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The Conflicts Conundrum: Avoiding and Managing Conflicts of Interest

A CNA PROFESSIONAL COUNSEL GUIDE FOR LAWYERS AND LAW FIRMS

Conflicts of Interest: An Overview

Conflicts of interest are one of the leading causes of legal malpractice lawsuits and disciplinary grievances against attorneys. While ethical rules have been developed to help attorneys recognize and avoid such situations, these rules can be complex and bewildering even to the most experienced practitioner. The consequences for attorneys who fail to take the appropriate measures can be severe and may include a legal malpractice lawsuit or grievance, forced disqualification from a representation, monetary payments, reputational damage, increased insurance premiums and, in a worst case scenario, even loss of one's license to practice law.[1] This guide will help explain the ethical requirements regarding conflicts of interest and offer some practical advice for avoiding and managing such conflicts in one's law practice.

The ABA Model Rules of Professional Conduct

The ethical rules regarding conflicts of interest arise out of an attorney's duty of undivided loyalty to his or her clients. Where the interests of another person or entity interfere with an attorney's ability to exercise his or her independent professional judgment on behalf of a client, the attorney's loyalty is divided and a conflict of interest arises. Generally, a lawyer can fulfill his or her duty of undivided loyalty only by thoroughly advising clients of the facts and circumstances surrounding the conflict of interest and obtaining the client's written informed consent to continue the representation. If the attorney fails to satisfy these obligations, the attorney may be subject to a claim for professional negligence.

The ABA Model Rules of Professional Conduct specify how attorneys should respond when confronted with a conflict of interest in their law practice. In most cases, the applicable rules are ABA Model Rules 1.7 and 1.8 (current clients), ABA Model Rule 1.9 (former clients), ABA Model Rule 1.10 (imputation of conflicts), ABA Model Rule 1.16 (declining or terminating representations) and ABA Model Rule 1.18 (prospective clients). Many, but not all, states have now adopted the ABA Model Rules of Professional Conduct, in whole or in part. Therefore, attorneys should become conversant with their state's specific rules of professional conduct to ensure that they are meeting their ethical obligations.

1 In 2012, the American Bar Association (ABA) House of Delegates, in Resolution 107, reaffirmed the ABA Standards for Imposing Lawyer Sanctions. Section 4.3 of the ABA Standards notes that disbarment is an appropriate sanction for a lawyer where the lawyer represents one or more clients with the intent to benefit the lawyer or another, knowing either that the lawyer's interests are adverse to the clients or that the clients have adverse interests to each other, and causes serious or potentially serious injury to the client(s).

Conflicts Involving Current Clients

The ABA Model Rules prohibit three different types of conflicts of interest with respect to current clients. First, lawyers may not represent clients whose interests are directly adverse on a matter. An example of a directly adverse representation is where a lawyer is required to cross-examine Client 1, who is called as a witness in a lawsuit involving Client 2, and Client 1's testimony is expected to be harmful to Client 2. A zealous advocate for Client 2 would impeach Client 1's testimony, for example, by showing that Client 1 is biased or has a personal interest. While taking such actions would benefit Client 2, impeaching Client 1's testimony would likely damage the attorney's relationship with Client 1. Accordingly, a conflict of interest would exist since the clients' interests would be directly adverse.

The second type of conflict of interest arises where no direct adversity is present, but there is a significant risk that the lawyer's representation will be "materially limited" by the lawyer's responsibilities to another client, a former client or a third person. This situation occurs when the lawyer's ability to consider, recommend or implement an appropriate course of action for the other client would be significantly encumbered. In addition, the potential harm must be *likely* to occur and the lawyer's independent professional judgment must be materially affected. For example, a lawyer's representation is often materially limited in joint representations, as an attorney representing numerous clients may be unable to recommend a specific course of action for one client due to the attorney's duty of loyalty to the other clients.

Third, a lawyer may not permit his or her own personal interests to interfere with the representation of a current client. For example, the lawyer may not refer clients to an enterprise in which the lawyer has an undisclosed financial interest. As noted above, disbarment may be an appropriate sanction for an attorney whose personal interests conflict with those of a client.

Overcoming a Conflict of Interest with a Current Client

If one of the above conflicts of interest arises during the representation of a current client, an attorney may be able to overcome the conflict and continue the representation. ABA Model Rule 1.7 permits an attorney to continue representing a client, despite the existence of a conflict, if the following four conditions are met.

