



**LAWYER TO LAWYER MENTORING PROGRAM
WORKSHEET W
INTRODUCTION TO CONFLICTS OF INTEREST**

Worksheet W is intended to facilitate a discussion about how to screen for, recognize and avoid conflicts of interest.

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- Review the conflict of interest rules. See Prof. Cond. Rules 1.7 – 1.10 and 1.18.
- If the new lawyer is a government employee (or has been in the past), discuss Prof Cond. Rule 1.11.
- If the new lawyer served (or is serving) as a law clerk to a judge or other adjudicative officer, see Prof. Cond. Rule 1.12.
- Discuss the importance of adequately screening for conflicts of interest. If in an in-house mentoring relationship, share with the new lawyer the firm's procedure for screening for conflicts. If in an outside mentoring relationship, describe the mentor's office procedure for screening for conflicts.
- Explain the importance of including prospective clients and declined clients in a conflicts database. Are these clients treated like former clients in terms of conflicts? What does this mean if another client comes along with interests adverse to the prospective client that never hired the lawyer?
- Discuss different types of conflicts of interest that can arise - particularly in the new lawyer's practice area(s) or office setting.
- Give examples of conflicts which can be waived with informed consent. Explain how to document your clients' consent to conflicts.
- Discuss the substantial relationship test which, when met, prohibits a lawyer from representing a client against a former client. Discuss whether informed consent by the former client can cure the conflict.
- Discuss screening walls, when they apply and practically speaking, how a law office manages them.



- Discuss how conflicts are handled when a lawyer changes firms. Should a lawyer be concerned about the same issues when hiring non-lawyer personnel who come from another firm?
- Discuss the propriety of working on a case where opposing counsel is a spouse, close relative, or any person with whom the lawyer shares a close personal relationship. Does client consent cure the potential problem?
- If the new lawyer works in a small firm or has a solo practice, discuss the conflict of interest rules articulated in the attached materials excerpted from the Louisiana State Bar Association's *Practice Aid Guide: The Essentials of Law Office Management* and compare it to Ohio's disciplinary rules. Louisiana State Bar Association, *Practice Aid Guide: The Essentials of Law Office Management*, 2007
<http://www.lsba.org/2007Publications/index.asp>. Also review the Louisiana State Bar Association's sample conflict of interest forms and letters and discuss whether they are good samples to use in Ohio. Share with the new lawyer ideas for other conflict forms and letters. Louisiana State Bar Association, *Practice Aid Guide: The Essentials of Law Office Management*, 2007
<http://www.lsba.org/2007Publications/index.asp>
- If the new lawyer works in a small firm or has a solo practice, discuss the attached article that gives tips on effectively managing conflict checking. Todd C. Scott, *Conflict-Checking Systems: Three Great (and Cheap) Ways to effectively Manage Conflict Checking*, GP/SOLO LAW TRENDS & NEWS Vol. 2, No. 2.
- Read and discuss these attached articles: Harry H. Schneider Jr., *An Invitation to Malpractice: Ignoring Conflict-of-Interest Rules Can Open Pandora's Box*, ABA Standing Committee on Lawyers' Professional Liability On-Line Resources, <http://www.abanet.org/legalservices/lpl/downloads/invitation1.pdf>. Harry H. Schneider Jr., *An Invitation to Malpractice (Part II): Once a Conflict of Interest Is Spotted, Take Action Promptly*, ABA Standing Committee on Lawyers' Professional Liability On-Line Resources, <http://www.abanet.org/legalservices/lpl/downloads/invitation2.pdf>.

RESOURCES

Ohio Supreme Court Board of Commissioners on Grievances and Discipline Ethics Advisory Opinions http://www.sconet.state.oh.us/BOC/Advisory_Opinions/



OHIO RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

- (1) the representation of that client will be directly adverse to another current client;
- (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

- (1) the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) each affected client gives informed consent, confirmed in writing;
- (3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

- (1) the representation is prohibited by law;
- (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

View comments at

http://www.supremecourtfohio.gov/rules/profConduct/profConductRules.pdf#Rule1_7



RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or *knowingly* acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless all of the following apply:

(1) the transaction and terms on which the lawyer acquires the interest are fair and *reasonable* to the client and are fully disclosed to the client in *writing* in a manner that can be *reasonably* understood by the client;

(2) the client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel on the transaction;

(3) the client gives *informed consent*, in a *writing* signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives *informed consent*.

(c) A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule:

(1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

(2) "gift" includes a testamentary gift.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in *substantial* part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following:



(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable, division (f)(4) apply:

(1) the client gives *informed consent*;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(3) information relating to representation of a client is protected as required by [Rule 1.6](#);

(4) if the lawyer is compensated by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has retained a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. **Your Lawyer:** Your lawyer has been retained by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.

2. **Directing the Lawyer:** Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.

3. **Communications:** Your lawyer should keep you informed about your case and respond to your reasonable requests for information.



4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

(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, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless the settlement or agreement is subject to court approval or 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 or pleas involved and of the participation of each person in the settlement or agreement.

(h) A lawyer shall not do any of the following:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer unless the client is independently represented in making the agreement;

(2) settle a claim or potential claim for such liability unless all of the following apply:

(i) the settlement is not unconscionable, inequitable, or unfair;

(ii) the client or former client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel in connection therewith;

(iii) the client or former client gives *informed consent*.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may do either of the following:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses;

(2) contract with a client for a *reasonable* contingent fee in a civil case.

(j) A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a *firm*, a prohibition in divisions (a) to (i) of this rule that applies to any one of them shall apply to all of them.

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_8

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) Unless the former client gives *informed consent*, *confirmed in writing*, 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.



