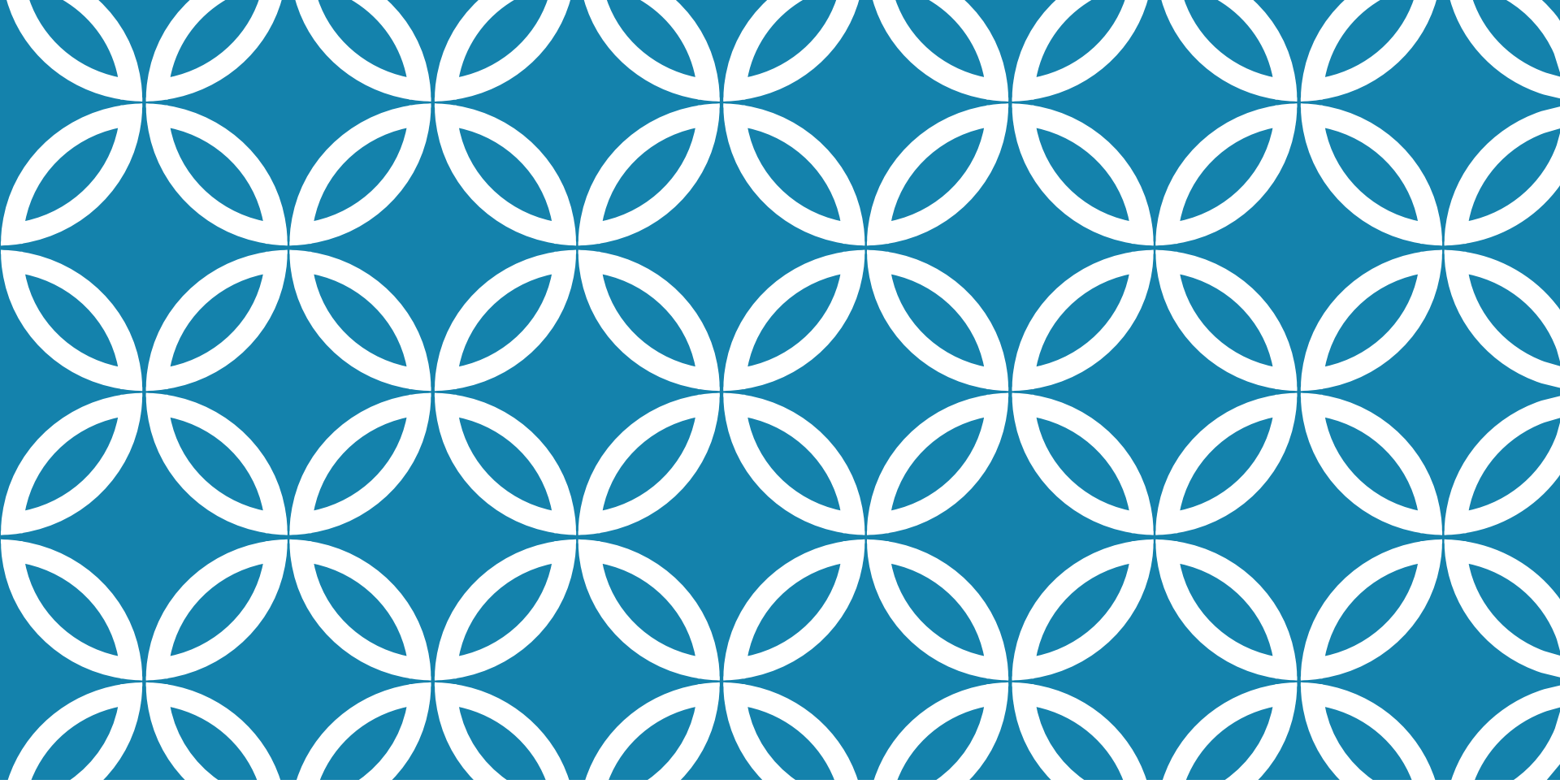

CONFLICTS WITH CURRENT CLIENTS: SPECIAL RULES

MRPC 1.8

RULE 1.8 OVERVIEW

Rule 1.8 addresses ten specific situations in which a lawyer's own interests may compromise a client's representation or otherwise harm a client's interests. In most of these situations, the conflict cannot be cured by informed client consent.

