

July-August 2004 *Multnomah Lawyer Ethics Focus*

Conflicts Part 2: Key Ingredients for a Conflict Waiver

By Mark J. Fucile
Fucile & Reising LLP

My paralegal used to be a professional baker. Like the great cookies she made, an effective conflict waiver depends heavily on blending the right ingredients in just the right portions. In this month's installment of our conflict series, we'll look at the key ingredients for a conflict waiver.

Here in Oregon the recipe for an effective conflict waiver is drawn from both the Code of Professional Responsibility and case law. The central provision in the professional rules is DR 10-101(B), which sets out the definition of "full disclosure" and includes the basic requirements. The leading case on conflict waivers, in turn, is currently *In re Brandt/Griffin*, 331 Or 113, 10 P3d 906 (2000), which discusses DR 10-101(B) in detail.

Blending the two together, the key ingredients for a conflict waiver are:

► *Explain the nature of the conflict.* DR 10-101(B)(1) casts the definition of full disclosure as "an explanation sufficient to apprise the recipient of the potential adverse impact on the recipient." In other words, you need to tell the client in a way that the client will understand what the risks of granting the waiver will be. In addition to being mandated by the rule, this facet of DR 10-101(B)(1) also has an important benefit for the lawyer: spelling out the conflict to

the client will increase the odds that the waiver will “stick” if the client has second thoughts later.

▶ *Confirm the disclosure in writing.* DR 10-101(B)(2) requires that the disclosure be “confirmed in writing.” This requirement helps both the client and the lawyer. For the client, it sets out in one place the nature of the conflict for which the client is being asked to consent. For the lawyer, it is an important record if there are ever any questions later about what the client was told before granting the waiver. Although DR 10-101(B) does not require that the client actually countersign the waiver to affirm consent, having the client do that is a good way to document consent. DR 10-101(B)(2) also requires that the written confirmation occur “contemporaneously” with any associated oral disclosures. Although oral disclosure and client consent are sufficient to start work on a matter, a written waiver should follow shortly after that—both to meet the requirement of the rule and to document consent at the time it is granted.

▶ *Include a recommendation to seek independent counsel.* DR 10-101(B)(2) contains a specific requirement that a conflict waiver “include a recommendation that the recipient seek independent legal advice to determine if consent should be given.” The client does not have to obtain independent counsel; but, the waiver has to at least recommend it.

▶ *Remember that some conflicts can't be waived.* Not all conflicts can be waived—even if the clients involved want to. This kind of conflict is called

an “actual” conflict in Oregon and is defined in DR 5-105(A)(1) as a situation in which “the lawyer has a duty to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client.” The classic example is that you can’t be on both sides of the same litigation.

▶ *Remember to obtain waivers from all clients affected.* Some waivers—such as those where the conflict is between the client and the lawyer’s own interest—only go to the client being represented. But, waivers involving multiple client conflicts must be obtained from both the client being opposed and the client being represented.

The most recent edition of the Oregon State Bar’s *Ethical Oregon Lawyer* contains sample conflict waivers covering a variety of situations. Although the *Ethical Oregon Lawyer* isn’t a cook book, it’s a great place to start when you’re trying to blend the key ingredients into an effective waiver.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar

Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.