- First, the lawyer must *reasonably believe* that he or she will be able to provide competent and diligent representation to each affected client.
- Second, the representation must not be prohibited by law.[2]
- Third, the representation must not involve a claim by one client against another client in the same litigation or proceeding, where the lawyer represents both clients.

If any of the first three conditions are not met, the conflict of interest cannot be waived and the representation is strictly prohibited. If these first three conditions are met, then the fourth requirement is that each client must provide written informed consent to waive the conflict. This discussion will focus on the first and fourth conditions above, as these elements are the most problematic.

With respect to the first requirement, the attorney should try to assess, honestly and objectively, whether the attorney can provide a competent and diligent representation. Such assessment should include anticipation and consideration of the counterarguments that may be asserted in any subsequent legal malpractice action. Finally, the attorney should decide whether a judge or jury hearing both sides would agree that it was reasonable for the attorney to conclude that he or she could provide a competent and diligent representation. In conducting this assessment, it may also be instructive for the attorney to confer with a disinterested attorney.

In addition, assuming that the conflict may be resolved through consent, the attorney must obtain written informed consent from each of the clients in order to continue the representation. ABA Model Rule 1.0 defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comment 20 to the ABA Model Rule 1.7 notes that the purpose of having the informed consent confirmed in writing is twofold: to emphasize the significance of the decision the clients are about to make, as well as to avoid any later issues that could potentially arise in the absence of a written document.

Courts have been relatively stringent about the requirement that clients receive adequate information regarding the conflict in order to effectively waive it. For example, in *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008), the plaintiffs argued that the defendant law firm had a conflict of interest since it represented both plaintiffs' interests in seeking expansion of the Ambassador Bridge, as well as those of a third party who was interested in opposing the formal expansion plan. The law firm defendant had moved for and obtained summary judgment on the grounds that the plaintiffs had waived the conflict of interest based upon their continued retention of the defendants. The Sixth Circuit Court of Appeals reversed summary judgment for the firm based partially on the existence of a genuine issue of material fact regarding the effectiveness of the informed consent. The court found that fact issues existed regarding whether the plaintiffs had received adequate information

2 For example, in some states, substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients. Also, under federal criminal statutes, certain representations by a former government lawyer are prohibited, notwithstanding the informed consent of the former client.

concerning the conflict. The court noted that assumed knowledge of the conflict was not, adequate as a matter of law, to adequately meet informed consent requirements. "Courts interpreting the ABA and Restatement rules have made it clear that it is not sufficient to leave the client to infer the full nature of a conflict from only bits and pieces of actual or constructive knowledge." *Id.* at 415. Attorneys should, therefore, comply with their state's specific requirements with respect to disclosing adequate information and explanation of the risks for purposes of obtaining informed consent. Any disclosures made to the client must be clear and include all the relevant facts, in case the client later challenges the adequacy of the informed consent.[3]

Moreover, attorneys should remember that written informed consent is required for each and every conflict that arises during the representation. Therefore, attorneys must review matters for conflicts of interest throughout the entire representation, not merely at its inception.

Withdrawal from the Representation

If a conflict cannot be waived or the client will not agree to waive the conflict, the attorney is then required to withdraw from the representation.[4] Many states require that the attorney seek the court's permission prior to withdrawal. Even in states where the court's permission is not required, it may be beneficial for attorneys to obtain a court order, as it will help to reinforce the attorney's position that the withdrawal did not create any material adverse effect for the client.

The ABA Model Rules require that attorneys take any steps to the extent reasonably practicable to minimize the harm to the clients as a result of a withdrawal. For example, attorneys should try to avoid withdrawing in close proximity to a hearing date or other significant event. If necessary, attorneys should discuss with their clients whether they prefer to obtain a continuance or delay while the client seeks and retains new counsel. Attorneys are advised to consult the applicable law in their jurisdictions regarding reasonably practicable procedures for withdrawing as counsel. Counsel should make every effort to comply with all applicable ethical rules and make all reasonable efforts to reduce any harm to the client as a result of the withdrawal. Taking such small steps to assist the client after the attorney's withdrawal could affect a client's decision of whether or not to file a bar complaint or legal malpractice lawsuit against an attorney.

