



# LMICK On-Demand CLE

## **The Lawyer-Client Relationship Continuum: Determining Duties Owed After Casual Conversations**

Does a casual conversation provide a solid business opportunity or a potential ethical conundrum? The lawyer-client relationship forms along a continuum, beginning with the non-client and moving to potential to prospective to current to former client. Depending on where an individual falls on this continuum, lawyers may owe certain ethical duties. At what point does a conversation at the grocery trigger the lawyer-client relationship continuum? (Hint: The answer is not the payment of fees.) How can you identify the stage of relationship development and ensure you are meeting your applicable ethical duties?

This session will provide an overview of the rules and opinions governing lawyer-client formation in Kentucky, including the recent 2022 Kentucky Bar Association Formal Ethics Opinion on Prospective Clients. The presenters will then explore real-world scenarios, identifying various stages of lawyer-client relationship development. Attendees will gain an understanding of how to navigate these encounters to ensure acceptance of only those intended clients.

### ***Presented by:***



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“The practice of law shall also embrace ‘all advice to **clients** ... the preparation and drafting of all kinds of legal instruments, where the work involves the determination by a trained legal mind of the legal effect of facts and conditions.’” *In re Lyvers*, 179 B.R. 837, 840 (Bankr. W.D. Ky. 1995) (quoting *Hobson v. Kentucky Trust Co. of Louisville* 197 S.W.2d 454, 460 (1946).)

- *See also, SCR 3.020, Practice of law defined:* The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.

***But...who are the clients?***

### **Stages of Lawyer-Client Relationship Formation?**

Non-Client → Potential Client → Prospective Client → Current Client → Former Client

### **Who is a potential client?**

- A potential client is someone who may engage an attorney for legal services. A potential client likely has not yet provided the lawyer any confidential information.
  - See KBA E-455, Question 1.

### **Who is a prospective client?**

- KBA E-455, Question 1:
  - “A person becomes a ‘prospective client’ by discussing with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter; however, not every communication with a lawyer...constitutes a discussion. ...[It] depends on the facts and circumstances surrounding the exchange of information.”
  - “If during the discussion the lawyer requests or invites a potential client to provide confidential information without giving the person an effective warning not to disclose confidential information and the potential client proceeds to provide the attorney with confidential information that is significantly harmful to such

person, then it is most likely that the person will become a prospective client.

- “On the other hand, if a person who is not acting in good faith communicates confidential information unilaterally, or after first receiving a warning not to make a disclosure of confidential information or without any reasonable expectation that the lawyer is willing to discuss the possibility of representing the person, then the potential client should not be considered a prospective client.
  - “Further, a person who discloses or communicates information to a lawyer must have a bona fide intent of retaining the lawyer or a good faith intention to seek legal advice, a person who does not should not be deemed a ‘prospective client.’”
- What duties are owed to a prospective client?
    - SCR 3.130 (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).
      - (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.
- Supreme Court Commentary to SCR 3.130 (1.18):
  - (1) Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.
  - (2) Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).
  - (3) It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.
  - (4) In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

- (5) A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.
- (6) Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.
- (7) Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.
- (8) Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.
- (9) For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

### **Who is a current client?**

- A current client has entered into a lawyer-client relationship. The Restatement (Third) of the Law Governing Lawyers provides the clearest definition for the formation of the current client relationship (§ 14 Formation of a Client-Lawyer Relationship):

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with power to do so appoints the lawyer to provide the services.