The lawyer must either avoid the situation entirely or comply with conditions designed to protect the client from overreaching by the lawyer.

2002 AMENDMENTS

Several subsections and corresponding comments were amended in 2002. Family relationships among lawyers, formerly the subject of subsection (i), are now addressed in Comment [11] to Rule 1.7.

Former subsection (j) (acquiring a proprietary interest in litigation) was renumbered as subsection (i), and a new subsection (j) was added to prohibit most client-lawyer sexual relationships. Subsection (k) was added to impute to firm colleagues all but one (sex with clients) of Rule 1.8's prohibitions; until this amendment, none of the rule's prohibitions was to be imputed except gifts to lawyers.

RULE 1.8 - CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a **business transaction** with a client or **knowingly** **acquire** an ownership, possessory, security or other pecuniary **interest** **adverse** to a client **unless**…

RULE 1.8 – BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

(1) the transaction and terms on which the lawyer acquires the interest are **fair and reasonable** to the client and are **fully disclosed** and transmitted in **writing** in a manner that can be reasonably understood by the client;

(2) the client is **advised in writing** of the desirability of seeking and is given a reasonable opportunity to seek the **advice of independent legal counsel** on the transaction; and

(3) the client gives **informed consent,** in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

The requirements of paragraph (a) must be met **even when the transaction is not closely related to the subject matter of the representation,** as when a lawyer **drafting a will** for a client learns that the client needs money for **unrelated expenses** and offers to make a **loan** to the client.

The Rule applies to lawyers engaged in the **sale of goods or services** related to the practice of law, for example, the sale of **title insurance** or investment services to existing clients of the lawyer's legal practice.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

It also applies to lawyers purchasing property from estates they represent.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

It does **not** apply to **ordinary fee arrangements** between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

In addition, the Rule does **not** apply to **standard commercial transactions** between the lawyer and the client for products or services that the **client generally markets to others**, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

[2] Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role.

When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable..

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

[3] The risk to a client is greatest when the client expects the lawyer to represent the client **in the transaction itself** or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction.

Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7.

COMMENT - BUSINESS DEALS WITH CLIENTS

(a) NO BUSINESS TRANSACTIONS w/clients UNLESS…

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is **inapplicable**, and the paragraph (a)(1) requirement for **full disclosure is satisfied** either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel.

The fact that the client was independently represented in the transaction is **relevant** in determining whether the agreement was **fair and reasonable** to the client as paragraph (a)(1) further requires.

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

If Rule 1.8(a) applies, the transaction must be objectively fair and reasonable to the client. *See, e.g., In re Miller*, 66 P.3d 1069 (Wash. 2003) (rejecting "sophisticated client" defense).

See also ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client and pursue collection for lawyer's benefit as long as transaction fair and reasonable to client and Rule 1.8 conditions satisfied).

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

Rule 1.8(a)(1) also directs that the terms of the transaction be fully disclosed and transmitted in a manner that can be reasonably understood by the client.

See *Fla. Bar v. Ticktin*, 14 So. 3d 928 (Fla. 2009) (press release announcing lawyer would assume management of indicted client's business did not constitute sufficient disclosure).

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

Rule 1.8(a)(2) requires that the client be advised in writing of the desirability of seeking the advice of independent counsel and be given a reasonable opportunity to do so. If the client does have independent counsel, the disclosure requirement of Rule1.8(a)(1) can be satisfied by either the independent counsel or the lawyer involved in the transaction.

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

Rule 1.8(a)(3) requires informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction. *See In re Trewin*, 684 N.W.2d 121 (Wis. 2004) (clients' signatures on loan documents did not constitute sufficient consent).

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

Loans between lawyers and clients are among the most common situations to which Rule 1.8(a) is applied.

See, e.g., In re Timpone, 804 N.E.2d 560 (Ill. 2004) (after representing client in divorce and sale of marital residence, lawyer borrowed money from proceeds); *In re Wilty*, 808 So. 2d 322 (La. 2002) (lawyer solicited loan from client receiving personal injury award).