3 Note that a conflict may be non-waivable if the attorney is unable to make the disclosure necessary to obtain consent. For example, if one client is unwilling to agree to allow the attorney to disclose facts necessary to enable the other client to make an informed decision, the attorney can not properly seek informed consent.
4 ABA Model Rule 1.16.

Conflicts Involving Former Clients

Long after the representation of a client has ended, an attorney's ethical duties of loyalty and confidentiality to the former client continue. Under ABA Model Rule 1.9(a), a lawyer who represented a former client in a matter is prohibited from representing another person in the same or a substantially related matter where that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing. For example, an attorney who has represented multiple clients in a matter may not later represent one of them against another one of the former clients in the same or substantially related matter, unless all of the affected clients give informed consent, in writing. Matters are "substantially related" if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in the former representation would materially advance the client's position in the subsequent matter. For example, if a lawyer represented a business person in a commercial dispute and learned extensive financial information about him or her, the lawyer could not later represent the business person's spouse in seeking a divorce. Such representation would create a substantial risk that the financial information obtained in the commercial dispute would materially advance the spouse's position against the business person in the divorce proceeding.

ABA Model Rule 1.9(b) concerns a situation where the lawyer has changed law firms and wishes to represent a new client in a matter that is the same or substantially similar to one the lawyer handled for a former client at his prior law firm. The lawyer is prohibited from taking on this representation if the current client's interests are materially adverse to those of the former client and the lawyer obtained material information relating to the former client. If the attorney did not acquire material information about the former client while at his prior law firm, neither the attorney nor his new law firm would be prohibited from accepting the representation. However, there would be a presumption that the attorney obtained material information about the former client while at the prior law firm.

The duty to protect a former client's confidences also continues after the representation ends. In general, the lawyer is prohibited from revealing information related to the representation or using such information to the former client's disadvantage. Although ABA Model Rule 1.9 (c)(1) permits attorneys to use information of former clients where the information has become "generally known," or as the Rules otherwise permit or require, it is important to note that the requirements for something to be "generally known" vary from jurisdiction to jurisdiction. For example, even where information is a matter of public record, in some states it may be considered protected information.[5] Therefore, attorneys must become conversant with the ethical rules of their state regarding the protection of client information and take a conservative approach to applying those rules in their legal practices.

5 The Restatement (Third) of the Law Governing Lawyers adopts an access approach to the question of when information is "generally known." If the information is easily accessible to the public, it is "generally known." If special knowledge or skills are required to obtain the information, or if acquiring it would be expensive, then it is not. See Restatement (Third) of The Law Governing Lawyers § 59(d). However, states have varying interpretations of what constitutes "generally known" information. Florida Rule 4-1.9 defines "generally known" as "information of the type that a reasonably prudent lawyer would obtain from public records or through authorized processes for discovery of evidence." However, in North Carolina, "whether information is "generally known" depends in part upon how the information was obtained and in part upon the former client's reasonable expectations. The mere fact that information is accessible through the public record or has become known to some other persons does not necessarily change the confidential nature of the information. If the information is known or readily available to a relevant sector of the public – such as the parties involved in the matter – then the information is probably considered "generally known." Comment [8] to North Carolina Rule of Professional Conduct 1.9.

Conflicts Involving Prospective Clients

Attorneys also owe certain duties to prospective clients that can give rise to conflicts of interest. A "prospective client" is a person who consults with a lawyer about the possibility of forming an attorney-client relationship. Even where no attorney-client relationship is ultimately established, the lawyer is prohibited from later representing a client with interests materially adverse to 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 the prospective client if used.[6]

Not every person who consults with a lawyer becomes a prospective client to whom the attorney will owe a duty of loyalty and confidentiality. For example, a person who unilaterally provides information to an attorney without a reasonable expectation that the lawyer may be interested in forming an attorney-client relationship is not a prospective client and would not be owed any duty by an attorney. Similarly, a person who intentionally sends information to an attorney to conflict the lawyer out of a representation would not qualify as a prospective client under the ABA Model Rules.

To avoid inadvertently creating a duty to a prospective client, an attorney should be careful about the information conveyed by a prospective client communicates. At the outset of a discussion, attorneys should inform prospective clients not to reveal any confidential information until the attorney has cleared conflicts and has formally accepted the representation. This warning may be especially important where the prospective client is already a client of the lawyer or firm concerning other matters. In this situation, the prospective client is more likely to believe that his or her communications regarding a new matter would be protected as well.

