NEW YORK RULES OF PROFESSIONAL CONDUCT:
A FEW WORDS ON CONFLICTS AND CONFIDENCES IN LAWYER-CLIENT RELATIONSHIPS

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Unless a lawyer had to take the MPRE as a condition to admission to the Bar (beginning in 1980), or has been the subject of a formal complaint to the Grievance Committee, there is a chance that the binding on the Rules of Professional Conduct (RPC) has never been broken.

Just as lawyers generally don't pour over the fine (and often dense) print of statutes until a client is accused of violating one, many lawyers don't read the RPC until they're accused of transgressing them. It may, however, be a good idea to become acquainted with the rules, so that counsel can know where the land mines in the legal landscape are located, and assiduously avoid them.

While staying out of professional trouble is always a worthy objective, counsel should know and observe the rules because they represent the right thing to do (or the thing to avoid as the case may be), in a profession that is responsible not only for providing effective representation to clients but for engendering confidence in and promoting respect for the law and our system of justice.

That is why every attorney is responsible not only for his/her own professional conduct (RPC 8.4), but also bears the burden of reporting (to the appropriate tribunal/investigative authority), the known violation of the rules by another lawyer whose misconduct raises a substantial question as to his/her honesty, trustworthiness or fitness to practice. (RPC 8.3[a]). This latter obligation does not apply, however, to protected confidential information (RPC 1.6), and information obtained via participation in a bona fide lawyer assistance program such as the Bar Foundation. (See RPC 8.3[c][2]).

Fortunately, the rules, while sometimes tricky and almost always fact-sensitive, recognize that lawyers in an adversary system of justice must have some latitude (whether as advisors, negotiators or advocates), to exercise independent professional judgment in answering questions and resolving conflicts that are more often gray than they are black-or-white. In the area of conflict of interests, for example, counsel's conduct (in deciding whether to decline/withdraw from or continue representing clients whose interests may diverge, is measured by the standard of what a reasonable, prudent (and disinterested) lawyer would do under the circumstances. (RPC 1.0[k]).

RULE 1.7 CONFLICT OF INTEREST INVOLVING CURRENT CLIENTS:

Sometimes, as when two clients have opposing interests (e.g. plaintiff/complainant and defendant in the same litigation/prosecution or proceeding before a tribunal, including a court, arbitrator in proceedings, legislative body, administrative agency or other body acting in an adjudicative capacity [RPC 1.0(w)]), the answer to whether a lawyer can represent both of them is clear. That is because a lawyer owes a duty of undivided loyalty to each client which cannot be accomplished when advocating for one necessarily means harming the interests of the other.

Comment One to RPC 1.7 states that "loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, SOLELY for the benefit of the client(s) and FREE OF COMPROMISING INFLUENCES AND LOYALTIES. Concurrent conflicts of interest, which can IMPAIR A LAWYER'S PROFESSIONAL JUDGMENT , can arise from the lawyer's responsibilities to another client, a former client, ...a third person, or from the LAWYER'S OWN INTERESTS (e.g. where the opposing law firm in a case in litigation offers you a job because they're so impressed with your work on this case). A lawyer SHOULD NOT permit these competing responsibilities or interests to impair the lawyer's ability to exercise professional judgment on behalf of each client."

Except as otherwise permitted by subdivision (b), RPC 1.7(a) states that a lawyer SHALL NOT represent a client when a reasonable lawyer would conclude that either: 1. the representation will involve the lawyer in representing DIFFERING INTERESTS or 2. there is a SIGNIFICANT RISK that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

"Differing interests" per RPC 1.0(f), include EVERY INTEREST that will ADVERSELY AFFECT either the lawyer's judgement or loyalty to a client, whether it is conflicting, inconsistent diverse, or other interest. By this definition, the potential

for conflict is fairly broad-sweeping, and counsel must always be on the look-out for situations where the clients' interests differ.
For example, if two lawyers (L1 and L2) in the same firm represent co-defendants (D1 and D2) in the same prosecution, and the People's witness (W) will inculpate D1 and exculpate D2, L1 will undoubtedly seek to impugn W's credibility while L2 would want W to appear credible (at least insofar as his testimony benefits D2), and, since the conflict of one lawyer in a firm is generally IMPUTED to other lawyers employed there (RPC 1.10[a]), these lawyers could not represent both defendants. (At least one if not both defendants would have to obtain new counsel and their confidential information could not be used to their detriment (RPC 1.6[a]).