SUBSECTION (A): BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER

Other common situations are sales and investment transactions that unfairly favor the lawyer, or for which the lawyer has not provided the required disclosure.

See, e.g., In re Davis, 740 N.E.2d 855 (Ind. 2001) (lawyer persuaded client to invest settlement funds in lawyer's business ventures); *In re Lupo*, 851 N.E.2d 404 (Mass. 2006) (lawyer purchased real estate from elderly aunt for substantially less than fair market value).

OWNERSHIP OR INVESTMENT INTEREST IN CLIENT AS FEE

As Comment [4] to the rule on fees (Rule 1.5) also notes, fees paid in property instead of money often have the essential qualities of a business transaction with the client.

See, e.g., In re Snyder, 35 S.W.3d 380 (Mo. 2000) (accepting quitclaim real estate interest in lieu of cash fee violated Rule 1.8(a)); *Cotton v. Ronenberg*, 44 P.3d 878 (Wash. Ct.App.002) (in lieu of fee, which lawyer had estimated at $10,000 to $30,000, lawyer accepted client's mobile home but promptly resold it for $42,000, belying his argument that transaction had been fair and reasonable within meaning of Rule 1.8(a)).

OWNERSHIP OR INVESTMENT INTEREST IN CLIENT AS FEE

When a lawyer acquires stock in a client's corporation in lieu of or in addition to a cash fee, a determination that the fee is reasonable under the factors enumerated in Rule 1.5(a) is insufficient to establish that the transaction also qualifies as "fair and reasonable" within the meaning of Rule 1.8(a), according to an ABA ethics opinion.

ABA Formal Ethics Op. 00-418 (2000) (must consider additional factors, including risk of enterprise failing and stock's marketability)

CHANGING FEE AGREEMENTS

Although Rule 1.8(a) does not apply to ordinary client-lawyer fee agreements, it has been applied to efforts to modify agreements during the course of the representation.

See, e.g., Naiman v. N.Y. Univ. Hosps. Ctr., 351 F. Supp. 2d 257 (S.D.N.Y. 2005) (purported supplemental fee agreement giving lawyer 50 percent of settlement invalid; "midstream modification that increases a contingency fee percentage may be a 'business transaction' that creates a conflict of interest"); *In re Hefron*, 771 N.E.2d 1157 (Ind. 2002) (lawyer switched from hourly to contingent fee after learning client would recover substantially more than anticipated).

RULE 1.8(B) - USE OF INFORMATION RELATED TO REPRESENTATION

(b) A lawyer shall not **use information** relating to representation of a client to the **disadvantage** of the client **unless** the client gives **informed consent,** except as permitted or required by these Rules.

COMMENT 5 - USE OF INFORMATION RELATED TO REPRESENTATION

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty.

Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer.

For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.

COMMENT 5 - USE OF INFORMATION RELATED TO REPRESENTATION

[5] …The Rule does not prohibit uses that do not disadvantage the client.

For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules

USE OF INFORMATION RELATED TO REPRESENTATION

ABA Formal Ethics Op. 05-435 (2005) (lawyer who simultaneously represents liability insurer and, in unrelated matter, claimant against one of its insureds may not use information relating to representation of insurer for **claimant's** benefit)

ABA Formal Ethics Op. 02-426 (2002) (lawyer acting as fiduciary may have conflict in using information gained in representation of beneficiary in unrelated matter)

ABAFormal Ethics Op. 92-367 (1992) (seeking third-party discovery of client may involve information within contemplation of Rule 1.8(b)).

USE OF INFORMATION RELATED TO REPRESENTATION

Rule 1.8(b) does not prohibit the lawyer from using client information in a way that does not disadvantage the client. In this respect, Rule 1.8(b) is more permissive than general fiduciary and agency law.

See Restatement (Third) of the Law Governing Lawyers § 60(2) (2000) (lawyer who uses client's confidential information for own pecuniary gain must account to client for profits).