- Case Law: A Client's Reasonable Belief of Expectation
  - “[A]n attorney-client relationship may be created as a result of a party's ‘reasonable belief or expectation,’ based on the attorney's conduct, that the attorney has endeavored to undertake representation.” *Pete v. Anderson*, 413 S.W.3d 291, 296 (Ky. 2013) (citing *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky.1997); *Am. Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12 (Ky.App.1998)).
  - “Therefore, whether a party had a ‘reasonable belief or expectation’ relating to the attorney's representation of that party's legal interests is a question of fact.” *Pete v. Anderson*, 413 S.W.3d 291, 296 (Ky. 2013) (See *Marrs*, 95 S.W.3d 856; *Lovell*, 941 S.W.2d 466.)
- What duties are owed to current clients?
  - *SCR 3.130(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.
  - *SCR 3.130(1.3) Diligence*
    - A lawyer shall act with reasonable diligence and promptness in representing a client.
  - *SCR 3.130(1.4) Communication*
    - (a) A lawyer shall:
      - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
- SCR 3.130(1.5) Fees
    - (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
      - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
      - (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
      - (3) the fee customarily charged in the locality for similar legal services;
      - (4) the amount involved and the results obtained;
      - (5) the time limitations imposed by the client or by the circumstances;
      - (6) the nature and length of the professional relationship with the client;

- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.
- (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.
  - (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Such a fee must meet the requirements of Rule 1.5(a). A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
  - (d) A lawyer shall not enter into an arrangement for, charge, or collect:
    - (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, maintenance, support, or property settlement in lieu thereof, provided this does not apply to liquidated sums in arrearage; or
    - (2) a contingent fee for representing a defendant in a criminal case.

- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
  - (1) the division is in proportion to the services performed by each lawyer, or, each lawyer assumes joint responsibility for the representation;
  - (2) the client agrees to the arrangement and the agreement is confirmed in writing; and
  - (3) the total fee is reasonable.
- (f) A fee may be designated as an advance fee. An advance fee agreement shall be in a writing signed by the client evidencing the client's informed consent, and shall state the dollar amount of the fee, its application to the scope of the representation and the time frame in which the agreement will exist.
- SCR 3.130 (1.6) Confidentiality of information
  - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
  - (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    - (1) to prevent reasonably certain death or substantial bodily harm;
    - (2) to secure legal advice about the lawyer's compliance with these Rules;
    - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or
    - (4) to comply with other law or a court order.
- SCR 3.130 (1.7) Conflicts 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.
- (b) Notwithstanding 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. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

○ *See also: SCR 3.130(1.8) Conflict of interest: current clients; specific rules*

### **Who is a former client?**

- A former client is one that is no longer represented by the lawyer. The lawyer-client relationship has been terminated.
- SCR 3.130 (1.16), Declining or terminating representation
  - ... (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
    - (1) withdrawal can be accomplished without material adverse effect on the interests of the client; ...

- ... (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

### **Best Practices**

- Intake Procedures. KBA E-455 provides suggested practices during the initial interview and in the conflicts check process to prevent a potential client from unintentionally becoming a prospective (or current) client.
  - Limit the amount of information obtained from the potential client until after an initial conflict check is completed.
  - Advise the potential client **before** they begin sharing any information of the following:
    - The sole purpose of the preliminary discussion is to do a basic conflict check.
    - Not to share any factual information until after giving sufficient information to allow a conflicts check to be completed.
    - This discussion does not generate an attorney-client relationship.
    - Appropriate follow-up will occur as soon as possible after the conflict check is complete and clear.
  - Additionally, “[a] prudent lawyer could advise a potential client as follows: ‘do not tell me any of your case or matter specific confidential information at this point – rather, only give me a simple description of the nature of the matter and the names of the persons involved in the matter.’” *KBA E-455, pg. 6.*
- Additional Best Practices:
  - If they do disclose information, be sure to return any and all original documentation
  - Use specific engagement and/or declination letters
  - Treat pro bono cases the same as all others
  - Encourage potential client to make an appointment to discuss further
  - Condition conversations to prevent conflicts
  - Do not feel pushed to talk or take the case

### **Hypothetical Scenarios: What are your duties, if any?**

- Discuss hypothetical interactions and determine whether:
  - The person is a potential or prospective client
  - An attorney-client relationship has formed
  - Any duty is owed to the person

