


NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT



CLIENT-LAWYER RELATIONSHIP

**Rule 1.7. Conflicts of Interest**

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.7. Conflicts of Interest**
  - Concurrent conflict of interest
    - one client will be directly adverse to another client
    - significant risk that representation of one will be materially limited by responsibilities to another or by a personal interest of the lawyer.

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O'Meara's Case, 164 N.H. 170; 54 A.3d 762 (2012).

- (1) threatened to sue his clients for his contingency fee if they terminated his services;
- (2) revised fee agreement without the clients' knowledge or consent
- (3) respondent threatened to withdraw as counsel on the morning of the mediation so as to secure \$2 million fee.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.7. Conflicts of Interest**
  - Concurrent conflict of interest
  - Salomon's Case, 202 A.3d 587 (decided 1/23/2019)
  - Attorney violated this rule when he represented both client who had an interest to sell the marital property and an entity interested in purchasing the property.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.7. Conflicts of Interest**
  - Concurrent conflict of interest
  - Shillen's Case, 149 N.H. 132, 138 (2003)
  - When the driver of a motor vehicle is involved in an accident that results in serious injury to a passenger and it is clear that the driver may have contributed to the cause of the accident, an attorney cannot undertake to represent both parties.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.7. Conflicts of Interest**
  - Concurrent conflict of interest

EXCEPTION

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.7. Conflicts of Interest

- Concurrent conflict of interest exception in 1.7(b) if:
  - competent and diligent representation to each affected client;
  - not prohibited by law;
  - does not involve the assertion of a claim by one client against another client
  - informed consent, confirmed in writing

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.7. Conflicts of Interest

- New Hampshire Public Defender Exception in Rule 1.7(c):
  - Can represent individual for arraignment if that individual is not:
    - A co-defendant of another NHPD client; or
    - A witness in a case in which NHPD is defending and representation of the witness creates significant risk that it will materially limit lawyer's responsibilities to existing client

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.8. Conflict of Interest

Current Clients



- Business transaction with client
- Pecuniary interest adverse to a client unless

**UNLESS**

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.8. Conflict of Interest

Current Clients

- ❖ Fair and reasonable
- ❖ Disclosed and transmitted in writing in a manner that can be reasonably understood by the client
- ❖ Advised in writing re: independent legal counsel
- ❖ Informed consent, in a writing

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.8(b) Conflict of Interest

Current Clients



- Using information to the disadvantage of the client without informed consent, except as permitted or required by these Rules.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

Rule 1.8(c) Conflict of Interest

Current Clients




NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(d) Conflict of Interest
  - Current Clients



NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(e) Conflict of Interest
  - Current Clients



- A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation

**EXCEPT**

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(e) Conflict of Interest
  - Current Clients
    - Contingency
    - Indigence

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(f) Conflict of Interest
  - Current Clients

- A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) informed consent;
  - (2) no interference
  - (3) communications confidential

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(g) Conflict of Interest
  - Current Clients

- No aggregate settlement of the claims – civil
- No aggregated agreement as to guilty or nolo contendere pleas – criminal
- Unless each client gives informed consent, in a writing signed by the client.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- Rule 1.8(h) Conflict of Interest
  - Current Clients

- No agreement to waive Malpractice Claims:
  - Prospective Waiver w/o separate counsel
  - Settlement with unrepresented client w/o written advice to seek counsel

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.8(i) Conflict of Interest**
- **Current Clients**
- Lawyer cannot acquire proprietary interest in action, except:
  - Ok to acquire a lien for fees;
  - Ok to enter into contingency fee agreement.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.8(j) Conflict of Interest**
- **Current Clients**
- Bourdon's Case, 132 N.H. 365, 371 (1989)
- Attorney should have warned client that their intimate relationship could prejudice her chances of being awarded custody of her child and should have informed her of her right to consent to or refuse his further representation.