If an attorney receives confidential information from a prospective client that could be significantly harmful to the prospective client, and the attorney is later disqualified from representing a current client, the disqualification would then be imputed to all other lawyers in the law firm as well. However, an attorney or law firm may avoid disqualification under certain conditions. First, if both the affected client and the prospective client have given their informed consent confirmed in writing, an attorney or law firm may continue the representation. Second, under ABA Model Rule 1.18 (d), the law firm may avoid imputation of the conflict if the lawyer involved has taken "reasonable precautions" to avoid exposure to disqualifying information,[7] the disqualified lawyer is timely screened from any participation in the matter and written notice regarding the representation is given to the prospective client.

6 ABA Model Rule 1.18.
7 Disqualifying information is any information obtained during a consultation with a prospective client that could be significantly harmful to the prospective client if later used in representing a client with interests that are materially adverse to those of the prospective client in the same or a substantially related matter.

Imputation of Conflicts

Where the conflict of interest involves an attorney who is currently associated with a law firm, that conflict is generally imputed to other attorneys of the law firm, based on the principle that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. However, this conflict will not be imputed to the law firm under two scenarios. First, where the conflict at issue is based on a personal interest of the disqualified attorney that does not present a significant risk of materially limiting the representation of the client by the other lawyers in the firm, the conflict will not be imputed to the firm.[8] For example, an attorney might be disqualified from representing a client due to his or her strong political beliefs. If that attorney's political beliefs would not materially limit other attorneys in the law firm from representing the same client, the personal conflict of the disqualified attorney would not be imputed to the other attorneys in the law firm. The main question is whether the prohibited lawyer's personal conflict is likely to influence the other attorneys' ability to competently and diligently represent the client.

Second, under the ABA Model Rules, the disqualified attorney's conflict will not be imputed to the law firm with which he or she is currently associated if the disqualification arises from the attorney's association with a prior law firm and involves a former client, as long as (1) the disqualified attorney is timely screened from any participation in the matter, (2) the disqualified attorney receives no part of the fee from the matter and (3) any affected former clients are promptly notified.[9] The ABA Model Rules provide specific procedures that must be followed, including providing written notice to the affected former clients and, at the former client's request, certifying that the firm is complying with required screening procedures.[10] Therefore, although a law firm is not required to obtain the former client's consent to screen the disqualified lawyer, the firm must follow the screening procedures outlined in the ABA Model Rules to ensure that the screen is effective.

Attorneys must review the ethical rules and laws of their state regarding conflicts screening, as a uniform standard does not apply to all states. For example, some states have added different screening procedures beyond those noted in the ABA Model Rules. Other states permit screening without client consent, unless the disqualified lawyer had a "substantial" or "primary" role in the former representation, or if the disqualified lawyer obtained "material" or "significant" information during the former representation. A number of states do not consider a screen sufficient to avoid the requirement to obtain informed consent in writing where a concurrent conflict of interest exists. In those states, a screen may represent a useful tool to offer the client as a means of obtaining informed consent to an otherwise conflicted representation. Therefore, prudence dictates that attorneys check their state requirements.

The ABA Model Rules provide different rules of imputation regarding a disqualified attorney who has terminated his or her association with a law firm. Generally, a conflict will not be imputed from an attorney formerly associated with a law firm to his or her prior law firm, as long as the conflict involves a former client of the law firm.[11] However, if the matter is the same or substantially related to that in which the formerly associated lawyer represented a client and another lawyer in the same law firm has obtained information from the client that is material to the matter at issue, then the law firm would be prohibited from representing the client.[12]

8 ABA Model Rule 1.10(a)(1).
9 ABA Model Rule 1.10(a)(2).
10 *Id.*
11 ABA Model Rule 1.10(b).
12 *Id.*

Practical Tips for Avoiding Conflicts of Interest

Attorneys and law firms can avoid becoming involved in a conflict of interest by taking certain preventative measures in their legal practice. Below are some effective strategies that can help to reduce the risk associated with a conflict of interest.