Similarly, if defense counsel representing a robbery defendant learns that the People's identifying witness is someone whom the lawyer represents (or represented) in a DWI case (and who L knows is an alcoholic prone to black-outs), counsel would be hard-pressed to continue representing both defendants inasmuch as the alleged robber would expect counsel to vigorously challenge the witness' credibility (and reliability of identification) which could only be accomplished by divulging and using confidential information to the detriment of the other client (who, undoubtedly, would feel betrayed by the attack from his own lawyer). Conversely, the robbery client would surely feel underserved if counsel soft-pedaled his challenge to the prosecution witness on account of their lawyer-client relationship.

Conflicts of interest, it should be noted, are not limited to the same MATTER (which is defined broadly by RPC 1.0[l) to include any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation INVOLVING SPECIFIC PARTIES).

Assume, for example that counsel represents a client (C1) in a personal injury case and then is retained by a client (C2), a landlord seeking to evict a non-paying or holdover tenant who happens to be C1. Although the matters are unrelated, by accepting representation of C2, counsel is now in a position to initiate a proceeding that could well inure to the detriment (i.e. eviction) of C1 who will undoubtedly wonder whether counsel truly has his/her best interests at heart in the personal injury matter.

The New York State Bar Association (NYSBA) Ethics Committee (Committee) recently issued an advisory opinion (#1185 on 4/20/20), in response to an inquiry into the permissibility of one firm (or lawyer) representing two clients, C1 and C2 (boyfriend and girlfriend), in separate but related prosecutions (DV against him, DWI against her) where she was likely to be a favorable witness against him ("he didn't do anything wrong, and I was drunk"), and he had knowledge (and testimony to give if necessary as to her state of sobriety), which could be used to attack her credibility in his case and hurt her in her DWI case.

The Committee opined that there was a clear conflict in this case arising from a "common nucleus of circumstances" (DV incident followed by the alleged victim being arrested for DWI), insofar as advancing the interests of one client would necessarily have an adverse affect on the interests of the other. For example, a reasonable lawyer for C1 would have every incentive to establish that C2 was intoxicated (which would surely be harmful to her in her DWI case), Also, a reasonable lawyer for C2 might well advise her not to testify at C1'S trial (even though in his favor), for to do so could have negative Fifth Amendment implications in her case.

The key questions, in the Committee's view, are whether there are differing interests (here, yes), and whether it could affect the lawyer's professional judgment in considering alternative courses of action, or foreclose alternative avenues that should reasonably be pursued on the client's behalf. (In a law firm situation, the conflict would also be imputed to other lawyers in the firm).

The Committee was also skeptical, on the limited facts presented, that the conflicts could be waived pursuant to RPC 1.7(b), because:1. C2's intoxication could be used against her in both proceedings; 2. She would be subject to damaging cross-examination in C1'S trial (and her testimony used against her in her case); 3. she could change her mind and testify against C1 (not entirely uncommon in DV cases); 4.there could be adverse plea implications in each case; 5.there was a risk of not fully disclosing all the risks to both clients; 6. C1'S attorney would not want C2 to invoke the Fifth Amendment at C1'S trial.

STEPS IN REPRESENTING CLIENTS WITH CONFLICTS:

Subdivision (b)(1) states that a lawyer MAY REPRESENT a client despite the existence of a concurrent conflict if: 1. the lawyer reasonably believes that he/she can provide competent and diligent representation (RPC 1.1) to each affected client; 2. the representation is not prohibited by law; 3. It 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 a tribunal; and 4. each client gives INFORMED CONSENT, confirmed in writing.

Per RPC 1.09j), INFORMED CONSENT represents an agreement to a proposed course of conduct after the lawyer has communicated information sufficient for a person (usually the client), to make an informed decision, and after the lawyer has adequately explained to him/her the material risks of the proposed course of conduct and the reasonably available alternatives.

Consent is CONFIRMED IN WRITING (e.g. to continued representation in a conflict situation or to a division of fees between lawyers not in the same firm [RPC 1.5[g][2]), either from the client to the lawyer, from the lawyer to the client (if not right after oral consent is given, then within a reasonable time thereafter), or on the record in a proceeding before a tribunal.

Conflicts can also arise where a lawyer represents two different clients who are on opposite sides of a legal issue in separate matters. This can put the lawyer in the bipolar position of arguing one way for one client (e.g. “this statute is unconstitutional”), and then doing a 180- degree turn-around on behalf of the other client. If counsel is successful (for example, before an appellate court, in striking down the law), he/she may well have harmed his/her second client’s case. Even if both clients consent to representation by the same attorney (because of his/her reputation for success), counsel should not represent both clients if only to avoid appearing as a hired gun on both sides of the same gun fight.