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- **Rule 1.8(k) Conflict of Interest**
- **Current Clients**
- Lawyers in Firms



NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- CLIENT-LAWYER RELATIONSHIP
- Rule 1.9(a). Duties to Former Clients
  - substantially related matter in which new client's interests are materially adverse to former client without informed consent

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- CLIENT-LAWYER RELATIONSHIP
- Rule 1.9(b). Duties to Former Clients
  - Different Lawyer, Same Firm
    - (1) materially adverse to that person
    - (2) material, confidential information acquired unless informed consent, confirmed in writing

NEW HAMPSHIRE RULES OF PROFESSIONAL CONDUCT

- CLIENT-LAWYER RELATIONSHIP
- Rule 1.9(c). Duties to Former Clients



- Use confidential information to the disadvantage of the former client
- Reveal information relating to the representation

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Corporations

- Rule 1.9(c). Duties to Former Clients
- "Practical Consequences Test"
- The corporate actor who gains control of an establishing corporation secures authority over its pre-existing attorney-client privilege. *Goodrich v. Goodrich*, 158 N.H. 130, 135 (2008).

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

- Rule 1.10. Imputation of Conflicts of Interest
- Specials rules for firms and lawyers coming and going

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

- Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Litigation Application

"The New Hampshire Rules of Professional Conduct are aimed at policing the conduct of attorneys, not at creating substantive rights on behalf of third parties." *State v. Decker*, 138 N.H. 432, 438, 641 A.2d 226 (1994).

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Litigation Application

Potential for abuse exists when a party seeks to disqualify opposing counsel

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Litigation Application

"A defendant's right to chosen counsel is limited by the trial court's independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *State v. Gonzalez*, 170 N.H. 398, 403, 173 A.3d 583 (2017)

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Litigation Application

- When a trial court becomes aware of a potential or actual conflict of interest relating to defense counsel's representation of a criminal defendant, it must conduct an inquiry on the record to investigate the extent of any conflict.
- "The inquiry is prophylactic; it is not constitutionally mandated."  
State v. Gonzalez, 143 N.H. 693, 706, 738 A.2d 1247 (1999).

NEW HAMPSHIRE RULES OF  
PROFESSIONAL CONDUCT

Litigation Application

- ❖ Actual conflict adversely affected his lawyer's performance, although he need not demonstrate prejudice.
- some plausible alternative defense or strategy that might have been pursued
- the alternative defense was inherently in conflict with the attorney's other loyalties or interests.
- ❖ State v. DeGroot, No. 2015-0010, September 21, 2018

JOINT DEFENSE  
AGREEMENTS AND  
CONFLICTS OF INTEREST

SCENARIO I

JOINT DEFENSE AGREEMENTS

A JDA is a contract between two or more clients and their lawyers that permits the sharing of otherwise attorney-client privileged or work product protected information without waiving the privileges

Does not necessarily need to be in writing (United States v. Schwimmer, 892 F.2d 237, 244 (2nd Cir. 1989)), but in cases where parties anticipate the need to assert privilege, a written agreement is the best practice.

They are not limited to defendants. Plaintiffs may also enter into JDAs.

COMMON INTEREST RULE

JDAs arise from the Common Interest Doctrine which is codified in the New Hampshire Rules of Evidence R. 502(b).

"A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client ...

(3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein."

ADVANTAGES TO JOINT  
DEFENSE AGREEMENTS

They can help parties reduce redundant work and costs.

Help parties with aligned interests coordinate strategies.

But there are risks...

DISADVANTAGES OF JOINT  
DEFENSE AGREEMENTS

Communications between clients are likely not protected. See N.H. R. of Evid. 502(b) (protecting information shared with a lawyer or a lawyer's representative); Fortune Laurell, LLC v. Yunnan New Ocean Aquatic Prod. Sci. & Tech. Group Co., 2018 N.H. Super. LEXIS 16, \*16

Increased possibilities for Conflicts of Interest.

SCENARIO I

Three individuals, Avon Barksdale, Russell "Stringer" Bell, and "Proposition Joe" Stewart are all indicted for conspiracy to sell heroin and witness tampering.

The attorneys for each of them agreed to participate in a joint defense agreement. At joint defense meetings, confidential information was discussed and exchanged between the parties.

On the eve of trial, "Proposition Joe" reaches a plea deal with the State and appears to be willing to testify against Barksdale and "Stringer" Bell.

What do you do?

US V. HENKE

This case arises from a false revenue reporting conspiracy carried out by Cal Micro executives in order to preserve the appearance that the company was a good investment option when in fact it was struggling financially.

Desaigoudar and Henke, a former Chief Financial Officer, Vice President, and Treasurer of Cal Micro, were indicted on charges of conspiracy, making false statements, securities fraud, and insider trading. Surendra Gupta, Cal Micro's President during the revenue reporting scheme, was also indicted, but reached a plea agreement with the government shortly before trial was to begin.

