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## Preparing a Conflict Waiver

By Michael Downey

Obtaining a client's waiver of a conflict may appear quite daunting. A lawyer may often obtain a good, valid waiver, however, if the lawyer understands the process and follows a few key steps. This column shares the premises and a formula for obtaining first-rate conflict waivers.

**When are conflict waivers required.** Conflict waivers serve as a memorialization or proof that a client has given informed consent for a lawyer to handle a legal matter despite a "disqualifying conflict of interest."

A "disqualifying conflict of interest" is a conflict of interest of adequate seriousness that the ABA Model Rules of Professional Conduct (or other applicable ethics standards) require the lawyer to obtain consent or forego – or terminate – a representation. Any time a lawyer has a "disqualifying conflict," the lawyer must resolve that conflict. Obtaining a waiver is a very common way to resolve a conflict. Other possible tools include declining or terminating a representation, or – when the ethics rules permit – establishing an ethics screen.

**Identify all the possible conflicts.** When a lawyer is evaluating obtaining a conflict waiver to take on a matter, the lawyer must be careful to identify and evaluate all possible conflicts – as well as the persons who must waive those conflicts.

As discussed below, some conflicts cannot be waived. Other conflicts may require

specific safeguards to be satisfied before the lawyer can undertake the representation. Often these special safeguards are listed in Rule 1.8.

Also, a lawyer may need to obtain consent from existing or former clients before undertaking a matter for a new or existing client. If a representation will be directly adverse to the interests of an existing client, a lawyer will likely need consent from both clients' whose interests are implicated. Alternatively, if there is a significant risk that the lawyer's representation on the new matter may be materially limited by obligations owed to a current or former client, the lawyer may need to obtain a conflict waiver not only from the client seeking in the potential new matter, but also from the current or former client.

Where conflicts are not identified and properly resolved, they may remain floating like dangerous chunks of ice below the waterline, waiting to scuttle the representation and cause legal, ethical, and other headaches for the lawyer.

**Ensure all applicable conflicts are waivable.** Once the lawyer has identified the relevant conflicts, the lawyer should determine whether the contemplated representation involves an unwaivable conflict before seeking a conflict waiver. If there is an unwaivable conflict, the Rules of Professional Conduct prohibit the lawyer from undertaking the representation, even if the client agrees to waive the conflict or

consents to the conflicted representation. The client's conflict waiver would be void or a nullity.

Rules 1.7(b) and 1.8 identify eight circumstances where conflicts are unwaivable. Seven of these nonwaivable conflicts arise in particular circumstances:

- 1) Representations prohibited by law, identified as unwaivable under Rule 1.7(b)(2). The most common such representation is defending multiple targets of a criminal investigation.
- 2) Asserting a claim in a proceeding before a tribunal for one client, when the lawyer is simultaneously representing the party against whom the claim is asserted in the same proceeding. Rule 1.7(b)(3) prohibits lawyers from suing and defending the same claim in a single proceeding;
- 3) Soliciting a substantial gift from a client, or preparing an instrument giving the lawyer or lawyer's relative a substantial gift, when the giver is not related to the lawyer, a conflict unwaivable under Rule 1.8(c);
- 4) Selling literary or media rights relating to a representation while still handling the representation, unwaivable under Rule 1.8(d);
- 5) Providing financial assistance to a litigation client beyond what Rule 1.8(e) permits;
- 6) Acquiring a proprietary interest in the subject matter of a client's litigation outside what Rule 1.8(i) allows; and
- 7) Engaging in a sexual relationship with a client, unless Rule 1.8(j) allows.

Rule 1.7(b)(1) establishes the eighth type of nonwaivable conflict, basically as a catch-all provision. Rule 1.7(b)(1) allows a lawyer to request a conflict waiver only when the lawyer "reasonably believes" that the lawyer can provide competent and diligent representation to the client. When the lawyer knows a prudent client knowing all the relevant facts would not waive the conflict, the lawyer is not permitted to request or receive a valid waiver.

As noted earlier, if a conflict is not waivable, the lawyer should not seek a conflict waiver – it would be void. The lawyer should instead decline or withdraw from the conflicted representation.

**Obtain informed consent.** Once the lawyer determines a conflict is waivable, the lawyer may proceed with obtaining a conflict waiver from a client. As noted earlier, normally a lawyer must obtain a client's "informed consent" to the conflicted representation. Rule 1.0(e) states that "informed consent"

denotes 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.

From this definition, we can glean the three key disclosures to obtain informed consent for a conflict waiver. The lawyer should disclose: (1) the circumstances giving rise to the conflict, (2) the material risks arising from that conflict, and (3) the reasonably available alternatives to the proposed course of conduct, undertaking the conflicted representation.



**Circumstances.** The lawyer's first required disclosure is the circumstances giving rise to the conflict. The lawyer should inform the client of all material information about the sources of the potential conflict.