See also United States v. O'Hagen, 521 U.S. 642 (1997) (lawyer guilty of securities fraud under "misappropriation" theory for trading on confidential client information).

RULE 1.8(C) – GIFTS FROM CLIENTS

RULE 1.8(C) – GIFTS FROM CLIENTS

(c) A lawyer shall not **solicit** any substantial **gift** from a client, including a testamentary gift, or **prepare** on behalf of a client an **instrument giving the lawyer** or a person related to the lawyer any substantial gift **unless** the lawyer or other recipient of the gift is **related** to the client.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

COMMENT - **GIFTS TO LAWYERS**

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness.

For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted.

COMMENT - **GIFTS TO LAWYERS**

[6] …If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent.

COMMENT - **GIFTS TO LAWYERS**

[6] …In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

COMMENT - **GIFTS TO LAWYERS**

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

COMMENT - **GIFTS TO LAWYERS**

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.

COMMENT - **GIFTS TO LAWYERS**

[8] …Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.

COMMENT - **GIFTS TO LAWYERS**

[8] …In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

CASES - **GIFTS TO LAWYERS**

See, e.g., Olson v. Estate of Watson, 52 S.W.3d 865 (Tex.App. 2001) (will leaving testator's entire estate to lawyer's family unenforceable);

Md. Ethics Op. 2003-08 (2003) (lawyer on church legacy committee may not prepare wills for church members who wish to bequeath property to church).

ABA - **GIFTS TO LAWYERS**

ABA Formal Ethics Op. 02-426 (2002) (lawyer may accept appointment as personal representative or trustee in will or trust prepared by lawyer for client; absent special circumstances, lawyer serving as fiduciary of estate or trust may appoint himself or other firm lawyers to represent him in that capacity if compensation for services reasonable).

RULE 1.8 – LITERARY RIGHTS

(d) **Prior to the conclusion** of representation of a client, a lawyer shall **not** make or negotiate an agreement giving the lawyer **literary or media rights** to a portrayal or account based in substantial part on information relating to the representation.

COMMENT - **LITERARY RIGHTS**

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer.

Measures suitable in the representation of the client may detract from the publication value of an account of the representation.

COMMENT - **LITERARY RIGHTS**

[9]… Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

CASES - **LITERARY RIGHTS**

See, e.g., Commonwealth v. Downey, 842 N.E.2d 955 (Mass. App. Ct. 2006) (defense counsel's agreement with television company to wear concealed microphone during murder trial created conflict of interest requiring new trial)

Harrison v. Miss. Bar, 637 So. 2d 204 (Miss. 1994) (lawyer's agreement with film producer for rights to her life story, including section on her representation of current client, violated Rule 1.8(d))

RULE 1.8(E) - FINANCIAL ASSISTANCE

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(e) A lawyer shall not provide **financial assistance** to a client in connection with pending or contemplated **litigation**, **except that…**

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(e) A lawyer shall not provide **financial assistance** to a client in connection with pending or contemplated **litigation**, **except that…**

(1) a lawyer **may** advance **court costs** and **expenses** of litigation, the repayment of which may be **contingent** on the outcome of the matter; and

(2) a lawyer representing an **indigent** client may **pay court costs and expenses** of litigation on behalf of the client.

COMMENT - FINANCIAL ASSISTANCE

[10] Lawyers **may not subsidize** lawsuits or administrative proceedings brought on behalf of their clients, **including** making or guaranteeing **loans** to their clients for living expenses, because to do so would encourage clients to pursue **lawsuits that might not otherwise** be brought and because such assistance gives lawyers **too great a financial stake** in the litigation.