(b) Unless the former client gives *informed consent*, *confirmed in writing*, 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 where both of the following apply:

- (1) the interests of the client are materially adverse to that person;
- (2) the lawyer had acquired information about the client that is protected by [Rules 1.6](#) and 1.9(c) and material to the matter.

(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 do either of the following:

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

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_9

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that 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 is no longer associated with a *firm*, no lawyer in that *firm* shall thereafter represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the *firm*, if the lawyer *knows* or *reasonably should know* that either of the following applies:

- (1) the formerly associated lawyer represented the client in the same or a *substantially related matter*;



(2) any lawyer remaining in the *firm* has information protected by [Rules 1.6](#) and [1.9](#) (c) that is material to the matter.

(c) When a lawyer has had *substantial* responsibility in a matter for a former client and becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

(d) In circumstances other than those covered by [Rule 1.10](#) (c), when a lawyer becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent a person in a matter in which the lawyer is personally disqualified under [Rule 1.9](#) unless both of the following apply:

(1) the new *firm* timely *screens* the personally disqualified lawyer from any participation in the matter and that lawyer is apportioned no part of the fee from that matter;

(2) *written* notice is given as soon as practicable to any affected former client.

(e) A disqualification required by this rule may be waived by the affected client under the conditions stated in [Rule 1.7](#).

(f) The disqualification of lawyers associated in a *firm* with former or current government lawyers is governed by [Rule 1.11](#).

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RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) A lawyer who has formerly served as a public officer or employee of the government shall comply with both of the following:

(1) all applicable laws and [Rule 1.9](#) (c) regarding conflicts of interest;

(2) not otherwise represent a client in connection with a matter in which the lawyer participated personally and *substantially* as a public officer or employee, unless the appropriate government agency gives its *informed consent*, *confirmed in writing*, to the representation.



(b) When a lawyer is disqualified from representation under division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter unless both of the following apply:

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

(2) *written* notice is given as soon as practicable to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer *knows* is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public. A *firm* with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) [Rules 1.7](#) and [1.9](#);

(2) shall not do either of the following:

(i) participate in a matter in which the lawyer participated personally and *substantially* while in private practice or nongovernmental employment, unless the appropriate government agency gives its *informed consent, confirmed in writing*;

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially*, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by [Rule 1.12](#) (b) and subject to the conditions stated in [Rule 1.12](#) (b).

(e) As used in this rule, the term “matter” includes both of the following:



(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties;

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_11

**RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR,
OR OTHER THIRD-PARTY NEUTRAL**

(a) Except as stated in division (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and *substantially* as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give *informed consent, confirmed in writing*.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and *substantially* as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and *substantially*, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in the matter unless both of the following apply:

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

(2) *written* notice is promptly given to the parties and any appropriate *tribunal* to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.



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http://www.supremecourtofohio.gov/rules/profConduct/profConductRules.pdf#Rule1_12

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 division (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 division (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 division (d).

(d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following applies:

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

(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 both of the following apply:

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

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

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Practice Aid Guide

The Essentials of Law Office Management



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Conflicts of Interest

Conflicts of interest can pop up at any time. The best advice is to perform a preliminary conflicts check before the initial consultation with a potential client, and then another, more comprehensive, conflicts check after the initial consultation but before accepting the representation. Finally, another conflicts check should be performed each time a new party enters into the legal matter. If a conflict is found and the conflict is one that is not consentable, or is consentable, but the consent was not obtained, then the lawyer must decline the representation, or if already representing the client, withdraw from the representation. Otherwise, the lawyer may face grave consequences, including disqualification, mandatory withdrawal, disciplinary actions, reversal of proceedings, forfeiture of fees, and malpractice claims. A non-engagement letter or a disengagement letter (see pages 30 and 32) should be sent to document such declination or termination of the representation.

Types of Conflicts

Generally, conflicts of interest fall into two categories. Conflicts may arise from directly adverse representations or where the representation of a client is materially limited as a result of the lawyer's other responsibilities or interests. A directly adverse conflict arises when you are called upon to represent one client against another client. A lawyer cannot represent two opposing parties in the same litigation. Moreover, a lawyer may not act as an advocate in one matter against a client the lawyer represents or represented in some other matter. Former clients are an excellent example of this type of conflict.

Even when there is no directly adverse conflict, a conflict of interest may nevertheless exist if there is a significant risk that the lawyer's representation may be materially limited as a result of the lawyer's responsibilities to other clients, to third persons, or as a result of the lawyer's own personal interest.

- ▶ This type of conflict may arise in the context of dual or multiple representations (*i.e.*, representing a husband *and* a wife, or a buyer *and* a seller, or two or more clients forming a business entity).
- ▶ It also may arise in the context of a financial interest (*i.e.*, owning a percentage of a client's business or making an agreement to limit malpractice liability to a client).
- ▶ Further, a conflict may arise in the context of a hidden interest (*i.e.*, romantic involvement with a client). You should not have sex with your clients. Nor should you enter into any business transactions with your clients, or knowingly acquire an ownership or other pecuniary interest adverse to your clients.¹
- ▶ You should not enter into an agreement to limit your malpractice liability without first making sure that your client is represented by independent counsel.

You should closely scrutinize the circumstances of each representation to determine whether the clients have "differing interests" that may call for different attorneys representing each client. It is also your duty to reject or disengage from any representation which is going to cloud your independent professional judgment and not allow you to render objective advice.

Consentable Versus Non-Consentable Conflicts

You must independently and objectively decide whether a conflict is consentable. "When a *disinterested* lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly

¹ Most legal malpractice insurance policies exclude from coverage claims where the insured attorney has a greater than 10 percent interest in his client's business.

ask for such agreement or provide representation, on the basis of the client's consent." Annotated Model Rule of Professional Conduct at p. 124 (ABA 2d ed. 1992) (emphasis added). When in doubt, the attorney should decline the adverse representation.