Conflicts can also arise in non-litigation situations such as when counsel represents multiple family members in a testamentary matter where the interests may first appear to be in harmony only to diverge when their individual wishes and desires are revealed. In deciding whether a conflict exists, counsel should take in to account: the importance of the matter to each client, the duration and degree of closeness of the lawyer to each client, the likelihood of significant disagreement among clients (is the matter likely to be litigated?), and the realization that all information shared by each client with counsel and vice versa is shared by all and not subject to the rules of privilege and confidentiality. (So, if litigation subsequently ensues between or among joint clients, their secrets are not safe, and they must be so advised before consenting to joint representation which can save money in the short term but prove to be more costly over the long haul).

RPC 1.6 CONFIDENTIALITY OF INFORMATION:

One of the hallmarks of the lawyer-client relationship is trust based on candid and complete communication which can only exist if the client knows that counsel cannot be compelled to disclose his/her privileged conversations (with counsel and his/her agents), and will not voluntarily (or negligently) reveal or use confidential information to the client’s detriment or to counsel’s benefit or that of a third party.

RPC 1.6(a) states that counsel SHALL NOT KNOWINGLY REVEAL CONFIDENTIAL INFORMATION, or USE SUCH INFORMATION to a client’s disadvantage (or for L’S advantage or of a third party), UNLESS: 1. the client gives informed consent; 2. the disclosure is impliedly authorized for the best interests of the client to ADVANCE THE CLIENT’S BEST INTERESTS, (e.g. where counsel reveals some information about the defendant’s side of the story in an effort to secure a favorable plea offer or, perhaps, to condition the judge’s thinking in anticipation of a non-jury trial); or 3. disclosure is permitted by paragraph (b) below.

CONFIDENTIAL INFORMATION which is sometimes confused with PRIVILEGED COMMUNICATIONS between lawyer and client (which is one source of confidential information), consists of INFORMATION GAINED DURING OR RELATING TO THE REPRESENTATION OF A CLIENT, (WHATEVER ITS SOURCE), that is: a. protected (as noted above), by the attorney-client privilege, b. is likely to be embarrassing or detrimental to the client if disclosed, or c. information that the client has requested be kept confidential.

Confidential information DOES NOT ordinarily include: i. the lawyer’s legal knowledge or research or ii. information that is GENERALLY KNOWN IN THE LOCAL COMMUNITY or in the trade, field, or profession to which the information relates.

For example, if counsel represents a young married couple (he's a famous athlete who just moved to Buffalo to play for the Bills), in the purchase of a lakefront home (and in his contract negotiations), and then later represents the wife in a divorce/custody action on account of her husband's recurrent alcohol abuse problem/DV behavior (for which he privately told counsel early on that he was in counseling), counsel could not use that information against him because it was obtained in confidence. However, if as part of his public-image repair plan, the husband went public with his problems and rehab efforts, counsel would no longer be precluded from using this erstwhile confidential information to the husband's detriment in the custody matter.

It is worth noting that the matter of Privilege is a Rule of Evidence which prevents a court or other adjudicative body, whether by subpoena, direct order or otherwise, from compelling counsel to disclose communications between counsel and client (and/or their agents) provided the client (to whom the privilege belongs), intended for the communications to be kept between them and communicates in a manner that is consistent with such intent. (e.g. Expressing vociferous disagreement with counsel's trial strategy in the courthouse hallway within obvious earshot of others will probably not enjoy the protection of Privilege).

The rule regarding Confidential Information, in contrast, is a rule of Professional Responsibility which is intended to discourage counsel from voluntarily disclosing information relevant to the representation (whether formally or in casual conversation), or using it to the client's detriment or to the lawyer's own or third party's advantage. (So, a lawyer who calls his brother-in-law and urges him, based on information from the client, to dump certain stock which he expects to take a nose-dive has violated this rule (and probably also the rules against insider trading).

While confidential information is sacred, it is not so sacrosanct as to be immune from disclosure or use in any and all circumstances. RPC 1.6(b) states that a lawyer MAY REVEAL or USE confidential information to the extent that he/she reasonably believes is necessary: (1) to prevent reasonably certain death or substantial bodily harm;

(So, if the client advises counsel, for example, that he (a disgruntled former Amtrak employee), has rigged the railroad tracks at a certain location so that the work-day, passenger train will go off the rails, counsel can but need not warn the appropriate authorities); The death or serious injury need not, however, be imminent, just reasonably certain to occur.