COMMENT - FINANCIAL ASSISTANCE

[10]…These dangers do **not warrant** a **prohibition** on a lawyer lending a client **court costs and litigation expenses,** including the expenses of **medical examination** and the costs of **obtaining and presenting evidence,** because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

COMMENT - FINANCIAL ASSISTANCE

[10]…Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

OPINION - FINANCIAL ASSISTANCE

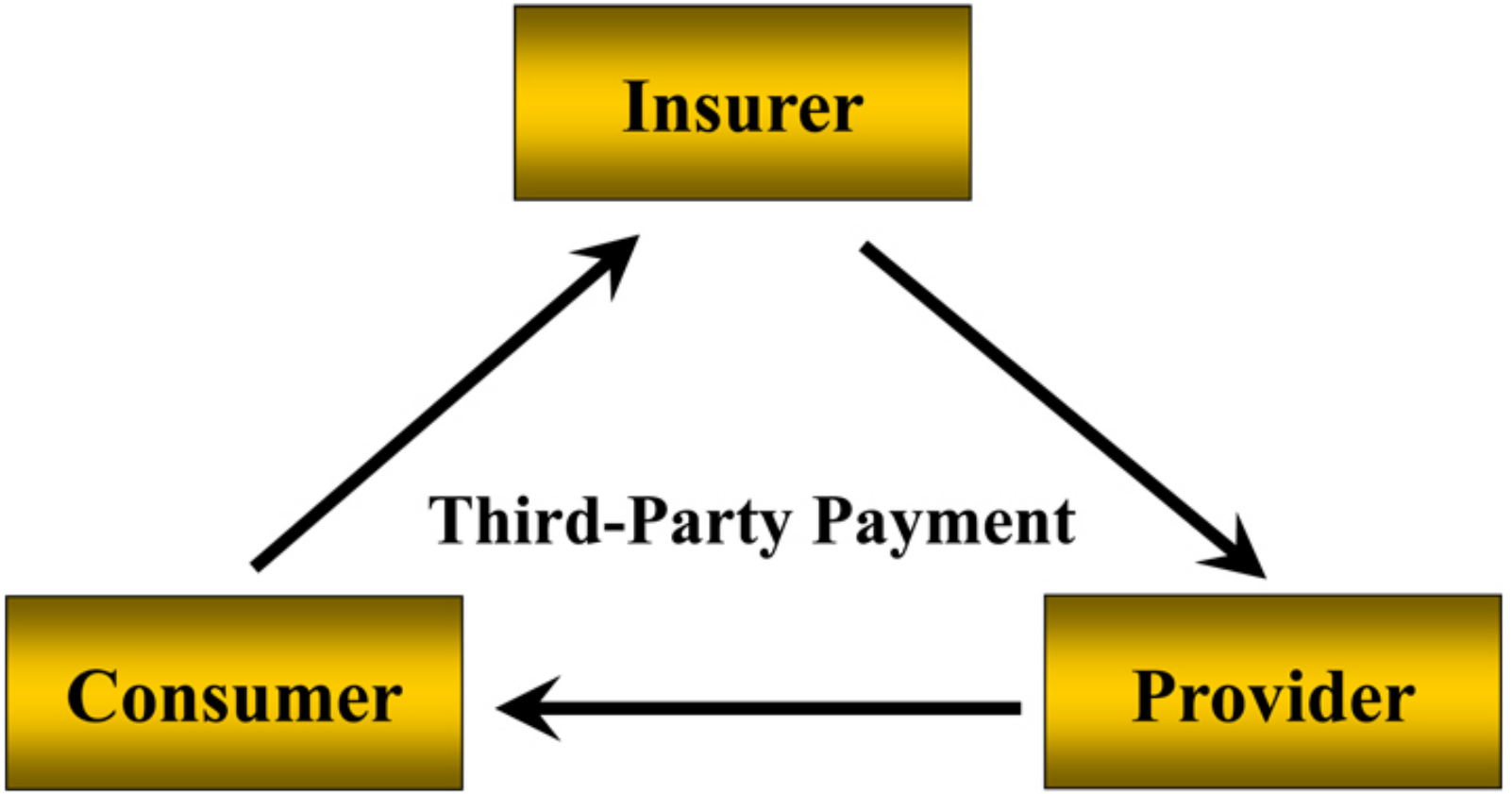
See ABA Formal Ethics Op. 04-432 (2004) (no per se prohibition on **posting bail** for client, but there must be no significant risk that the representation will be materially limited by lawyer's personal interest in recovering advance).