While clients may consent to representation notwithstanding a conflict, some conflicts are non-consentable. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client. Consentability is typically determined by considering whether the interest of the clients will be adequately protected if the clients are permitted to give their informed consent to a representation burdened by a conflict of interest. Representation is prohibited if under the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation as required by Rules of Professional Conduct 1.1 (see page 76) and 1.3 (see page 77). For this reason, conflicts where clients are aligned directly against each other in the same litigation are non-consentable. Other conflicts are non-consentable because applicable law prohibits the representation. For example, under federal criminal statutes, certain representations by a former government lawyer are prohibited, despite the informed consent of the former client.

Consentable Conflicts

Not all representations containing the types of conflicts described above have to be declined or terminated, if the potential or existing client gives informed consent. The following types of transactions can be entered into, but only with the client's informed consent:

► **Business transaction or acquiring pecuniary interest adverse to the client.**

You may not enter into a business transaction or acquire an ownership or other pecuniary interest adverse to the client unless:

1. the transaction is fair and reasonable to the client;
2. the terms are fully disclosed and given to the client in writing, in a manner clearly understood by the client;
3. the client is advised in writing well in advance of the transaction to seek advice of independent counsel; and
4. the client consents in writing.

► **Using information relating to a client's representation.**

You may not use information relating to the representation of an existing or former client to the disadvantage of the client, unless the client has been fully informed and consents to its use.

► **Compensation from another party.**

You may not accept compensation for representing a client from any person other than the client unless the client gives informed consent, or the compensation is provided by contract with a third person, such as an insurance contract or a prepaid legal service plan; there is no interference with a lawyer's independence or professional judgment or with the client-lawyer relationship; and none of the client's confidential information is revealed.

► **Multiple client settlements.**

You may not enter into an aggregate settlement of the claims of multiple clients unless each client gives informed consent in a writing signed by the client.

► **Former clients.**

If you formerly represented a client in a matter, you may not represent another person in the same or a substantially related matter if that person's interests are materially adverse to the interest of the former client, unless your former client gives informed consent, confirmed in writing.

► **Imputation of conflicts of interest.**

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 Rules 1.7 (see page 79) or 1.9 (see page 80), 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.

► **Special conflicts of interest for former and current government officers and employees.**

You may not represent a private client in connection with a matter in which you participated personally and substantially as a public government officer or employee, unless the government agency gives its informed consent, confirmed in writing, to such representation. Additionally, your firm and associates may not represent this client, unless you have been screened from any participation in the matter, you are not given any part of the fee, and your former government agency is notified immediately in writing.

► **Former judge, arbitrator, mediator or other third-party neutral.**

You may not represent a client in connection with a matter in which you participated personally and substantially as a judge, other adjudicative office, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing. Additionally, your firm may not represent this client, unless you are screened, you are not given any part of the fee, and written notice is given to the appropriate tribunal.

► **Organization as client.**

If an organization is your client, you may not represent any of its directors, officers, employees, members, shareholders, or other constituents unless the organization consents. If you represent an organization, you may also represent any of its directors, officers, employees, members, shareholders, or other constituents subject to the provisions of Rule 1.7 (see page 79). If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate officer of the organization.

Non-Consentable Conflicts

Some conflicts simply cannot be waived. Not even a very detailed consultation and a subsequent written client consent evidencing the client's desire for your representation will do. Consequently, you must not enter into certain prohibited representations and transactions with your clients. These prohibited transactions include, but are not limited to:

- Preparing an instrument giving yourself or any person related to you any substantial gift from your client, including a testamentary gift, unless you and your client are related.
- Negotiating an agreement giving yourself literary or media rights to a portrayal of the representation.
- Directly adverse representation in the same matter.
- Despite the prohibition in Rule 1.8(e) (see page 79) against providing financial assistance to clients, it is permitted under certain circumstances. (See page 37 in the Fees, Billing and Trust Accounts section.)
- Agreeing prospectively to limit your liability to a client for malpractice unless the client is independently represented in making the agreement or settle a claim or potential claim for malpractice liability with an unrepresented client or former client without first advising the client in writing that independent representation is appropriate.
- Acquiring a proprietary interest in the cause of action or subject matter of the litigation, except you may acquire a lien authorized by law to secure your fees/expenses and contract with your client for a reasonable contingent fee in a civil case.

Informed Consent

You've determined that there is a conflict and that the conflict is consentable. What do you do next? (Remember, if the conflict is non-consentable, your job is finished except for the mailing out of the non-engagement or disengagement letter.) First, you must conclude that the conflicting representation will not inure to the detriment of your client or clients. The Rules of Professional Conduct require that this decision must be made using objective, reasonable and independent standards. Second, each client must consent to the representation after being informed of the conflict. And the consent that is required is "informed consent." New Rule 1.0 Terminology paragraph "e" (see page 76) 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 risk of and reasonably available alternatives to the proposed course of conduct. Informed consent is voluntarily and knowingly granted after full disclosure of all relevant information that likely would influence the client's decision.² So what should be included in the client's informed consent letter?

1. The full disclosure of all relevant information transmitted in writing to the client in a manner reasonably understood by the client.
2. An acknowledgment that the client was given an opportunity in writing to seek the advice of independent counsel in consenting to the conflict.
3. The client's consent in writing.

² Schneider, Harry H. Jr., "An Invitation to Malpractice," ABA's Standing Committee on Lawyer's Professional Liability

4. An acknowledgment that all affected clients were sent the informed consent letter.
5. If applicable, an assurance that the disqualified lawyer is being screened from any participation in the matter and will not be given any part of the fee, nor reveal any protected confidential information.

See page 31 for a sample informed consent letter.