2. to prevent the client from committing a crime. (This option does not apply to past crimes which the client has confessed to counsel unless he/she has, for example, in the case of a kidnapping, buried the victim alive and there is still a chance that he/she is still alive);

3. to withdraw a written/oral opinion or representation previously given by the lawyer and which he/she believes is still being relied upon by a third person, where the lawyer has discovered that the opinion/representation was based on materially inaccurate information or is being used to further a crime or fraud.

If, for example, the lawyer who, based on his/her client/art dealer's "expert" information, represents to a prospective buyer that a particular painting is a "an authentic Monet " when, in fact, counsel overhears his client say that it was actually painted by a dime-a-dozen, street-hustler named "O.C. Money," counsel would be within his/her rights to rescind his earlier representation of authenticity.

4. to secure legal advice (e.g. from a respected lawyer or law professor), about compliance with these rules or other law by the lawyer, another lawyer associated with the same firm or the firm as a whole. (e.g. if the lawyer has a novel or complicated suppression issue or if the client suggests a course of conduct the propriety of which is unclear, counsel may consult with a trusted authority and reveal confidential information sufficient to enable an informed response).

5. to defend the lawyer or his/her employees/associates against an accusation (whether formal or informal) of i. wrongdoing or ii. to establish or collect a fee;

Example: The defendant, charged with robbery where identity is the issue offers to testify that he was elsewhere at the time of the crime, and informs counsel that his good friend who was with him will back up his story. (Counsel's investigation reveals that the friend was in jail when the robbery occurred). Believing that the client was lying about the alibi (when confronted by counsel, the defendant said, "Okay, so I made that part up. Just get me off of this charge cuz I can't go back to prison."). The defendant also advises that he wants to testify that he was elsewhere (when, in fact, he wasn't), and counsel prevails upon him, saying, "that's a bad idea especially with your prior robbery conviction." After the defendant is convicted, he files a grievance, alleging that counsel prevented him with threats and other verbal abuse from testifying or calling an alibi witness. In defense of this accusation of misconduct, counsel may, in addition to denying the defendant's accusations of coercion, explain why he urged the defendant not to testify and did not call someone who turned out to be a bogus alibi witness.

Similarly, if a client stiffs counsel on payment of a legal fee rightly due and owing, counsel may establish the work performed and reveal otherwise confidential information to the extent necessary to establish his/her entitlement to the amount demanded. (e.g. “representing this client in this custody matter was particularly challenging and took much longer than it should have because of his changing version of events that required multiple amendments to our responding papers.”).

6. When permitted or required by the rules or to comply with a court order.

c. A lawyer must take reasonable steps to PREVENT INADVERTENT OR UNAUTHORIZED DISCLOSURE OR ACCESS to confidential information protected by this rules, RPC 1.9(c)(former clients) and RPC 1.18(b) (prospective clients i.e. those who consult with counsel with an eye toward representation that does not materialize).

RULE 1.8 SOME SPECIFIC CONFLICT RULES INVOLVING LAWYERS AND CURRENT CLIENTS:
BUSINESS RELATIONSHIPS:

Sometimes, a lawyer may enter into a BUSINESS TRANSACTION or venture (apart from usual representation), with a client. Because of the perceived inequalities of the relationship, counsel must be careful to follow the dictates of RPC 1.8 which states that a lawyer who intends to enter into such transaction with a client who has differing interests (and who expects counsel to exercise professional judgment therein for the client’s protection), must take steps to ensure that:

(a)(1) the transaction is FAIR AND REASONABLE and the TERMS 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 WRITTEN AND SIGNED CONSENT to the essential terms of the transaction and the lawyer’s role therein.

(b) A lawyer shall not use INFORMATION RELATING TO THE REPRESENTATION of a client to the latter’ s disadvantage without informed written consent (why a client would consent to same is not entirely clear), except as permitted or required by the rules.

GIFTS:

(b) A lawyer SHALL NOT: (1) SOLICIT ANY GIFT from a client (including a testamentary gift), for the benefit of the lawyer or a PERSON RELATED to him (e.g. spouse, child grandchild, parent, grandparent or other relative or person with whom the lawyer has a CLOSE FAMILIAL RELATIONSHIP).

