

October 2004 WSBA *Bar News Ethics & the Law* Column

Managing Conflicts

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In the summer installment of *Ethics & the Law*, we looked at why conflicts matter. In this quarter's column, we'll examine two ways of managing conflicts to reduce civil and regulatory risk: (1) using conflict waivers effectively; and (2) structuring representations to eliminate conflicts in the first place.

Using Conflict Waivers Effectively

The recipe for an effective conflict waiver in Washington is drawn largely from the Rules of Professional Conduct. The WSBA and the Washington Supreme Court are considering proposed amendments to the RPCs—including those regulating conflict waivers. Although some terminology will change if the proposed amendments are adopted, the key practical ingredients for an effective conflict waiver will remain the same.

► *Confirm client consent in writing.* Both the present and the proposed versions of the current and former client conflict rules—respectively, RPCs 1.7 and 1.9—require that conflict waivers be confirmed in writing. With both, it is the client's consent that is being confirmed in writing. When documenting the client's consent, however, it is also wise to confirm *the disclosures* that led to consent. For the client, it sets out in one place the nature of the conflict to which the client consented. 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 neither the current nor the proposed rules require that the client actually countersign the waiver to affirm consent, having the client do that is a good way to document consent. Oral disclosure and client consent are sufficient to start work on a matter. A written confirmation of the waiver, however, should follow shortly after that—both to meet the requirement of the rule and to document consent at the time it is granted.

► *Explain the nature of the conflict.* The current versions of RPCs 1.7 and 1.9 require that waivers be predicated on “consultation and a full disclosure of the material facts” and, in turn, define “consultation” as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” The proposed amended versions (which are available on the WSBA’s web site at www.wsba.org/lawyers/groups/ethics2003/default.htm) recast the predicate in terms of the client’s “informed consent” and define that 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.” Whether framed as “full disclosure” or “informed consent,” the goal remains the same: you need to tell the client in a way the client will understand what the risks of granting the waiver will be.

► *Remember that some conflicts can't be waived.* Not all conflicts can be waived—even if the clients involved want to. The classic example is that you can't be on both sides of the same litigation. Under the current version of RPC 1.7, multiple client conflicts are waivable only when “[t]he lawyer reasonably believes that the representation will not adversely affect the relationship with the other client[.]” Proposed amended RPC 1.7 retains this general limit and adds a specific prohibition against representing both sides in the same litigation.

The new WSBA Legal Ethics Deskbook contains sample conflict waivers covering a variety of situations. It's a great place to start when you are trying to blend the right ingredients into an effective waiver.

Eliminating Conflicts in the First Place

For there to be a conflict, there has to be *adversity* in the legal positions of the clients involved. If the adversity (or the potential for adversity) is eliminated, then the potential conflicts will likely be eliminated, too. Adversity can be eliminated by structuring a representation at the outset to handle only aspects of a matter where the positions of multiple clients are in concert.

Although this technique can be used in some instances to eliminate multiple client conflicts in different matters, it is most commonly employed in situations where the same lawyer is handling a matter jointly for multiple clients. For example, in products liability cases, it is common for dealers to tender the defense of a case to the manufacturer and for both to want to use the same

lawyer to defend them. If the manufacturer and the dealer agree (without the defense lawyer acting as a broker between them) to reserve any claims and other liability-shifting issues between them to a later forum with other counsel, then the lawyer has no conflict in defending them in the primary action against the plaintiff because their interests in that case are fully aligned.

Structuring or limiting representations won't eliminate all conflicts and can have practical constraints if the resulting scope is too narrow to represent the clients effectively. In many situations, however, it can be a very useful tool for managing conflicts.

ABOUT THE AUTHOR

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