1. Warn Prospective Clients Not to Reveal Confidential Information

Where, during an initial consultation, a prospective client reveals confidential information to an attorney before the conflicts check has been completed, and the conflicts check reveals that a conflict exists with a client of the law firm, the law firm could be conflicted out of representing both the prospective client as well as the current client. Therefore, attorneys must clearly and unequivocally inform prospective clients at the outset of any discussion not to reveal any confidential information to them. Prior to clearing conflicts, the only information the attorney should request from prospective clients is the minimum information necessary in order to complete the conflicts check.

2. Implement and Use a Conflicts Checking System

Implementation of a conflicts checking system is a critical step to prevent conflict issues from arising. While a conflicts system may be either manual or computerized, a computer-based conflicts system is preferable as it is more likely to be routinely used, due to its faster speed. A computerized program also may be less likely to overlook information than a manual system. Ultimately, the most important factor in an effective conflicts checking system is whether the information entered into it is complete and accurate. Therefore, the system should be integrated with other office systems and be easily accessible to all office personnel. The law firm should commit to using and maintaining this system on an ongoing basis to ensure that the firm meets its duty of loyalty to its clients.

To be most effective, a conflicts checking system should incorporate, at a minimum, a comprehensive list or database of current and former clients, opposing counsel and opposing parties. Firms may wish to consider adding other applicable names as well, such as subsidiaries, aliases, contact persons at entity clients, and close family members of lawyers and staff who work at other law firms. The system should track whether the matter is currently open or closed, since different conflicts standards will apply to each scenario. Information should be continuously entered into the system throughout the representation: before the initial interview, as new claims or matters are opened, as individual or entity names change, as new parties are added, as experts, witnesses or attorneys are added to existing representations, and as the relationship of a party changes.

Conflicts checks also should be mandatory whenever new attorneys or staff members join the law firm. These individuals may have worked on matters at another law firm that can present a conflict with the law firm's clients. Law firms must take steps to prevent such conflicts. First, the new lawyer or staff person should perform an initial check of his or her client list against the law firm's client list. Upon completion of that check, the firm should then add the new person's former and current clients to the law firm's conflict checking system. Taking this step will ensure that all lawyers in the law firm are aware of any conflicts created by any of the new person's former and current clients.

3. Regularly Circulate a New Client/ Matter List

As a complement to a conflicts checking system, it is recommended that the law firm regularly circulate a list of new clients and cases to all lawyers and staff in the office. Everyone in the law firm should be required to review the list for possible conflicts in case they are not already entered in the conflicts checking system. It is possible that someone in the law firm may identify a conflict from the list that would not have been detected otherwise.

4. Independently Evaluate the Conflict

Once a conflict is identified, a disinterested partner or conflicts committee should evaluate the conflict to determine whether the conflict may be waived. If the involved attorney is left to decide on his/her own whether to proceed with the representation, there is a greater risk that the attorney may ignore or minimize the conflict due to his or her personal interest in accepting the representation. A disinterested partner or conflicts committee will be able to evaluate the conflict more objectively.

5. If the Representation is Declined, Send a Non-Engagement Letter

If the law firm or attorney decides that an unmanageable conflict of interest exists, then the attorney or law firm should decline the representation in writing as soon as possible. Without this documentation, the prospective client may later contend that the attorney was representing him or her or that confidential information was provided to the attorney, which could prevent the attorney from acting against the prospective client's interests in the future.

6. Obtain a Written Conflicts Waiver from Any Affected Parties

Although conflict waivers are not guarantees against the filing of a disciplinary complaint or legal malpractice claim based upon a conflict of interest, they can significantly reduce the likelihood of such a claim being filed and can help to support an attorney's defense to such claims. Certain precautions can significantly increase the likelihood that a conflict waiver will be deemed effective. First, any conflict waiver must be reduced to writing and signed by both clients. Second, the attorney must provide full and complete disclosure of all material aspects of the representation and any potential adverse effects of the conflict. Third, the attorney should inform both clients that he or she is not representing them with respect to the decision of whether to sign the proposed conflict waiver and recommend that they consult with outside counsel regarding the conflict waiver.

7. Execute a Written Engagement Agreement

Many legal malpractice claims could be avoided if attorneys consistently drafted a written engagement letter clarifying the scope of the representation, including specification of any particular areas that will not be covered by the representation. For example, if the law firm is being retained to handle a commercial transaction, but another firm is providing tax advice regarding the transaction, the engagement letter should expressly note that the law firm is not being retained to provide tax advice.