This rule does not necessarily preclude counsel from accepting a modest UNSOLICITED gift from a grateful client, but counsel should neither covet nor lay claim to benefits that are not part of his/her rightful compensation. (e.g. After a lawyer does significant work on his/her alma mater’s fundraising campaign, he/she mentions to the dean that his son was recently rejected for admission to the law school and he would really like his son to be re-considered: Such conduct is verboten under this rule because it involves solicitation of a gift on behalf of a relative and also suggests that counsel’s motives in helping raise money for the school were perhaps not so altruistic after all).

This rule does not apply to solicitation of gifts from clients who are relatives (or long-standing pre-existing clients who are presumed to be immune to counsel’s overbearing ways).

LITERARY/MEDIA RIGHTS:

(d) Before the conclusion of all aspects of the matter giving rise to the representation (or proposed representation of the client/prospective client), a lawyer SHALL NOT negotiate or enter into any arrangement/understanding with: (1) a client or prospective client by which the lawyer ACQUIRES AN INTEREST in literary or media rights with respect to the SUBJECT MATTER OF THE REPRESENTATION.

In the above-referenced example of the famous athlete who moves to Buffalo, counsel could not (prior to conclusion of the representation), acquire literary/media rights in that part of the client's story which INVOLVES THE REPRESENTATION (e.g. negotiating the client's contract with the Buffalo Bills), but counsel could acquire rights to the client's life-story which predates his signing with the Bills since it is arguably not part of the subject matter of the representation.

(2) A lawyer shall also not negotiate or enter into any agreement/understanding with any person by which the lawyer transfers or assigns any interest in literary/media rights with respect to the subject matter of the representation.

FINANCIAL ASSISTANCE:

While representing a client in connection with contemplated or pending litigation, a lawyer SHALL NOT ADVANCE or GUARANTEE FINANCIAL ASSISTANCE TO THE CLIENT. BUT, a lawyer MAY: 1. ADVANCE COURT COSTS AND EXPENSES of litigation, repayment of which may be contingent on the outcome of the matter.;

While a lawyer may advance such costs, he/she CANNOT PROVIDE other financial assistance (e.g pay the client's on-going medical bills other than the cost of retaining an expert or for other investigative assistance), to tide the client over while the case is pending. (Doing so gives counsel too great a personal stake in the outcome of the matter).

2. A lawyer who represents an indigent client pro bono may pay court costs and expenses of litigation on behalf of a client.

(3). A lawyer, in an action in which his/her fee is payable, in whole or in part, as a PERCENTAGE of the recovery in the action, MAY PAY on the lawyer's own account COURT COSTS and LITIGATION EXPENSES. In such case, the fee paid to the lawyer from the proceeds of the action MAY INCLUDE an amount equal to such costs and expenses incurred.

THIRD PERSON PAYMENT:

(f) A lawyer SHALL NOT ACCEPT COMPENSATION for representing a client, or anything of value related to the representation of a client, FROM ONE OTHER THAN THE CLIENT UNLESS:1. the client gives INFORMED CONSENT; 2. there is NO INTERFERENCE with the lawyer's INDEPENDENT PROFESSIONAL JUDGMENT; and 3. the client's CONFIDENTIAL INFORMATION is protected per RPC 1.6.

If, for example, counsel is retained to represent a client charged with prostitution, counsel could NOT accept payment for the representation from the client's employer (i.e. pimp) if he tries to dictate the representation (e.g "I don't want her taking any misdemeanor plea,"), or wants to sit in or be de-briefed on counsel's conversations with the client (absent her permission), and/or the client does not provided informed consent to the arrangement.

MULTIPLE CLIENT SETTLEMENTS:

(g) A lawyer who represents two or more clients SHALL NOT participate in the making of an aggregate settlement of the claims of or against the clients, absent court approval, UNLESS EACH CLIENT gives INFORMED WRITTEN AND SIGNED CONSENT. The lawyer's disclosure SHALL INCLUDE the existence and nature of ALL THE CLAIMS involved and the participation of each person in such settlement.

MALPRACTICE:

(h) A lawyer SHALL NOT: (1) make an agreement PROSPECTIVELY LIMITING his/her liability to a client for malpractice; 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.

So, if for example, counsel, in the context of a fee dispute, offers to reduce his fee substantially on the condition that the client (who has since fired him/her), withdraws his malpractice claim, counsel must first advise the former client in writing to consider consulting with independent counsel.

