

Ethical Representation of Tenants



Presented At

ANNUAL HOUSING LAW SEMINAR

VOLUNTEER LAWYERS NETWORK

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Presenter



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Read the Rules



Minnesota Rules of Professional Conduct

Available from the Office of Lawyers Professional
Responsibility

<http://lprb.mncourts.gov/rules/Pages/MRPC.aspx>

I. Clinic and Hot Line Advice - Rule 6.5



PRO BONO LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program offering pro bono legal services, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

Rule 6.5 Comments



[1] Legal services organizations, courts and various organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client’s informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

Rule 6.5 Comments



[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rule 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rule 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rule 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 1.2



SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

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(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

....

Rule 1.2 Comments



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Agreements Limiting Scope of Representation

[6] The objectives or scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Rule 1.2 Comments



[7] Although this rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

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Clinic and Hot Line Advice Scenarios



Are these legal to provide limited service without conflict checks?

In person pro bono advice clinics away from the law firm

In person pro bono advice clinics at the law firm

Pro bono hot lines

Clinic and Hot Line Advice Scenarios



In person pro bono advice clinics away from the law firm

Rules 6.5 (a) and 1.2 (c)

Yes, with informed consent of the client, unless the lawyer knows of a conflict

In person pro bono advice clinics at the law firm

Rules 6.5 (a) and 1.2 (c)

Yes, with informed consent of the client, unless the lawyer knows of a conflict, *but see* Rule 6.5, Comment 3 regarding checking for conflicts

Pro bono hot lines

Rules 6.5 (a) and Rule 1.2 (c)

Yes, with informed consent of the client, unless the lawyer knows of a conflict

Volunteer Lawyers Network Standard



Inform the client of the limits of the representation at the beginning of the meeting.

The service is only limited representation, with no on-going services unless specifically agreed by the attorney and client.

Obtain informed consent by the client.

II. Confidentiality



Rule 1.6 Confidentiality of Information

(a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.

(b) A lawyer may reveal information relating to the representation of a client if:

(1) the client gives informed consent;

(2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;

(3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;

(4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or to prevent the commission of a crime;

(5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

Confidentiality



- (6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;
 - (7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;
 - (8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;
 - (9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;
 - (10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule 8.3; or
 - (11) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Confidentiality



Rule 1.18 Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

Volunteer Lawyers Network Standard



Inform clients that the attorney and client privilege applies in the clinic setting.

III. Conflict of Interest Outside of Clinics Current Clients - Rule 1.7



CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Rule 1.7



(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Conflict of Interest: Current Clients Scenarios



Can you represent?

Married co-tenants in apartment with repair problems and current with their rent

Mother and minor son tenants in apartment facing eviction for son's alleged breach of lease

Conflict of Interest: Current Clients Scenarios



Married co-tenants in apartment with repair problems and current with their rent

Rule 1.7

Probably, but they would need to act as one for settling and remedies

Informed consent, confirmed in writing, is advised

Mother and minor son tenants in apartment facing eviction for son's alleged breach of lease

Rule 1.7

Probably for only representing mom, but probably not for representing both

Conflict of Interest: Current Clients: Specific Rules - Rule 1.8



CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

....

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

(1) the client gives informed consent or the acceptance of compensation from another is impliedly authorized by the nature of the representation;

(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.

(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 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 involved and of the participation of each person in the settlement.

....

Conflict of Interest: Current Clients: Specific Rules Scenarios



Can attorney represent?

Father asks attorney to represent competent adult son tenant in eviction action

Father offers to pay attorney to represent competent adult son tenant in eviction action

Landlord offers to settle eviction action against co-tenants

Conflict of Interest: Current Clients: Specific Rules Scenarios



Father asks attorney to represent competent adult son tenant in eviction action

Rule 1.8 (f)

Yes, with informed consent, no interference, and confidentiality

Father offers to pay attorney to represent competent adult son tenant in eviction action

Rule 1.8 (f)

Yes, with informed consent, no interference, and confidentiality

Landlord offers to settle eviction action against co-tenants

Rule 1.8 (g)

Yes, with written informed consent

Duties to Former Clients - Rule 1.9



DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) unless the former client gives informed consent, confirmed in writing.

Rule 1.9



(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Duties to Former Clients Scenarios



Can attorney represent?

Attorney represented tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Attorney advised tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Attorney represented landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord.

Attorney advised landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord.

Duties to Former Clients Scenarios



Attorney represented tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Rule 1.9 (a)-(b)

Probably not, but possible with written informed consent from first tenant

Attorney advised tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Rule 1.9 (a)-(b)

Probably not, but possible with written informed consent from first tenant

Attorney represented landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord.

Rule 1.9 (a)-(b)

Probably depending whether matters are substantially related, but written informed consent from landlord would be best

Attorney advised landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord.

Rule 1.9 (a)-(b)

Probably depending whether matters are substantially related, but written informed consent from landlord would be best

Imputation of Conflicts of Interest - Rule 1.10



IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer becomes associated with a firm, and the lawyer is prohibited from representing a client pursuant to Rule 1.9(b), other lawyers in the firm may represent that client if there is no reasonably apparent risk that confidential information of the previously represented client will be used with material adverse effect on that client because:

Rule 1.10



- (1) any confidential information communicated to the lawyer is unlikely to be significant in the subsequent matter;
 - (2) the lawyer is subject to screening measures adequate to prevent disclosure of the confidential information and to prevent involvement by that lawyer in the representation; and
 - (3) timely and adequate notice of the screening has been provided to all affected clients.
- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

Rule 1.10



- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Imputation of Conflicts of Interest: General Rule Scenarios



Can attorney represent?