US V. HENKE

Before trial, Desaigoudar, Henke, and Gupta participated in joint defense meetings during which confidential information was discussed. Communications made during these pre-trial meetings were protected by the lawyers' duty of confidentiality imposed by a joint defense privilege agreement. Before trial was to begin, Gupta accepted a plea agreement and promised to testify for the government.

Desaigoudar's attorney then moved for a mistrial and to withdraw because his duty of confidentiality to Gupta under the joint defense agreement prevented him from cross-examining Gupta on matters involving information he learned as a result of the privileged pre-trial meetings. Henke's lawyer was also present at the joint defense meetings and felt that his duty to Gupta impaired his ability to adequately represent Henke.

US V. HENKE

The district court denied the motion to withdraw. It reasoned that any privileged impeaching information counsel learned about Gupta would not be known to new counsel and the defendants were therefore no worse off for being represented by their original attorneys. The court granted the motion for a mistrial to allow defense counsel to regroup after Gupta's plea.

US V. HENKE

The State called Gupta to testify.

The defense did not cross-examine Gupta.

### US V. HENKE

"Few aspects of our criminal justice system are more vital to the assurance of fairness than the right to be defended by counsel, and this means counsel not burdened by a conflict of interest. Here, because of that conflict, the appellants' lawyers were constrained to impair yet another primary right of their clients: the right to cross-examine a witness who testified against them. By choosing to convert Gupta into a prospective witness shortly before the trial was scheduled to start, the government - which may not have anticipated this complication when it made a deal with Gupta - caused this problem, and should not now be heard to complain."

### TWO EXAMPLE CASES

Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist., 810 F.Supp.2d 929 – horror story of conflicts.

U.S. v. Henke, 222 F.3d 633 (9th Cir. 2000)

### CONFLICTS OF INTEREST AND JDAS

An attorney receiving confidential information under a JDA owes a duty of confidentiality to the parties to the JDA. This duty is not limited solely to the attorney's actual client.

An attorney can be disqualified as a result of JDA.

An attorney's disqualification can be imputed to the attorney's firm.

All of the parties to the JDA rely upon each other to check conflicts. If there is a mistake, tainted information could conflict out all of the attorney's party to the JDA.

### PARENTS AND CHILDREN CONFLICTS OF INTEREST

#### SCENARIO 2

### PARENTS AND CHILDREN CONFLICTS OF INTEREST

- Blue Cross/Blue Shield of New Hampshire-Vermont v. St. Cyr, 123 N.H. 137 (1983) (parent, rather than the child, is entitled to recover the medical expenses of a minor child injured by another).
- Briere v. Briere, 107 N.H. 432 (1966) (minor unemancipated children could sue their father in tort for damages for their personal injuries).
- Boyle's Case, 136 N.H. 21 (1992) (finding a violation of Rule 1.7 where a fundamental conflict existed between attorney's role as guardian ad litem for the children and his role as advocate for their father in a criminal matter).

### PARENTS AND CHILDREN CONFLICTS OF INTEREST

- In re Wyatt's Case, 159 N.H. 285 (2009) (attorney who represented both a ward and ward's wife and a conservator violated Rule 1.7(b) because there was no evidence that he considered that the concurrent representation would not adversely affect either client or that the clients consented).
- Lutkus v. Lutkus, 141 N.H. 552 (1997) (insurer's subrogation rights could not be defeated by allocating all of the settlement proceeds to the child and none to the father even though the child was not made whole by the recovery).



PARENTS AND CHILDREN  
CONFLICTS OF INTEREST

- *Siciliano v. Capitol City Shows*, 124 N.H. 719 (1984) (court would not create a new cause of action allowing plaintiffs to recover for the loss of a negligently injured or killed child's society because judicial and statutory precedent did not support an extension of liability under the facts of the case).
- *Vachon v. Hartford*, 125 N.H. 577 (1984) (Approval of petition to approve settlement did not offend N.H. Super. Ct. R. 111 when medical insurer negotiated an agreement with the parents as subrogee and that settlement was reached with the tortfeasors that provided for payment of medical expenses).