It is worth keeping in mind that a disciplinary action (which is brought to the Grievance Committee and overseen by the Appellate Division and, ultimately, the Court of Appeals), is brought to determine whether a disciplinary rule has been violated and, if so, what sanction (e.g. letter of reprimand, censure, suspension or revocation of license to practice), is warranted. The purpose of the process is to screen complaints and, where there is merit, to protect the public from disreputable or otherwise unfit and/or incompetent lawyers.

A malpractice action, in contrast, is a civil claim (usually sounding in negligence and/or breach of contract) brought by an aggrieved party (usually the client) who claims to have suffered and therefore seeks payment of money damages on account of the lawyer's actions (or inaction as the case may be). There is no separate cause of action for a breach of a disciplinary rule but, (as with an alleged violation of a Vehicle and Traffic rule in a personal injury action), it can provide relevant evidence of negligence (or some other failing), in the malpractice action.

PROPRIETARY INTEREST IN THE ACTION:

i. A lawyer SHALL NOT acquire a proprietary interest in the cause of action or the subject matter of the litigation that he/she is conducting for a client, EXCEPT THAT he/she MAY: 1. ACQUIRE A LIEN to secure the lawyer's fee or expenses (but he/she can't hold a file hostage in exchange for payment of a fee due and owing); (2): the lawyer MAY ALSO contract with the client for a REASONABLE CONTINGENT FEE in a civil matter (subject to RPC 1.5[d]) or other law/court rule.

There can be NO CONTINGENT FEE in a criminal case, so counsel cannot, for example, tell the client, "your fee will be $5,000.00 if we plead it out and $20,000.00 if we go to trial and I get you acquitted."

In civil cases, contingent fees must be clearly spelled out in writing (e.g. what percentage of any recovery after settlement trial or appeal will go to counsel, and whether counsel's cut will be determined before or after deduction of costs/expenses chargeable to the client), and otherwise be fair and reasonable, considering the time and effort required to reach a resolution. (See RPC 1.5 regarding Fees).

SEXUAL RELATIONS:

RPC 1.8(j)(1) states that a lawyer SHALLL NOT: i. require or demand sexual relations with any person as a condition of entering into or continuing any professional representation by him/her; ii. use coercion, intimidation or undue influence in entering sexual relations incident to any professional representation by him/her or the firm; iii. in a DOMESTIC RELATIONS MATTER (RPC 1.0[g]: divorce, separation, annulment, custody, visitation, maintenance, child support, alimony, action to enforce/modify a judgment/order in such proceedings), the lawyer SHALL NOT ENTER into sexual relations with the client DURING HIS/HER REPRESENTATION of the client.

2. This rule does NOT APPLY to sexual relations between lawyers and their spouses or to on-going consensual sexual relationships that PREDATE the commencement of the lawyer-client relationship.

(k) Where a firm lawyer has sexual relations with a client but DOES NOT (in fact, cannot) participate in that client's representation (unless the relationship pre-dated the representation), the other lawyers in the firm SHALL NOT be subject to discipline under this rule solely because of the occurrence of such sexual relations.

QUESTION: A client advises her new counsel that she fired her former divorce lawyer (hired on her brother's recommendation), because he had sex with her against her will when she resisted his advances. She stresses that she does NOT want new counsel to mention this to anyone because of her own personal embarrassment (she feels foolish for letting him wine and dine her during the representation and allowing herself to flirt with him), and desire not to upset her brother. Can counsel report the first lawyer to the Grievance Committee?

Answer. Not unless the client consents to disclosure. Although the lawyer's conduct, if true, seriously calls into question his fitness as a lawyer which counsel would otherwise be required to report to the Grievance Committee (RPC 8.4[b], 8.3 [a]), the information was conveyed to counsel in confidence which the client has instructed counsel to keep that way. (RPC 1.6[3][c]). As such, it would be a violation of the rules to disclose this information, (though nothing would prevent counsel from urging the client to report the other lawyer to law enforcement or to authorize his alerting the Grievance Committee in the hopes that the lawyer would be stopped from repeating such behavior with another client).

As is evident, conflicts and confidences are often closely related inasmuch as conflicts can occur precisely because of confidential information (pertaining to one client or the other), that counsel is not at liberty to disclose. While representing multiple clients can often be cost-saving and ultimately beneficial to the clients (and well worth counsel's while), they can also present perils and pitfalls for the lawyer who is unfamiliar with the rules of professional conduct relating to them. As with any important professional endeavor, forewarned is forearmed.