Law firms also may wish to consider including in their engagement letters an advance waiver for future conflicts that could arise. An advance conflict waiver is an agreement, given by a client, to a potential future representation by the law firm that would otherwise be precluded due to a conflict of interest. A typical advance waiver paragraph might state as follows:

> "The Client agrees that, notwithstanding our representation of the Client in general corporate matters we may, now or in the future, without seeking or obtaining your further consent, represent other persons, whether or not they are now clients of our law firm, in other matters, including litigation, where those other persons are adverse to the Client. The Client further agrees not to seek disqualification of our law firm should the firm sue the Client in the future."

Courts typically address the effectiveness of advance waivers on a case-by-case basis. Generally, they look at the extent to which the client reasonably understood the material risks that the waiver entailed. The more explicit the explanation of the types of future representations that could arise and the actual and reasonably foreseeable adverse consequences of those representations that are provided to the client, the greater the likelihood that the court will find informed consent. An advance waiver can be an effective tool to prevent a conflict issue from arising. However, even where an advance conflict waiver exists, the attorney or law firm should continue to request a specific conflict waiver any time an actual conflict arises.

8. Beware of Multiple Client Representations

Multiple client representations are a frequent source of conflicts of interest issues. In some cases, the risk of a conflict of interest in a multiple client representation is so great that the attorney should decline the representation. For example, a lawyer could not undertake a common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. A common representation also should not be undertaken where one client asks the lawyer not to disclose to the other client information relevant to the common representation, since the attorney has an equal duty of loyalty to both clients. Attorneys should beware of situations where the clients' interests initially appear to be aligned, but then diverge during the course of the representation. When that occurs, the lawyer may then have no choice but to withdraw immediately from representing all of the clients. To prevent this situation from occurring, the attorney should discuss with the clients at the beginning of the representation the potential for a conflict to arise during the representation and the risks and benefits of representing the clients jointly. The attorney should further explain that there is no right to confidentiality between the co-clients in view of the attorney's duty of loyalty to both.

9. Avoid Business Transactions with Clients

Engaging in business transactions with clients often leads to dangerous conflicts of interest for attorneys. ABA Model Rule 1.8 permits business transactions with a client only if the following specific conditions are met.

- First, the transaction must be "fair and reasonable" to the client and must be fully disclosed to the client in writing in a manner that can be "reasonably understood by the client."
- Second, the attorney must give the client the "opportunity to seek the advice of independent counsel in the transaction."
- Third, the client must consent to the transaction in writing.

It is important to understand that, even if the attorney meets all of the aforementioned conditions, a client may still pursue a legal malpractice claim or file a disciplinary complaint against the attorney if the business deal goes sour. In those situations, courts and disciplinary committees will closely scrutinize attorneys' business transactions with clients. An attorney who is found to have violated the ethical rules could face severe punishment, up to and including disbarment. Furthermore, there may be coverage issues regarding claims arising out of business transactions with clients. It is, therefore, strongly recommended that attorneys simply avoid engaging in business transactions with their clients. Any attorney who decides to engage in a business transaction with a client notwithstanding these significant risks should strictly follow the ethical rules in the state in which the attorney is practicing. In particular, attorneys should strongly encourage their clients in writing to seek independent legal advice regarding whether to enter into the business transaction with the attorney and have the client's independent counsel review the conflict waiver letter prior to the client signing it.

10. Act Immediately if a Conflict Arises

Finally, if a conflict arises during the representation, the attorney should immediately provide full disclosure of the conflict, as well as evaluate further steps that must be taken to minimize the harm to the client. In addition, the attorney must ensure that the client's interests are preserved while new counsel is being engaged. For example, if the client has a time deadline approaching, the attorney may need to seek a reasonable extension of time to enable the client to retain new counsel and for new counsel to take the necessary actions to protect the client. In addition, attorneys should consider promptly reporting to their professional liability carriers any circumstances likely to lead to a legal malpractice claim or disciplinary grievance in order to receive the benefit of any pre-claim assistance available to them under their professional liability policies.

Attorneys face significant risks from conflicts of interest in their legal practice. However, attorneys may minimize or avoid such risks by taking steps to familiarize themselves with the ethical rules in their jurisdiction pertaining to conflicts of interest, implementing effective conflicts checking systems and procedures, and avoiding those types of representations where conflicts are most likely to occur.