The following Rules of Professional Conduct should be reviewed when embarking on a conflicts of interest check:

- ▶ Rule 1.7 - Conflict of Interest: Current Clients (see page 79);
- ▶ Rule 1.8 - Conflict of Interest: Current Clients: Specific Rules (see page 79);
- ▶ Rule 1.9 - Duties to Former Clients (see page 80);
- ▶ Rule 1.10 - Imputation of Conflicts of Interest: General Rule (see page 80);
- ▶ Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees (see page 80);
- ▶ Rule 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral (see page 81); and
- ▶ Rule 1.13 - Organization as Client (see page 82).

Additionally, all conflicts of interest checking systems should:

- ▶ Be integrated with other office systems;
- ▶ Provide conflicts data for everyone in the office;
- ▶ Check for varying spellings of names;
- ▶ Show any party's relationship with the client; and
- ▶ Remind lawyers to document all conflict search results with memos in the file.

Conflicts of Interest Checklist

- All attorneys and staff must disclose necessary information concerning potential conflicts relating to past clients at prior places of employment, but not confidential information. (See page 29.)
- Prior to the initial consultation, the potential clients must disclose all name information, including their other names (*i.e.*, maiden, other marital, etc.), opposing parties' names, and associated persons' and/or entities' names. (See pages 26-28.)
- Thereafter, at the initial consultation, the potential clients must disclose more detailed information in order for a more comprehensive conflicts check to be made. (See pages 26-28.)
- The attorney then performs the conflicts check, reviewing the master client list, the former client list, and the subject matter list, if applicable.
- The Conflicts Search Results Memo must be circulated to all attorneys and staff for their review and input. (See page 29.)
- Follow up with any attorney or staff member who fails to return the Conflicts Search Results Memo within 24 hours of distribution. (See page 29.)
- Analyze the results of the circulated memo and of the preliminary and comprehensive conflicts checks to determine whether there exists a conflict.
- If no conflict is found, the new client is entered into the conflict system and sent an engagement letter.
- If a conflict is found and the attorney is not allowed to accept the representation, send a non-engagement letter explaining the conflict. (See page 30.)
- If a conflict is found and the attorney is allowed to accept the representation:
 - disclose the circumstances which give rise to the actual or potential conflict;
 - disclose a description of actual/foreseeable adverse effects of those circumstances;
 - if the potential conflict arises out of dual or multiple representation, then disclose that no attorney-client privilege exists as between the clients;
 - if the potential conflict arises out of a past representation (*i.e.*, past representation of adverse party in an unrelated matter), then disclose all pertinent non-privileged facts necessary for the potential client to make an informed decision as to whether to waive the conflict.
- Obtain written informed consent after advising the potential client to seek independent legal advice regarding the waiver. (See page 31.)¹
- If a conflict is found, all necessary disclosures are made, and written informed consent is obtained, accept the representation by sending an engagement letter.²
- Once representation has been accepted, perform another conflicts check each time a new party enters into the legal matter. If the new party creates a conflict, withdraw and send a disengagement letter. (See page 32.)

¹ Remember, some conflicts cannot be waived, even though an informed consent was obtained

² However, we recommend that you *do not* accept the representation because informed consents do not cure all conflicts and there may still be a violation of the ethical rules.

Additional Resources for Conflicts of Interest

Book and Articles

- ▶ ABA, *The Business Lawyer, Conflict of Interest Issues*, 50 Bus. Law 1381 (1995).
- ▶ *Lawyers Liability Review*, Vol. 14, No. 10 (Oct. 2000).
- ▶ Mallen, Ronald E., Smith, Jeffrey M., *Legal Malpractice No. 2*, Chapter 14, *Fiduciary Obligations in General*; Chapter 15, *Fiduciary Obligations - Conflicting Interests*; Chapter 16, *Fiduciary Obligations Adverse Representation* (4th ed. 1996).
- ▶ *National Reporter on Legal Ethics and Professional Responsibility, Kansas Formal and Informal Opinions, Opinion No. 95-04, Conflict of Interest; Adverse Representation* (University Publications of America).
- ▶ Ciolino, Dane S., *Louisiana Professional Responsibility Law and Practice 2004*, 2nd Edition (Louisiana State Bar Association, 2004).

Case Management (Conflicts) Software

- ▶ Case Master 10. Software Technology, Inc., (402)423-1440
- ▶ Amicus Attorney V, Gavel & Gown Software, (800)472-2289
- ▶ Abacus Law, Abacus Data Systems, (800)726-3339
- ▶ C/LS/Summit, Computer Law Systems, (800)932-9038
- ▶ Thomson Elite, (800)977-6529
- ▶ Tussman Program 7.1, Tussman Programs, Inc., (800)228-6589
- ▶ TimeMatters, Data.Txt Corp., (800)328-2898
- ▶ Northshore Technology Center, (985)893-7062

Conflicts of Interest Search Form

(Privileged and Confidential)

The following must be completed by the potential client, attorneys and staff:

1. Obtain all the information on the potential client:

Name _____
Other names _____
Nicknames _____
Address _____
Spouse's name _____
Spouse's other names _____
Spouse's nicknames _____
Address (if different) _____
Opposing parties' names _____
Associated persons or entities _____

Potential client stops here and Preliminary Conflict Check performed. If no conflict is found, potential client completes § 2 and then attorneys and staff complete the remainder.