DEBENEDETTO "PARTIES"  
AND  
CONFLICTS OF INTEREST

SCENARIO 3

A. ELEMENTS OF THE  
DEBENEDETTO DECISION

- *DeBenedetto v. CLD Consulting Engineers*, 153 N.H. 793 (2006)
- In context of comparative fault, apportionment of damages, and contribution under RSA 507:7-e the Court held word "party" includes "...all parties contributing to the occurrence giving rise to an action, including those immune from liability or otherwise not before the court."
- Court has further stated that seeking to apportion fault to non-party is in "the nature of an affirmative defense." The defendant "essentially becomes another plaintiff who must seek to impose liability on a (non-litigant) just as the plaintiff seeks to impose it on him." *Goudreau v. Kleeman*, 158 N.H. 2336, 256 (2009).
- Result is a defendant must develop and prove a *primo facie* case of fault against the non-party.

B. WHAT ARE THE CONFLICTS OF INTEREST  
AND  
PRACTICAL IMPLICATIONS OF NAMING  
DEBENEDETTO PARTIES?

- NHRPC 1.7 sets out the conflict of interest elements as to current or former clients. The heart of the inquiry is avoidance of "direct adversity" between multiple clients, or when adverse representation of one client is "materially limited" by responsibilities to another client.
- NHRPC 1.7(b)(4) provides for waivers to resolve multiple client conflicts. Waiver is predicated on "informed consent", confirmed in writing.
- There is little legal authority to definitively set out resolution of conflicts arising from a Defendant naming *DeBenedetto* parties. A NH Bar Association Ethics Opinion (#2017-18.2) provides a strong cautioning opinion stating that both direct adversity and material limitation arise by a defendant naming a concurrent client for purposes of an apportionment defense. The Ethics Committee was divided on whether waiver is ever permissible in resolution of such conflicts, although stating that waiver is clearly not permissible in many circumstances.

- Essential features of direct adversity and material limitation –
  - i. Exposure of the *DeBenedetto* party to discovery, including the expense and burdens of production.
  - ii. Disruption of amicable relationship with *DeBenedetto* party/client due to cross-examination, appearance of betrayal or disloyalty.
  - iii. Potential for reputational damage to *DeBenedetto* party/client due to publicity, notoriety of the claim.
  - iv. Potential for being named by plaintiff, or other third parties, as defendant in the litigation resulting from the *DeBenedetto* disclosure.

- Limitations on waiver by concurrent clients -
  - i. Ethics committee divided on whether waiver ever permissible.
  - ii. Some cases clearly preclude waiver – can the lawyer reasonably conclude competent and diligent representation can be provided to both clients?
  - iii. Standard to be applied the "harsh reality" test. The perspective should be that of a "disinterested lawyer."
  - iv. Circumstances that may permit waiver: (Minor claim or role in claim, not worth the trouble to object, some other law firm will step in, better to be opposed by lawyers you like, sophisticated client, client has inside counsel.)

**C. PRACTICAL RESOLUTION  
OF *DeBenedetto*  
CONFLICTS OF INTEREST**

- Defendants should weigh *DeBenedetto* party identification carefully, run conflict checks, and eliminate naming non-essential third party clients.
- As to current clients, conflict due to “direct adversity” and “material limitation” is probable. Exercise caution and assess waiver and avoid naming such parties due to conflict.
- Waiver by current clients regarding related claims should be avoided.
- Waiver as to former clients is less problematic. But careful assessment of the information held by firm or other continuing relationships are important.

- Use of conflict counsel. Have defendant retain separate unrelated attorney to pursue *DeBenedetto* claim against concurrent client.
- May still raise issues of shared information and disruption of concurrent client relationship. Highly variable court responses to use a conflict counsel.

**D. OTHER AUTHORITY**

- State Bar of Arizona Ethics Opinion
- Arizona Committee of the Rules of Professional Conduct Formal Op. 2003-04 (No conflict if Statute of Limitations has run, but recognizes other adversity)
- Other non-party litigant context. *Mid-State Aftermarket Body Parts, Inc. v. MQVP, Inc.*, 2009 WL 1211440 (ER. D.Ark. 2009)
- Other circumstances where you must examine a client as witness in unrelated matter.
- NH Supreme Court rejection of conflict waivers. *Boyle's* case 136 NH 21 (1992), *Kelley's* case 137 NH 314 (1993) *Shillen's* case 149 NH 132 (2003).