



King County

Office of Public Defense

**Examples of Conflicts of Interest
under the Case Analysis Protocols**

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1. Introduction

2. Applicable Rules

RPC 1.6, 1.7, 1.8, 1.9(a), 1.9(c), 1.10, 1.15(b), (2), (3), (5) and (d), 3.7, 5.1, 5.2, 5.4, 6.2, 6.5,

3. Definitions – Additional Consideration and Examples

Attorney–Client Relationship: An attorney-client relationship can be formed without an attorney being assigned by the court or the Office of Public Defense (OPD) and without the attorney appearing in the matter.

Client: Whether a person actually is a client is independent of whether they have a right to be one, i.e., whether they have a right to counsel.

Current Client: a client in any pending civil or criminal matter. This includes a client who has been sentenced and is awaiting a motion for reconsideration, WSBA Formal Opinion 176, and a client who has been assigned or given advice (“sub advice”) on a case not yet filed.

Former Client: Representation may not actually end when the funder views the case as being concluded for purposes of credit & payment. For instance the client may still be seeking advice on a related matter, such as how best to deal with a problem with a treatment agency while on probation. Whether the client is a current or former client must be determined by the actual relationship rather than the agency’s payment or credit status.

Pending Matter: an active matter where there is either on-going or reasonably anticipated future attorney representation of a client.

Concluded Matter: Example, a client we represent for a line up may call us with questions which we may choose to answer when he has not yet been filed on and has no other lawyer; we may do so without assignment or credit. That does not mean the attorney-client relationship is not ongoing.

Information Relating to the Representation of a Client: The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Confidences: information protected under attorney client privilege, RCW 5.60.060. Confidences include information conveyed to an attorney by a client in the course of the legal relationship, which is anticipated to be privileged based upon the circumstances surrounding the statement. This includes advice given by an attorney to a client on a legal matter. Confidences survive the death of the client. Note that “information relating to the representation of the client”, RPC 1.6, (above) and client secrets (below) are broader categories.

Limited Appearance (RPC 1.2): an appearance made by an attorney who is clearly stated on the record to be for a limited purpose only, or can be observed to be for a limited purpose, based upon all of the surrounding facts; such as, an attorney covering a calendar for investigation and detention hearings or arraignment hearings. An attorney who aids a person by giving substantial advice during the investigation phase of a case, has also represented the defendant for a limited purpose.

Secret: [Under former RPCs:] information gained as a result of the professional relationship with the client, which the client has requested be kept secret, or information which would embarrass the client or be detrimental to the client. Detrimental is to be construed broadly, including financial, social and emotional detriment, as well as liability for a criminal act, WSBA Formal Opinion 176 (imputed physical danger as detriment). Absent a specific request for secrecy, the determination of embarrassment or detriment shall be on objective determination based upon the reasonable client in the same or similar circumstances as the actual client. The scope of secret is broader than the scope of confidences, *Seventh Elect Church in Israel v. Rogers* 102 Wn.2d 527 (1980). [Current RPCs replace “secrets” with “confidential information, which is considerably broader. It encompasses “not only matters communicated in confidence by the client but also all information relating to the representation, whatever its source.” Commentary to RPC 1.6.]

4. Policy

4.1. Ethical duties regarding conflicts of interest

4.2. Concurrent representation of more than one person who is involved in a single matter.

An example co-defendants or defendant and a witness or suspect in the case or co-respondents/represented members of a family in a dependency case or a respondent and an adverse witness in a civil dependency case

This type of conflict is significant and exceptions are limited (i.e. compelling reasons exist, the attorney has explained the potential conflict fully, and all clients' consent is in writing). What appears to be an agreed representation quite often unravels to the detriment of the clients and the attorney. This type of representation can easily lead to allegations of ineffective assistance of counsel and reversal of cases due to the presumption of prejudice caused by the divided loyalty of an actual conflict. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Cuyler v. Sullivan* 446 U.S. 335 (1980); *Wood v. Georgia* 450 U.S. 261 (1981); *In Re Richardson* 100 Wn.2d 669 (1983).