2. Determine which area of law is involved and write in the names, nicknames or other names of the associated persons/entities involved:

If litigation matter, who is the:

Insured _____
Plaintiff(s) _____
Defendant(s) _____
Insurer _____
Tutor/minor _____
Expert witness(es) _____

If divorce matter, who is the:

Client _____
Spouse _____
Child(ren) _____
What is/are the age/ages of the child(ren)? _____

Continued

If corporate/business/real estate matter, who is the:

Owner(s)/spouse(s) _____

Buyer(s) _____

Partner(s) _____

Seller(s) _____

Officer(s) _____

Directors _____

Shareholder(s) _____

Subsidiaries/affiliates _____

Key employces _____

Property address(es) _____

Any opposing party in a transaction _____

If probate matter, who is the:

Deceased _____

Spouse/child(ren)/heir(s)/legatee(s) _____

Succession representative _____

Attorney for succession representative _____

If worker's compensation matter, who is the:

Injured worker _____

Employer _____

Insurer _____

If estate planning matter, who is the:

Testator/testatrix _____

Spouse/child(ren)/heir(s)/legatee(s) _____

Trustee _____

Continued

If criminal matter, who is the:

Accused _____

Victim(s) _____

Witness(es) _____

Co-Defendant(s) _____

If bankruptcy matter, who is the:

Client _____

Creditor(s) _____

Spouse _____

Results of Search

Conflict System Search done by _____

Title _____ Relationship to firm _____

Instructions:

- Duplicate of this form and attached Conflicts Search Results Memo routed to and signed by all attorneys and staff.
- No conflict found: entered as new client into conflict system and engagement letter sent by _____
- Conflict found, analyzed, and client accepted (explain reasons)

- Engagement and Informed Consent letters sent by _____
- Conflict found, client not accepted, non-engagement letter sent by _____

Conflicts of Interest Search Results Memo

1. Circulate this form to all attorneys and staff, making sure to attach the completed Conflicts of Interest Search Form.

2. Give a deadline for the return of the memo: _____

3. Have all attorneys and staff answer all of the following questions:

a. Do you have any business interest with:

Client? Yes _____ No _____

Anyone associated with client? Yes _____ No _____

Anyone associated with persons/entities? Yes _____ No _____

b. Do you have any personal interests with:

Client? Yes _____ No _____

Anyone associated with client? Yes _____ No _____

Anyone associated with persons/entities? Yes _____ No _____

c. Have you had any current or past relationship, affiliation or association with this client? Yes _____ No _____

d. Do you know of any reason we should not represent this client? Yes _____ No _____

If you have answered yes to any of the above, please give details below:

Signature of Attorney/Staff: _____ Date: _____

Sample Conflict of Interest Non-Engagement Letter

June 20, 20---

Mr. John J. Non-Client
123 Main Street
Anytown, Louisiana 45678

Re: Conference on June 19, 20---;
Potential Personal Injury Claim against Mr. Smith.

Dear Mr. Non-Client:

I enjoyed meeting with you recently regarding your potential claim against Mr. Smith. As we discussed, I have a possible conflict of interest. Although we did not discuss the particulars of your potential claim, it does not appear to be appropriate under the ethical rules for our firm to represent you. We must therefore decline to represent you. Under these circumstances, you should consult other counsel immediately to determine your rights and interests. Please keep in mind that you may be facing important deadlines, so you should not delay in contacting other counsel.

Thank you for offering us this engagement. If we may be of service to you in other matters in the future, we hope you will contact us then.

Sincerely,

FIRM NAME

Attorney Name

Sample Conflict of Interest Informed Consent Letter

June 20, 20---

Mr. John J. Potential Client
123 Main Street
Anytown, Louisiana 45678

Dear Mr. Potential Client:

Below is your Informed Consent of our firm representing you in a business acquisition, to which you may agree after careful consideration of all the facts, even though there are actual and potential conflicts of interest. At this time, we wish to remind you of the relevant information with respect to the potential conflict, which you should use to make your decision.

- ▶ This representation will
- ▶ This representation will also
- ▶ "_____"

We previously recommended to you in writing that you seek independent legal advice regarding the conflicts. Having followed that advice, you sought independent legal counsel and were apprised of conflicts that exist and may arise. Nevertheless, if you knowingly and voluntarily consent to representation by the firm, (FIRM NAME), and waive any and all actual and potential conflicts of interest, please sign below and return this letter to us.

[Optional]

[Additionally, Attorney Smith has been disqualified from taking any role in the representation of your case and will be screened from any participation in the matter. He will not be given any part of the legal fee, nor will he be allowed to reveal any of your confidential information he obtained while working at his prior law firm.]

All affected clients have been put on notice by being sent a copy of this informed consent letter.

Sincerely,

FIRM NAME

Attorney Name

Client Signature _____

Client Name Typed _____

Date _____

Sample Conflict of Interest Disengagement Letter

June 20, 20—

Mr. John J. Former Client
123 Main Street
Anytown, Louisiana 45678

Re: File Subject or Matter Description
Calcasieu Parish, Louisiana

Dear Mr. Former Client:

Thank you for allowing us to be of service to you in the above-captioned matter. The joining of A.B. Sea, Inc. in your lawsuit has created a conflict of interest for our firm because one of our partners, (Attorney Name), has been and continues to be A.B. Sea's primary counsel in other matters. Your continued representation would result in an adverse conflict of interest.¹ Therefore, we must withdraw from representation of you at this time. Additionally, Mr. Wisdom will refer A.B. Sea to independent counsel for representation in your matter.

We are enclosing your entire file with this letter, as well as a check in the amount of \$750.00, representing a refund to you of the amount of the advance deposit which has not been earned. You should contact other counsel immediately to further pursue (and protect) your interests in this matter. Your new counsel should have adequate time to serve your best interests, and you should provide said counsel with your file for necessary review. A complete status of the matter with deadlines noted is attached.

Our final invoice for service rendered is enclosed. It was a pleasure serving you, and we wish you the best in all your future endeavors.

Sincerely,

FIRM NAME

Attorney Name

Enclosures

(CAVEAT: Make sure any withdrawal/termination is in compliance with Rule 1.16 of the Rules of Professional Conduct, see page 84.)