- Throughout the hypotheticals, discuss best practices when interacting with potential or prospective clients, including:
  - Limit information gathering during initial conversation
  - Follow up each initial meeting with written communication
    - Advise how much time is left to file suit or file an appeal so the client understands the clock is ticking
    - Encourage communication with another lawyer for a “second opinion” (but do not offer to contact the other attorney for them)
    - declining, state clearly that you are not their attorney
  - Do not offer to find another attorney to evaluate or take the case
    - When appropriate, provide a recommendation
  - *The most up-to-date template letters are available at [www.lmick.com](http://www.lmick.com) or by emailing [risk@lmick.com](mailto:risk@lmick.com)*
- Hypothetical: Grocery store encounter
  
- Hypothetical: In-office initial consultation
  
- Hypothetical: No good deed: pro bono case
  
- Hypothetical: “Don’t you represent me, too?” (*Corporate attorney considerations*)

## **§ 14 Formation of the Client Lawyer Relationship**

*Restatement (Third) of the Law Governing Lawyers (2000)*

The American Law Institute

### **A relationship of client and lawyer arises when:**

- 1. a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either**
  - a. the lawyer manifests to the person consent to do so; or**
  - b. the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or**
- 2. a tribunal with power to do so appoints the lawyer to provide the services.**

[Selected comments:]

...

*b. Rationale.* The client-lawyer relationship ordinarily is a consensual one (see [Restatement Second, Agency § 15](#)). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services. The consent requirement, however, is not symmetrical. The client may at any time end the relationship by withdrawing consent (see §§ [31](#), [32](#), & [40](#)), while the lawyer may properly withdraw only under specified conditions (see §§ [31](#) & [32](#)). A lawyer may be held to responsibility of representation when the client reasonably relies on the existence of the relationship (see Comment *e*), and a court may direct the lawyer to represent the client by appointment (see Comment *g*). Lawyers generally are as free as other persons to decide with whom to deal, subject to generally applicable statutes such as those prohibiting certain kinds of discrimination. A lawyer, for example, may decline to undertake a representation that the lawyer finds inconvenient or repugnant. Agreement between client and lawyer likewise defines the scope of the representation, for example, determining whether it encompasses a single matter or is continuing (see § [19\(1\)](#); § [31\(2\)\(e\)](#) & Comment *h*). Even when a representation is continuing, the lawyer is ordinarily free to reject new matters.

*c. The client's intent.* A client's manifestation of intent that a lawyer provide legal services to the client may be explicit, as when the client requests the lawyer to write a will. The client's intent may be manifest from surrounding facts and circumstances, as when the client discusses the possibility of representation with the lawyer and then sends the lawyer relevant papers or a retainer requested by the lawyer. The client may hire the

lawyer to work in its legal department. The client may demonstrate intent by ratifying the lawyer's acts, for example when a friend asks a lawyer to represent an imprisoned person who later manifests acceptance of the lawyer's services. The client's intent may be communicated by someone acting for the client, such as a relative or secretary. (The power of such a representative to act on behalf of the client is determined by the law of agency.) No written contract is required in order to establish the relationship, although a writing may be required by disciplinary or procedural standards (see § 38, Comment *b*). The client need not necessarily pay or agree to pay the lawyer; and paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else, for example, when an insurance company designates a lawyer to represent an insured (see § 134).

...

*e. The lawyer's consent or failure to object.* Like a client, a lawyer may manifest consent to creating a client-lawyer relationship in many ways. The lawyer may explicitly agree to represent the client or may indicate consent by action, for example by performing services requested by the client. An agent for the lawyer may communicate consent, for example, a secretary or paralegal with express, implied, or apparent authority to act for the lawyer in undertaking a representation.

A lawyer's consent may be conditioned on the successful completion of a conflict-of-interest check or on the negotiation of a fee arrangement. The lawyer's consent may sometimes precede the client's manifestation of intent, for example when an insurer designates a lawyer to represent an insured (see § 134, Comment *f*) who then accepts the representation. Although this Section treats separately the required communications of the client and the lawyer, the acts of each often illuminate those of the other.

...

*f. Organizational, fiduciary, and class-action clients. ...*

Under Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity (see Subsection

(1)(b); see also § 103, Comment b (extent of a lawyer's duty to warn an unrepresented person that the lawyer represents a client with conflicting interests)).