Conflicts of Interest Self-Assessment

GENERAL RISK CONTROL PROCEDURES	YES	NO	COMMENTS
Does my law firm maintain a conflicts of interest checking system?			
Is the system used by everyone in the law firm, all the time?			
Are the following names entered into the system?: - Clients, relatives of staff, subsidiaries of clients, and aliases; - Primary contact persons at entity clients; - Opposing parties and opposing counsel (and their law firms); - All close family members of lawyers and staff who work at other law firms, legal departments, government agencies and client offices. - Expert witnesses and major fact witnesses; - Non-parties at fault; - Former clients; - Prospective clients; - Individuals, entities and insurance companies paying clients' legal fees; and, - Vendors to the firm (landlord, IT company, ethics counsel, cleaning service, insurance agent).			
Is law firm staff trained to re-run a conflicts check every time a new party, a non-party at fault, new counsel, or new expert/key fact witness is added to a proceeding or a new proceeding commences?			
Is law firm staff also trained to re-run a conflicts check when entity clients experience changes in management or ownership?			
Does my law firm review its conflicts of interest system on a periodic basis to confirm that categories of information entered into it still make sense?			
Has my law firm assigned one lawyer and one staff person responsibility for reviewing and maintaining the conflicts checking system?			
Are conflicts checks run at least once a year for every matter regardless of whether there have been any new names entered into the system?			
Does my law firm regularly distribute a new client/matter list to everyone in the law firm?			
Does my law firm have a disinterested partner or conflicts committee evaluate any conflicts identified prior to opening the matter?			
Does my law firm send non-engagement letters where a non-waivable conflict exists or where my law firm decides not to take on the representation?			
Does my law firm send written engagement letters to clients clearly documenting the scope of the representation, as well as any legal services that my law firm has not agreed to provide?			
Does my law firm's standard engagement letter contain an advance conflicts waiver?			
Does my law firm website contain a disclaimer and warning that sending e-mails directly to the firm does not constitute an attorney-client relationship and that confidential information should not be transmitted to the law firm and will not be kept confidential?			
Do my law firm's paper intake forms, if any, contain a disclaimer that the disclosure of information on the form is for the purposes of conflicts checking and does not establish an attorney-client relationship?			
Has my law firm trained its staff, including receptionists, paralegals, administrative assistants and others who have contact with prospective clients, about guarding against the unintentional creation of an attorney-client relationship?			

PROSPECTIVE CLIENTS CONFLICTS	YES	NO	COMMENTS
Did a person consult with me about the possibility of forming an attorney-client relationship?			
Did I: - Limit the discussion to information needed for the conflicts check? - Advise the prospective client not to reveal any highly sensitive information and that the information transmitted was simply for the purpose of checking for conflicts? - Condition the discussion on the person's consent that "no information disclosed during the consultation will prohibit me from representing a different client in the matter?"			
Are a client's interests materially adverse to those of the prospective client in the same or a substantially related matter?			
Could the information provided by the prospective client be significantly harmful to a client in the same or a substantially related matter?			
If a client's interests are materially adverse to the prospective client, have both the prospective client and the current client provided informed consent to the representation, confirmed in writing?			
If I am disqualified from the representation: - Did I take reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary? - Was I timely screened from my law firm's participation in the matter? - Was the client timely notified?			

CURRENT CLIENT CONFLICTS	YES	NO	COMMENTS
Will the client representation be directly adverse to another client?			
Is there a significant risk that my representation of one or more clients will be materially limited by my responsibilities to another client, a former client, a third person or by a personal interest?			
Notwithstanding the existence of a conflict of interest, do all of the following statements apply (such that the representation may proceed): - I reasonably believe that I will be able to provide competent and diligent representation to each affected client; - The representation is not prohibited by law; - The representation does not involve the assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal; and - Each affected client has given informed consent, confirmed in writing.			
If the client is a corporation, have I advised any constituents of the entity company that I do not represent them as well?			
If someone else is paying the legal fees for a client or I will have regular contact with a third party (family member, friend, etc.) who is assisting in the representation, does the engagement letter specify that I do not represent those individuals as well?			
If someone else is paying the legal fees for a client or I will have regular contact with a third party (family member, friend, etc.) who is assisting in the representation, did I send a non-engagement letter to such individuals clarifying that they are not my clients?			