¹ A conflict that is reasonably anticipated, although not present at the inception of the representation, can be waived in advance with adequate disclosure and consent by the client.

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Ethics

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Conflict-Checking Systems:

Three Great (and Cheap) Ways to Effectively Manage Conflict Checking

By Todd C. Scott, Esq.

The purpose of a conflicts check is to ensure that your commitment to your client's matter will not be distracted by your commitment to any other person. Many attorneys believe that this commitment can be upheld by a brief moment of thought, comparing their client's circumstances to that of the firm's other clients, at the time they are being retained for their services.

Professional liability insurers and risk management professionals continually stress the importance of a conflict-checking system in law firms to help identify potential conflicts at the time the attorney-client relationship is established. Consistently, it has been shown that a check for conflicts-of-interest that does not include the use of a thorough list or database will leave the firm vulnerable to an embarrassing, and potentially negligent conflict-of-interest problem.

Establishing a reliable conflict-checking system in your firm can be a relatively easy thing to do. However, the system is only as good as the information that is put into it. Therefore, creating the conflict-checking system and maintaining it should be viewed as an ongoing and permanent commitment to securing your client's confidence and your devotion to their best interests will never be questioned.

The elements necessary for conducting an effective conflicts check in your law practice are:

- Establishing a thorough, well-maintained list of names;
- Ensuring that the conflict-checking procedure becomes a part of firm's routine;
- Everyone in the firm is trained in the procedure and involved in the system.

The best conflict-checking system is one that will work, and that the members of the firm will find easy to use and maintain. There is nothing inherent in a computer-based conflicts program that makes it superior to a well-maintained manual system. However, since a computer-based conflicts system can conduct a thorough check rather quickly, it is more likely to be used routinely by the firm, and it is less likely to overlook a single name buried in a large database.

A Forms-Based Conflict System

In a forms-based conflict system, you search for conflicts by checking a list of the firm's clients (current and former), a list of "other parties," and a list of lawyers who have represented other parties involved in your client matters. These searches must be conducted prior to the new client signing a retention agreement with your firm.

The primary conflict review occurs when you check the client list. You are looking to see if any person who is an adverse party to a new matter is currently being represented by the firm in another matter, or has been represented by the firm in the

past.

If a review of the client list reveals no potential conflicts, you should then review the other parties list and the lawyer list to see if there are any relationships involving the firm's current or past legal matters that the new client would probably want to know about.

The best way for the law firm to establish and maintain these lists is to keep them in three separate binders. The client list in the first binder is updated every time a new client retains the firm to handle a legal matter. A Client Data Sheet containing basic information about that client is added to the binder in alphabetical order, and is permanently stored in the binder.

The second and third binders containing lists of other parties and lawyers are always being updated as a client's matter is ongoing. As you learn of new parties and individuals, as well as attorneys that become involved in your client's matter, you fill out a short Conflicts File Memorandum form indicating the name of the person and their relationship to the legal matter involving one of your clients.

Be aware that of the three binders described above, it is the list of other parties related to your legal matters that will easily become the largest volume. Knowing exactly which names to add to that list can change depending upon the areas of practice that you are involved in. The list should include any person significantly involved in any of your legal matters, as well as any individual closely associated with the firm. The parameters described here are wide and may include witnesses, heirs, and parties, as well as investigators, adjusters, and the third-party vendor who fixes the firm's computers. (For further guidance about the names that should be included in this list, see the Conflict Parties list included in MLM's online library.)

Remember, a conflict of interest can be waived by your client if the individual agrees to the waiver after you have fully disclosed the potential conflict to them. Therefore, if you are on the fence as to whether a conflict of interest does exist, advise your prospective client of the relationship you have discovered in your search, and let them decide whether the connection is too close for their comfort.

Using Software to Search for Conflicts

One common misunderstanding involving law office software is that there is a category of software products called "conflict checking software." Although there are a handful of software programs that purport to be used exclusively for conflicts checking, for the most part, there are no software titles available for lawyers to perform this exclusive task.

In the world of law office software, conflicts checking tools are commonly available in case management software programs. The connection between conflicts checking and case management software makes sense. After all, if you take the time to enter detailed information about your clients, former clients, witnesses, opposing counsel, interested parties and just about everyone else who has ever come in contact with the firm in a software program, what it starts to resemble is a large database of firm information that can be used for several purposes – including conflicts checking.

Since case management products became affordable for use in small law offices in the days of Windows 95, this category of software has rapidly secured its spot as the hub of a law firm's information system. Case management software performs two vital functions for a law practice: It is a comprehensive database of information concerning the firm's clients, and it also serves as a calendaring/docket-control system that can be accessed throughout the firm.

The manufacturers of case management software understand that lawyers want to have the ability to quickly and easily perform conflict checks across the program's

entire database. Therefore, performing a conflict check in a case management program is usually as simple as pushing a single button after entering a name to search for within the system. The searches are so quick and so thorough, that after determining that the name "John Smith" was not found in the lists of current clients, former clients, and other parties, it will then search the calendars of the lawyers in the firm, and even the note pads within the electronic client files to see if someone has come in contact with the name in an informal way.

For those lawyers interested in the conflicts-checking features of case management software but don't have an interest in establishing a firm-wide database program, you may want to consider purchasing a single-user version of a case management application and use it exclusively for maintaining the conflicts database. With this type of set-up, the software program would be installed on one workstation within the firm, and the computer user would become the firm's designated conflicts checking clerk.

Case management software comes with many dynamic features for tracking client information all throughout the firm – but there is no requirement that the purchaser use the software for all that it can do. Just as many users logon to Microsoft's Outlook for nothing more than to send and receive e-mail, it would be okay if your firm purchased a case management software product simply for its conflict-checking abilities.