Attorney in firm advised or represented tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant, and contacts another attorney in the same firm while the first attorney remains in the firm.

Attorney advised or represented landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord, and contacts another attorney in the same firm while the first attorney remains in the firm.

Imputation of Conflicts of Interest: General Rule Scenarios



Attorney in firm advised or represented tenant in eviction action based on dispute with another tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant, and contacts another attorney in the same firm while the first attorney remains in the firm.

Rules 1.10 (a) and 1.9 (a)-(b)

Probably not, but possible with written informed consent from first tenant

Attorney advised or represented landlord in eviction action against a tenant for breach of lease. Later another tenant faces habitability problems with the same landlord, and contacts another attorney in the same firm while the first attorney remains in the firm.

Rules 1.10 (a) and 1.9 (a)-(b)

Probably depending whether matters are substantially related, but written informed consent from landlord would be best

Duties to Prospective Client - Rule 1.18



DUTIES TO PROSPECTIVE CLIENT

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

Rule 1.18



(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Duties to Prospective Client Scenarios



Can attorney represent?

Attorney was contacted by tenant in eviction action based on dispute with another tenant but did not represent or advise the tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Attorney was contacted by landlord in eviction action against a tenant for breach of lease but did not represent or advise the landlord. Later another tenant faces habitability problems with the same landlord.

Duties to Prospective Client Scenarios



Attorney was contacted by tenant in eviction action based on dispute with another tenant but did not represent or advise the tenant. The first tenant settled to move. Later the second tenant faces eviction based on dispute with first tenant.

Rule 1.18

Probably not, but possible with written informed consent from both tenants and confidentiality

Attorney was contacted by landlord in eviction action against a tenant for breach of lease but did not represent or advise the landlord. Later another tenant faces habitability problems with the same landlord.

Rule 1.18

Probably with confidentiality, but written informed consent from both parties is best

IV. Client with Diminished Capacity - Rule 1.14



CLIENT WITH DIMINISHED CAPACITY

- (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonable protective action, including consulting individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.
- (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(b)(3) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Client with Diminished Capacity Scenarios



Can attorney advise?

Adult tenant with developmental delay who functions like a 15 year old and does not have a guardian seeks advice about dealing with apartment habitability problems

Adult tenant with developmental delay who functions like a 15 year old and has a guardian seeks advice about dealing with apartment habitability problems

Adult tenant with developmental delay who functions like a 15 year old and does not have a guardian states he will withhold rent without legal justification

Client with Diminished Capacity Scenarios



Adult tenant with developmental delay who functions like a 15 year old and does not have a guardian seeks advice about dealing with apartment habitability problems

Rule 1.14

Probably can advise

Adult tenant with developmental delay who functions like a 15 year old and has a guardian seeks advice about dealing with apartment habitability problems

Rule 1.14

Should contact the guardian

Adult tenant with developmental delay who functions like a 15 year old and does not have a guardian states he will withhold rent without legal justification

Rule 1.14

Probably can advise but also could contact a relative

V. Competence - Rule 1.1



COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Competence



Know the law

Housing Law in Minnesota

<http://povertylaw.homestead.com/ResidentialUnlawfulDetainer.html>

HOME Line

<https://homelinemn.org/>

VI. Be Careful Out There



Settlement Negotiations:

Statements made in settlement negotiations may be actionable for damages in a separate action. In *Hoyt Properties, Inc. v. Production Resource Group, L.L.C.*, 736 N.W.2d 313 (Minn. 2007), a commercial landlord sued the tenant and tenant's parent corporation, alleging that during settlement negotiations in a separate eviction action, the parent corporation through its attorney misrepresented itself as completely separate from tenant. *Id.* at 316-17. The Court held that the alleged statements were actionable as fraudulent misrepresentations. *Id.* at 319.

Be Careful Out There



Collateral Estoppel and Res Judicata:

In *Ellis v. Minneapolis Commission on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982), the Court held that the issue of illegal discrimination, which was litigated in an eviction (unlawful detainer) action, could not be litigated in a subsequent discrimination action. The Court noted that in the unlawful detainer action, the proceeding was not summary in nature, where the tenant had significantly more time to prepare than in the typical case, the tenant introduced extensive evidence, and the jury trial lasted for four days. The court concluded that "[i]n this unique fact situation, [the tenant] had a full and fair opportunity to litigate [the issue]."

Be Careful Out There



In *Duling Optical Corp. v. First Union Management, Inc.*, No. C5-95-2718 (Minn. Ct. App. Aug. 13, 1996), Finance & Commerce at 66 (Aug. 16, 1996) (Appendix 181) (unpublished decision), the Court of Appeals affirmed the District Court's conclusion in a separate damages action that it lacked jurisdiction to award attorney's fees for separate unlawful detainer actions, since the issue of attorney's fees should have been decided in the unlawful detainer actions.

VII. Questions



Advisory Opinions from the Office of Lawyers Professional Responsibility

Phone:

651-296-3952 or toll-free 1-800-657-3601

Online Request:

<http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx>

Questions



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