FORMER CLIENT CONFLICTS	YES	NO	COMMENTS
Am I representing a client in a matter that is the same or substantially similar to a matter in which I represented a former client, and the current client's interests are materially adverse to the former client's interests?			
Has the former client given informed consent, confirmed in writing, to my representation of the client?			
Did a law firm with which I was formerly associated previously represent a person with interests materially adverse to my current client?			
Did I acquire material information about the matter when I was with that law firm?			
Would the disclosure of confidential information regarding a former client serve to disadvantage of the former client?			
Has the information regarding my former client become "generally known" or is it otherwise permissible to disclose it?			

PERSONAL CONFLICTS OF A LAWYER	YES	NO	COMMENTS
Have I entered into a business transaction with a client or knowingly acquired an ownership, possessory, security or other pecuniary interest adverse to a client?			
Were the transaction and the terms under which I acquired the interest fair and reasonable to the client?			
Were the transaction and terms under which I acquired the interest fully disclosed and transmitted to the client in a writing that could be reasonably understood by the client?			
Did I advise the client in writing to seek the advice of independent legal counsel regarding entering into the transaction, and was the client given a reasonable opportunity to seek such advice?			
Did the client give informed consent, in a writing signed by the client, to the essential terms of the transaction and my role in the transaction, including whether I was representing the client in the transaction?			
Did I solicit a substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving me or a person related to me, any substantial gift?			
Is the recipient of the gift related to the client (ie. spouse, child, grandchild, parent, grandparent or other close family member)?			
Have I made or negotiated an agreement giving myself literary or media rights to a portrayal or account based in substantial part on information relating to the representation?			
Have I provided financial assistance to a client in connection with pending or contemplated litigation, other than: - An advance of court costs and expenses of litigation, the repayment of which is contingent on the outcome of the matter; or - A payment of court costs and expenses of litigation on behalf of the client, where the lawyer represents an indigent client.			
Have I agreed to accept compensation for representing a client from one other than the client, without the client's informed consent, where my independent professional judgment or the attorney-client relationship is affected?			
Have I entered into an agreement prospectively limiting my liability to a client for legal malpractice where the client was not independently represented in making the agreement?			

PERSONAL CONFLICTS OF A LAWYER (CONTINUED)	YES	NO	COMMENTS
Have I settled a claim or potential claim for legal malpractice liability with an unrepresented client or former client?			
Did I advise the unrepresented client or former client in writing of the desirability of seeking the advice of independent legal counsel regarding that matter and give them a reasonable opportunity to seek such advice?			
Have I acquired a proprietary interest in the cause of action or subject matter of litigation I am conducting for a client, other than a lien authorized by law to secure my fee or expenses or a contract for a contingent fee in a civil case?			
Have I had sexual relations with a client, other than in a consensual sexual relationship that commenced prior to the time the attorney-client relationship was formed?			

OBTAINING INFORMED CONSENT	YES	NO	COMMENTS
Have I advised the client(s) of the nature of the conflict?			
Have I advised the client(s) of the risks and benefits of granting the conflict waiver and the alternatives?			
Have I advised the client(s) as to what will happen if an actual conflict arises?			
Have I advised the client(s) of their right to consult with independent counsel regarding this conflict waiver?			
Have the client(s) had sufficient time to retain and consult with independent counsel prior to providing a conflict waiver?			
Have the client(s) given informed consent to waive the conflict, in writing?			
Does the written waiver note all of the above factors in its language?			

JOINT REPRESENTATIONS	YES	NO	COMMENTS
Am I representing two or more clients jointly in a transaction or litigation?			
Are the interests of the clients currently aligned?			
Do I reasonably believe I can competently represent each of these clients in this matter?			
Have the parties already become antagonistic with each other?			
Is contentious litigation or negotiations between the co-clients either imminent or contemplated?			
How likely is it that a conflict of interest between the co-clients will develop later?			
Can my impartiality be maintained?			
Have I explained the risks and benefits of representing the clients jointly?			
Have the clients given informed consent to the joint representation, confirmed in writing?			
Have I discussed with the clients how confidentiality will be addressed among the co-clients?			
Do I have a written engagement letter which explains how information will be shared among the clients?			

Distributed By:

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