A Simplified Tool That You Already Own

Not all automated conflict checking systems for law firms need to be in a specialized software application. Did you know that you can create a simple, searchable database in any word processing program? By taking advantage of the search features in your word processor you can easily create a dynamic conflict checking tool.

To create this simple database in Microsoft Word, start by creating a table in your document by selecting "Insert/Table" from the "Table" menu. Indicate in the Insert Table screen that you want your table to have 8 columns and 100 rows, and then click OK. When the table is inserted in the word document, label the tops of each column as follows: No., Date, Contact, File, Matter Type, Relation Code., File Status, Misc. Information.

Once the table is created with column headings, it should be permanently saved in the firm's computer network. As new files are opened at the firm, enter names of persons related to the matter in the table just as you would enter them in the binders of your forms-based conflict system. Over time, the document will become quite lengthy as the names of many persons associated with your case files are added to the table. (To add more rows to the table, put your cursor in the bottom right cell and click the Tab key. Let the table get as long as you like.)

You need not worry about searching for potential conflicts in such a long list because your word processor has a quick search tool for finding a needle in a haystack. In Microsoft Word 97 or 2000, the search tool can be found if you click on the "Edit" menu and choose "Find." After that, just enter the name you are searching for, and if the name appears somewhere in the table, it will be indicated during the search.

If the name of an individual that is about to retain your firm appears somewhere on the list, you may have a potential conflict of interest with another matter. It is up to the attorney who is assigned to the matter to determine if a conflict of interest exists, using the criteria in ABA Model Rule 1.7 and your local rules of professional conduct.

The conflict checking database you create in your word processor is really no different than the manual, form-based system – it just holds more information, has an easy search feature, and does not need to be printed and kept in binders. Like all databases, it should be back-up regularly on tape or disk and copies of the backup

should be kept off-site. The system meets the needs of most small law firms, but larger firms should consider employing the larger database capabilities found in case management software.

Todd Scott is Vice president of Risk Management and Member Services at Minnesota Lawyers Mutual Insurance Company, a professional liability carrier that provides insurance products and risk management services for lawyers in 37 states. For further information on this topic or any other malpractice avoidance or legal ethics topic, check out MLM's web site at www.mlmins.com, or contact Todd at 800-422-1370.

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An Invitation to Malpractice

Ignoring conflict-of-interest rules can open Pandora's box

BY HARRY H. SCHNEIDER JR.

Not that long ago, most professional liability errors were clear-cut cases of culpability—failing to commence a lawsuit within the statute of limitations, or drafting a will in violation of the rule against perpetuities. Not any more.

Malpractice today arises out of situations where the error can be subtle, and no more apparent in retrospect than when the advice was given. Increasingly, lawyers are being sued almost as insurers of the financial success of their clients' business transactions, where the client—who has taken some business risk and lost—can demonstrate that the loss could have been avoided if the lawyer had provided different advice.

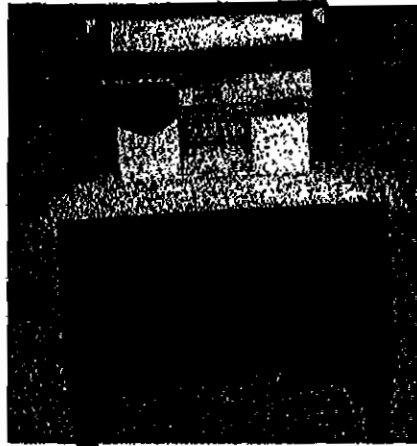
A key component of those claims is an allegation that the lawyer had a conflict of interest that impaired his or her ability to render objective advice. If proved, that allegation at once supplies the trier of fact with an explanation and motive for the lawyer's failure to give legal advice that would have avoided the client's problem. It also satisfies the breach of duty element of the malpractice claim. The client's business loss then becomes the lawyer's responsibility.

All too often, practitioners unwittingly invite these claims by failing to recognize the rules governing conflicts of interest. If not detected early and resolved properly, conflicts of interest can create liability where otherwise none would lie. A few practical tips:

Read the Rules. Most lawyers are not conversant with the conflict-of-interest rules in their jurisdictions. They assume that once they have implemented a conflicts-checking system, their problems are solved. Not true. The most elaborate conflicts check is simply a fancy name-matching device. There is no substitute for knowing the rules once a name is matched, and a conflict detected.

Spot-check Your System. Make sure your system works. Does it include all the necessary informa-

tion to allow the conflict to be analyzed? In addition to client names and related parties, does it identify all other parties as adverse? Does it distinguish between closed matters and ongoing matters? Do you have a method to prevent a new client or a new matter from being opened until the conflicts check is completed?



Does your system allow for the introduction of new names that may be discovered after the initial conflicts check has been performed?

What Constitutes a Conflict?

The rules in most jurisdictions simply codify the general principle that a lawyer owes undivided loyalty to the client: A lawyer may not represent a client, absent informed consent, in any situation where the interest of anyone else interferes with the lawyer's ability to provide objective representation.

Model Rule 1.7 establishes two general prohibitions. First, a lawyer may not simultaneously represent a client on a matter where the client's interests are "adverse" to another existing client. Second, a lawyer may not represent a client in any situation where the lawyer's abilities are "materially limited" by the lawyer's responsibilities to third parties, another client, or where the lawyer's own self-interest would conflict with the client's.

What Is an Adverse Party?

The best practical definition of adverse party is "anyone other than your client who has anything to do with the subject matter of your client's legal problem." Resist the temptation to label other parties as "similarly situated," and to interpret "adverse" to mean hostile. Anyone whose interests are other than identical

with your client's is adverse.

Isn't There a Difference Between Contested Litigation Matters and Business Advice? No. Interested parties are adverse whether they sit on the opposite side of the courtroom or around the friendly side of the bargaining table. Lawyers who represent multiple clients until they square-off against each other are fooling themselves. The simultaneous representation of clients with non-identical interests in the same subject matter is just as prohibited before relations turn sour as it is afterward.