LAWYER OBTAINING LOAN FOR CLIENT LITIGATION EXPENSES

Some jurisdictions have concluded that although there are risks, a lawyer in a contingent-fee case may borrow funds from a lending institution to cover a client's litigation expenses. *See, e.g., Chittenden v. State Farm Mut. Auto. Ins.* Co., 788 So. 2d 1140 (La. 2001) (with adequate disclosure and consent, lawyer may make agreement obligating client to repay lawyer interest on loan secured by lawyer to cover client's litigation expenses)

Ariz. Ethics Op. 01-07 (2001) (lawyer may arrange line of credit to fund litigation and charge client interest on loan if lawyer has no financial interest in lender, fully discloses arrangement to client, and charges client only actual interest incurred)

RULE 1.8(F) - PERSON PAYING FOR A LAWYER'S SERVICES



RULE 1.8(F) - PERSON PAYING FOR A LAWYER'S SERVICES

(f) A lawyer shall not accept compensation for representing a client from **one other than the client** unless…

RULE 1.8(F) - PERSON PAYING FOR A LAWYER'S SERVICES

(f) A lawyer shall not accept compensation for representing a client from one other than the client **unless…**

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

COMMENT- PERSON PAYING FOR A LAWYER'S SERVICES

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part.

The third person might be a **relative** or **friend**, an **indemnitor** (such as a liability **insurance** company) or a **co-client** (such as a **corporation** sued along with one or more of its employees).

COMMENT- PERSON PAYING FOR A LAWYER'S SERVICES

[11]…Because third-party payers frequently have interests that differ from those of the client, including interests in **minimizing the amount spent** on the representation and **in learning how the representation is progressing,** lawyers are **prohibited** from accepting or continuing such representations **unless** the lawyer determines that there will be **no interference** with the lawyer's independent professional judgment and there is **informed consent from the client.**

COMMENT- PERSON PAYING FOR A LAWYER'S SERVICES

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer.

If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7.

COMMENT- PERSON PAYING FOR A LAWYER'S SERVICES

[12] …The lawyer must also conform to the requirements of Rule 1.6 concerning **confidentiality**.

Under Rule 1.7(a), a **conflict of interest** exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client).

COMMENT- PERSON PAYING FOR A LAWYER'S SERVICES

[12] …Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is **nonconsentable** under that paragraph.

Under Rule 1.7(b), the **informed consent** must be confirmed in **writing**.

NOTES - PERSON PAYING FOR A LAWYER'S SERVICES

The most common situation in which a lawyer is paid by someone other than the client is **insurance defense** work, but the situation also arises when **parents** hire counsel for their children, when **employers** pay employees' legal expenses, and when friends or relatives pay for criminal defendants' counsel.

NOTES - PERSON PAYING FOR A LAWYER'S SERVICES

ABA Formal Ethics Op. 02-428 (2002) (lawyer may draft will for testator at request of existing client who pays lawyer and is a potential beneficiary, provided the testator gives informed consent and requirements of Rule 1.8(f) as well as Rule 5.4(c) satisfied).

NOTES - PERSON PAYING FOR A LAWYER'S SERVICES

ABA Formal Ethics Op. 96-403 (1996) (Model Rules offer no guidance on whether lawyer retained by insurer represents insured, insurer, or both; if insured objects to settlement that policy authorizes insurer to make, lawyer must give insured opportunity to reject insurer's defense and assume defense at own expense).

CASES - PERSON PAYING FOR A LAWYER'S SERVICES

In criminal cases, third-party payment of a defendant's legal fees can raise due process and **Sixth Amendment** concerns. *See Wood v. Georgia*, 450 U.S. 261 (1981)("inherent dangers" arise when criminal defense counsel hired and paid by third party; trial court on notice must inquire further to protect defendant's rights); *United States v. Schwarz*, 283 F.3d 76 (2d Cir. 2002) (firm was paid $10 million by police union to defend police officer charged with assault; union concurrently defendant in assault victim's civil suit)

RULE 1.8(G) - AGGREGATE SETTLEMENTS

RULE 1.8(G) - AGGREGATE SETTLEMENTS

(g) A lawyer who represents two or more clients shall not participate in making an **aggregate settlement** of the claims of or against the clients, or in a criminal case an **aggregated agreement** as to guilty or nolo contendere **pleas**, unless each client gives **informed consent**, in a **writing** signed by the client.

