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Conflicts Revisited, Part 1: Current Client Conflicts

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We last took a comprehensive look at conflicts five years ago when the then-new Rules of Professional Conduct became effective. Given the passage of time and the continuing importance of this topic, we'll revisit conflicts over the next three months. This month, we'll examine current client conflicts. Next month, we'll follow with former client conflicts. We'll then conclude with a discussion of structuring representations to eliminate conflicts altogether.

There are two basic variants of current client conflicts. First, conflicts can arise between clients. Second, conflicts can arise between the interests of a client and those of the lawyer or the lawyer's firm. We'll look at both and then close with a review of conflict waivers.

Multiple Client Conflicts

Multiple client conflicts are governed primarily by RPC 1.7(a)(1). They occur when our representation of "one client will be directly adverse to another client[.]" In this context, "directly adverse" usually means representing one client against another in a legal matter rather than simply that the clients themselves are economic competitors. Because we owe current clients a broad fiduciary duty of loyalty, we are generally prohibited from taking on matters adverse to them for other clients. The prohibition comes in two main forms. First, we are

prohibited from representing both sides in the same matter even if the clients concerned are willing to consent. For example, we can't negotiate both sides of the same business transaction. This variant is often called a "non-waiveable conflict." Second, even if a matter is unrelated to work we've handled for another client, we are prohibited from representing one current client against the other unless both clients consent. For example, absent consent, we can't represent Client A against Client B in a transaction even if the only work that we do for Client B is unrelated employment litigation. This variant is often called a "waiveable conflict."

Interest Conflicts

Conflicts between the interests of a client and those of a lawyer or the lawyer's firm are controlled principally by RPC 1.7(a)(2). RPC 1.8 also addresses a number of specific scenarios triggering this kind of conflict, such as business transactions with clients. Interest-based conflicts occur when our professional judgment for a client may be "materially limited" by our own interests, those of our firm or some other obligation. In other words, the concern is that we will "pull our punches" in representing a client in favor of our own interest. For example, a lawyer entering into a business investment with a client might be tempted to skew advice to the client to protect the lawyer's investment. As long as "the lawyer reasonably believes that the lawyer will be able to provide

competent and diligent representation” (RPC 1.7(b)(1)) notwithstanding the interest, interest conflicts are waiveable.

Conflict Waivers

As noted, some current client conflicts are non-waiveable—such as representing both sides in the same transaction. Assuming a conflict is waiveable, then the clients affected must give their “informed consent.” “Informed consent” is defined by RPC 1.0(g) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” RPC 1.7 and RPC 1.8 require that conflict waivers be confirmed in writing and, under RPC 1.0(g), further require that the written waiver “reflect a recommendation that the client seek independent legal advice to determine if consent should be given.” Moreover, some waivers under RPC 1.8—again, such as business transactions with clients—expressly require the client to sign the waiver (rather than simply having the lawyer’s letter confirm the consent granted).

Conflict waivers involve important elements in both substance and form. On substance, they document the disclosures made to the client. On form, failure to meet the requirements of RPC 1.0(g) will open the waiver to challenge and potentially leave the lawyer with an “unwaived conflict.” The Oregon State Bar *Ethical Oregon Lawyer* (chapter 20) and the Professional Liability Fund web

site both have waiver templates covering many common conflicts. The templates are useful because they contain the requisite “boilerplate” and because conflict waivers are not something that most lawyers draft often. At the same time, lawyers using the templates must remember that they are the ones who need to supply the critical details in the waiver that may mean the difference between “informed consent” and something that falls short.

Summing Up

Addressing conflicts appropriately (whether by declining the work involved or obtaining waivers) is central to avoiding potential bar discipline and disqualification. As noted earlier, conflicts under the RPCs can also translate directly into claims asserting breach of the fiduciary duty of loyalty. Therefore, addressing conflicts appropriately is equally central to lessening the risk of civil damage claims.

ABOUT THE AUTHOR

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