a) Arraignment or investigation calendars:

Absent extraordinary circumstances, the Attorney of the Day (AOD) must address the issue of probable cause and must address the arraignment. The release issue is the issue most likely to result in an actual conflict and request to set a case over. Since arraignment is the only time a defendant has a right to plead guilty, however, under some circumstances, it would be inappropriate for an attorney with a conflict to advise the client about entering a plea at arraignment, and the court should be so advised and some provision be made to provide alternate counsel so that the client can be arraigned with counsel with undivided loyalties.

b) Probation violation hearings and reviews: Representation of the current client in a probation hearing resisting restitution, seeking to have treatment conditions stricken, etc., may be adverse to the actual or potential interests of the former client who is a victim or co-defendant with joint and several restitution liability.

4.3. Conflicts with witnesses, co-defendants, co-respondents in a dependency case or suspects who are former clients

This situation is governed by RPC 1.9 (a)-(c) and RPC 1.10. RPC 1.6 does not create an independent source of conflict; RPC 1.7 addresses current clients only.

If an individual lawyer in the office is precluded by RPC 1.9 from representing a particular client, then all the members of the law firm are likewise prohibited from representing the client under RPC 1.10(a).

RPC 1.9(a) has two separate components. Both of these must be satisfied for a conflict to exist.

- 1) The current client's interest must be **materially adverse**. Whether a particular representation is adverse to a former client is fact specific. Former clients may have adverse interests due to financial, reputational, associational, liberty, and other interests.

And

- 2) The matter must be the **same or a substantially related matter**.

The evil addressed is the appearance of an attorney "switching sides."

Examples:

Former client was charged with assault and current client is charged with assault. Former client is the alleged victim and the allegation by current client is self-defense; substantial relationship exists. However, if current client alleges someone else committed the present assault, no substantial relationship is likely to exist.

Dependency cases cover a broader range of issues so the potential for substantial relationships across cases is greater. For example a current client (a parent of a potential dependent child) whose counsel intends to cross examine the grandparent/person who made the Child Protective Services (CPS) referral when the grandparent was a former client. The attorney has a duty to the former client and may not act adversely to the former clients interests when defending the current client if the prior representation would be substantially related to the current representation (RPC 1.9(a)) or by using actual information from the prior case (RPC 1.9(c)).

It is essential to avoid the appearance of unfairness or impropriety. Therefore, if a former client is a witness in a current case, the current case ordinarily should not be assigned to the same attorney who previously represented the witness. This is to avoid

the appearance of unfairness, rather than necessarily because of a substantive conflict.

Examples:

Current defense counsel intends to cross-examine witness (former client) about alcohol consumption on the night of the incident. This is a violation of the witness' conditions of probation. The probation order is the result of the previous representation. No conflict, *State v. Anderson* 42 Wn. App. 659 (1986).

Former client will be cross-examined about his conviction for TMVR or Theft; no conflict. *State v. Hunsaker*, 74 Wn. App.38 (1994), *State v. Ramos* 83 Wn. App.622 (1996).

Former client is a witness and **information given to the former attorney** is admissible under ER404 (B), as prior bad acts or under ER 405 (a) and ER 608 (b), as impeachment on character for truthfulness or ER 806 or any other ER. A conflict exists.

See example under Section 4.2.

- 4.4. Screening for prior representation**
- 4.5. Imputed Conflict RPC 1.10**
- 4.6. Attorney joining agency from prior practice, RPC 1.10(e) and 1.11.**
- 4.7. Transfer due to irreconcilable conflict with defendant**
- 4.8. Client complaints**
- 4.9. Attorney as a witness, RPC 3.7**
- 4.10. Employee of the firm as a witness for the prosecution**
- 4.11. Employee of the firm with knowledge of the defendant or any witness, including a victim, RPC 2.1**
- 4.12. Attorney Duty upon withdrawal**