The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

COMMENT- AGGREGATE SETTLEMENTS

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer.

Under Rule 1.7, this is one of the risks that should be discussed **before undertaking the representation,** as part of the process of obtaining the clients' **informed consent.**

COMMENT- AGGREGATE SETTLEMENTS

[13]…In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case.

COMMENT- AGGREGATE SETTLEMENTS

[13]…The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted.

COMMENT- AGGREGATE SETTLEMENTS

[13]…Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

COMMENT- AGGREGATE SETTLEMENTS

See *In re Hoffman*, 883 So. 2d 425 (La. 2004) (lawyer must confer with each client directly and disclose each client's share);

ABA Formal Ethics Op. 06-438 (2006) (in seeking consent of multiple clients to aggregate settlement, lawyer must advise each client of **total settlement amount**, nature and **amount of each client's participation, fees and costs** to be paid to lawyer, and how **costs will be apportioned** to each client)

RULE 1.8(H) - LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

(h) A lawyer shall not:

(1) make an agreement **prospectively limiting the lawyer's liability** to a client for **malpractice** unless the client is independently represented in making the agreement; or

(2) **settle** a claim or potential claim for such liability with an **unrepresented client** or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation.

Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[14] …This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[14] …Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[14] …Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule.

Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement.

COMMENT- LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

[15] In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

See ABA Formal Ethics Op. 02-425 (2002) (retainer agreement may require binding arbitration of fee disputes and malpractice claims provided client fully apprised of advantages and disadvantages of arbitration and gives informed consent; arbitration provision must not limit liability to which lawyer would otherwise be exposed).

LIMITING LIABILITY AND SETTLING MALPRACTICE CLAIMS

The rule does not prohibit lawyers from practicing in limited-liability entities.

See ABA Formal Ethics Op. 96-401 (1996) (lawyers may practice as limited-liability entity if individual lawyers remain personally liable for acts or omissions).

RULE 1.8 - ACQUIRING PROPRIETARY INTEREST IN LITIGATION

(i) A lawyer shall not acquire a **proprietary interest** in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

COMMENT- ACQUIRING PROPRIETARY INTEREST IN LITIGATION

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation.

COMMENT- ACQUIRING PROPRIETARY INTEREST IN LITIGATION

[16]…In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules.

The exception for certain advances of the costs of litigation is set forth in paragraph (e).

COMMENT- ACQUIRING PROPRIETARY INTEREST IN LITIGATION

[16]…In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law.

COMMENT- ACQUIRING PROPRIETARY INTEREST IN LITIGATION

[16]…These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client.

When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a).

COMMENT- ACQUIRING PROPRIETARY INTEREST IN LITIGATION

ABA Formal Ethics Op. 00-416 (2000) (lawyer may purchase accounts receivable from client if transaction complies with Rule 1.8(a), but if accounts are subject of litigation conducted by lawyer, lawyer must either acquire entire claim or withdraw from representation).

RULE 1.8(J) - CLIENT-LAWYER SEXUAL RELATIONSHIPS

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

COMMENT- CLIENT-LAWYER SEXUAL RELATIONSHIPS

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship.

COMMENT- CLIENT-LAWYER SEXUAL RELATIONSHIPS

[18]…However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship.

COMMENT- CLIENT-LAWYER SEXUAL RELATIONSHIPS

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

RULE 1.8 - IMPUTATION

RULE 1.8(K) - IMPUTATION OF PROHIBITIONS

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

RULE 1.8(K) - IMPUTATION OF PROHIBITIONS

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to **all lawyers associated in a firm** with the personally prohibited lawyer.

RULE 1.8(K) - IMPUTATION OF PROHIBITIONS

[20]…For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

RULE 1.8(K) - IMPUTATION OF PROHIBITIONS

[20]…The prohibition set forth in paragraph (j) (NO SEX WITH CLIENTS) is personal and is not applied to associated lawyers.