believe that our firm's withdrawal will prejudice Company at this stage of the litigation, since deposition discovery has only just begun, and since trial is _____. Please identify as quickly as possible the counsel that you would like to substitute in this case. We will work closely with that counsel to transition the file. We are separately advising Mr. Insurance Adjuster at _____Insurer of our intent to withdraw as counsel.

Very truly yours,