Sometimes a lawyer may want to withhold particular information – such as a lucrative financial relationship between the lawyer and the adverse party – because the lawyer fears this information may cause the client not to waive the conflict. Holding back such information is very foolish. The fact you think such information might cause the client not to give consent indicates your belief the information is “material.” A failure to share material information, meanwhile, will likely invalidate a conflict waiver.

**Risks.** The second key disclosure to obtain a valid conflict waiver is disclosure of the risks involved. Ethics rules and other authorities indicate the client should know both the benefits and risks of the conducted under consideration. Disclosing benefits is not too worrisome: lawyers are usually quite willing to disclose benefits, and I expect it would be unlikely a waiver would be invalidated because it did not properly detail the benefits of a conflicted representation.

In contrast, risks require careful disclosure. Ordinarily two types of risks should be disclosed. The first group of risks are those relating to “zeal.” Do the circumstances giving rise to the conflict or its resolution impose limits on the lawyer's actions, or create risks the lawyer might not zealously or aggressively the client's interests? If so, the lawyer should describe those risks.

The second type of risk concerns confidences. Is there a risk that the lawyer might obtain confidences from representing one client that might be material to another

client? If so, will the lawyer be required to keep the material information confidential (to respect obligations of confidentiality) or may the lawyer share the information because the clients involved are waiving confidentiality? Also, will the client's interests in confidentiality otherwise be compromised? Any such risks should be addressed.

**Alternatives.** Finally, request for informed consent should include a disclosure of alternatives. Could the lawyer set different limits on zeal or procedures for handling confidences, and thus be able to provide broader, less impeded representation to the client? If so, the lawyer should spell out those alternatives.

Often I also advise lawyers to remind the client that the client may retain unconflicted counsel to handle the representation. Some lawyers hesitate, fearing the client may choose to retain a different lawyer. If the client would rather switch to unconflicted counsel, however, it is often best to learn this at the outset. Also, if the lawyer does not disclose the option of retaining alternative counsel, the client may later try to claim lack of such awareness should invalidate the waiver.

**Independent counsel.** The ethics rules generally do not require a lawyer to advise a client to obtain independent, unconflicted counsel. Rule 1.8 does require such advice when the lawyer is seeking a prospective waiver of malpractice liability, trying to settle a malpractice claim, or engaging in a business transaction with a client.

In other circumstances, a lawyer may want to recommend having an unconflicted lawyer review the conflict and requested conflict waiver. When such a review occurs,

it helps protect the client's interests, and ensure that the waiver will survive any subsequent scrutiny.

**Memorialize the client's consent.** After or in conjunction with obtaining informed consent, the lawyer generally should memorialize in writing the client's informed consent to waive the conflict and proceed with the conflicted representation.

Rule 1.7(b)(4) generally requires a lawyer to "confirm in writing" the receipt of informed consent to waive a conflict. "Confirmed in writing" is another term defined in Rule 1.0. Rule 1.0(b) states:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Notably, Rule 1.0(b) permits a lawyer to use a writing – such as an email or letter – to "confirm[] an oral informed consent." The language of Rule 1.0(b) suggests the written confirmation may be brief, and simply reference that informed consent was obtained.

An abbreviated confirmation may be often appropriate when the conflict is mundane and straightforward, and the client is sophisticated in legal matters. A lawyer asking a corporate client's in-house counsel to waive a mundane conflict may discuss the conflict with in-house counsel, obtain the waiver orally, and then send in-house counsel a few sentences identifying the

nature of the conflict and confirming the waiver.

In other circumstances, a more detailed and comprehensive written waiver may be appropriate. Sometimes the ethics rules require a more detailed waiver. Rule 1.8(a) imposes detailed requirements a lawyer must satisfy when seeking to engage in a business transaction with a client. Rule 1.8(g) and (h) also impose special requirements when a lawyer seeks to represent multiple clients in an aggregate settlement and when a lawyer seeks to prospectively limit malpractice liability or settle a malpractice claim with a client. Lawyers seeking to waive such conflicts are again advised to consult with and comply with the particular requirements established for such conflict waivers, using the ethics rules almost like a checklist.

In other settings, the interest of the client and lawyer may be best served when the lawyer prepares and the client signs a thorough, written conflict waiver. Ordinarily that waiver includes written information addressing the three disclosures described above: (1) the circumstances giving rise to the conflict; (2) the risks of that conflict, including with regard to "zeal" and confidences; and (3) the alternatives to the conflicted representation. As noted, the lawyer may also want to recommend the client seek independent counsel before agreeing to waive a conflict.

#### **Wrap up and review of conflict waivers.**

When preparing a conflict waiver, a lawyer should use clear, comprehensible and comprehensive language and examples. After all, if the conflicted representation results in an ethics complaint, motion to disqualify, or malpractice claim, the conflict waiver will likely be the first and most important exhibit in the litigation. Any

deficiencies in the conflict waiver will then be emphasized with the added clarity of hindsight.

For this same reason, it is often a very good idea to have another lawyer – particularly one familiar with legal ethics and legal

malpractice matters – discuss the proposed disclosures and written confirmation. This should help identify and cure any obvious shortcomings before those shortcomings become central to a court or disciplinary proceeding.

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