What Is a Material Limitation on the Lawyer's Abilities? A material limitation is any circumstance external to the client's situation and peculiar to the lawyer, that would tend to influence the lawyer's advice in a manner that could affect the outcome of the client's legal problem.

Can a Lawyer Represent Adverse Clients in Unrelated Matters? No. Under the rules, if you represent a client on a single matter, you cannot represent another client adverse to the first client on *any* matter. Accordingly, a lawyer could not represent the manufacturer of an exploding bottle in a product liability suit and at the same time represent a landowner selling property to the same bottle manufacturer.

Nor can your partner, even if he or she practices in a different office or in another jurisdiction. Rule 1.10 disqualifies all affiliated lawyers from doing what any one of them would be prohibited from doing.

How About Former Clients?

While Rule 1.7 strictly forbids *contemporaneous* representation of clients with conflicting interests, Rule 1.9 specifically permits the *consecutive* representations adverse to a former client so long as the subject matter is unrelated and the lawyer has not acquired confidences material to the subsequent representation.

Thus, the lawyer who has completed defending the bottle manufacturer in the product liability case is free to represent another client in a sale of real property to the same manufacturer. But the lawyer could not represent a subsequent client in a similar product liability case involving the manufacturer.

Can the Conflict Be Waived? Yes, but more on that next time. ■

Harry H. Schneider Jr. is a partner in the Seattle, Wash., firm of Perkins Coie. He is chair of the ABA's Standing Committee on Lawyers' Professional Liability.

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An Invitation to Malpractice (Part II)

Once a conflict of interest is spotted, take action promptly

BY HARRY H. SCHNEIDER JR.

Identifying a conflict of interest is only half the problem. Resolving the conflict cleanly and completely, once detected, is equally important. A conflicts check dutifully performed soon becomes worthless if the lawyer neglects to follow through in the appropriate manner. A few more practical tips:

Conflict Avoidance. The least complicated method of conflict resolution remains the most foolproof. Simply avoid the conflicting representation. Decline to take on the new client or the new matter, and refer the business to another law firm.

Unfortunately, while flawless in theory, conflict avoidance is not always that simple in practice.

Some conflicts may not develop until the representation of both clients is well under way, as when an unforeseen merger results in your client being controlled by a company you currently are opposing on behalf of another client in an unrelated matter. Or, midway through a purchase-and-sale negotiation where you represent the seller, it surfaces that a late investor in the deal will be another of your firm's clients represented by independent counsel.

Where the lawyer reasonably concludes that dual representation of clients with conflicting interests can be accomplished without adversely affecting either, and with the clients' informed consent, many conflicts of interest can be waived and the representation undertaken. This action is in full compliance with both the Rules of Professional Conduct and the lawyer's ethical obligations.

For waiver and consent to be effective, the rules set forth a two-part test. First, the lawyer must conclude that the conflicting representation will not inure to the detriment of either client, and the lawyer's decision must be "reasonable." Second, each client must consent to the representation after being made aware of the conflict.

How to "Reasonably" Assess Whether or Not a Client Will Be Harmed. Is the simultaneous repre-

sentation in each client's interest? Ask someone else. Do not make this judgment alone. Have someone else in the firm do the analysis. Better yet, pay for each client to consult with independent counsel solely on the issue of whether to consent.



Except for the most modest engagements, paying for a couple of hours of independent advice is well worth the expense. For the smallest matters, it probably makes more sense to forgo the conflict entirely and refer one or both clients to successor counsel. For the more complex matters—where independent counsel on the consent issue could prove unduly expensive—perhaps it would be a stretch to conclude that the dual representation is fair to both clients.

What Constitutes Consent Under the Rules? What is required is informed consent, voluntarily and knowingly granted after full disclosure of all relevant information that likely would influence the client's decision.

A common tendency here is to confuse "full disclosure" with predicting the future. Some lawyers bypass adequate disclosure and, instead, proceed to inventory every possible factual scenario that could befall the client if consent is granted. The better practice is to focus on what is known.

With the permission of each client, make sure the other is informed fully as to the nature of the legal problems presented and the

scope of the representation to follow. More conflict waivers are later invalidated by a failure to disclose facts known by the lawyer at the time of consent than by the lawyer's inability to predict accurately all future developments in the competing representations.

Document the Clients' Consent. A letter memorializing each client's consent should be prepared, signed by each client, and should contain the following elements:

- ▶ Disclosure of the conflict in enough detail to apprise the client of the implications on future representation.

- ▶ Signature by each client, evidencing consent.

- ▶ A description of the consideration for consent (future or continued representation), and the procedures to be followed to ensure that secrets and confidences are not compromised (such as a "Chinese Wall" or other screening mechanism to prevent dissemination of client confidences).

- ▶ An acknowledgement of the clients' access to, and reliance on, the advice of independent counsel in consenting to the conflict.

- ▶ The scenario to be followed if any party later withdraws consent. Set out in writing that the law firm will be permitted to withdraw from the continued representation of one client, as well as an acknowledgement that such withdrawal will be the sole remedy—no disqualification and no disgorgement of fees will follow.

- ▶ An unequivocal statement that the firm's undivided loyalty will be exercised solely on behalf of each client in each matter.

- ▶ An indication that the consent letter is being sent to both affected clients.

Timeliness. Failure to identify a conflict early in a representation potentially compromises all advice given after the conflict should have been detected. Failure to resolve a conflict promptly once detected can be even more serious.

Better yet, detect the conflict before it technically is created. Failure to do so leaves you without the option of avoidance, and leaves the firm with only the possibility of client acquiescence (which may not be obtained) or technical violation leading to problems of client dissatisfaction or professional liability. ■

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