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**Conflicts Counsel:  
A Practical Solution for a Difficult Problem**

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As civil litigation has grown more complex, a problem that occurs with increasing frequency is the need to obtain discovery from a third-party that litigation counsel represents in unrelated matters. By the time the need for the discovery becomes apparent in ways that could not be predicted at the outset, the law firm often is deep into the case for the litigation client. The discovery involved can range from a document subpoena to a deposition. Many times the third-party client is cooperative, the discovery involved is handled through in-house counsel and there is no adversity in a conflict sense. Occasionally, however, the discovery sought is sensitive enough that the third-party client opposes the discovery outright or wishes to narrow it significantly through either negotiations or in court. In that event, the law firm has a conflict. Although the conflict would be waivable because the matters are unrelated, sometimes the third-party client is not willing to grant a waiver. In that difficult circumstance, a practical solution is to bring in an independent lawyer or firm—often referred to as “conflicts counsel”—to handle the discrete discovery work involved.

In this column, we’ll look at the scope and limitations of using conflicts counsel.

### **Scope**

The concept of conflicts counsel has been around for a long time. In fact, the ABA issued an ethics opinion in 1992—ABA Formal Opinion 92-367—that discussed using conflicts counsel for taking testimony from a witness that lead counsel represented in unrelated matters. A more recent New York City Bar opinion—2017-6—cites the earlier ABA opinion and applies it to subpoenas. Courts have also recognized the use of conflicts counsel to address otherwise disqualifying current and former client conflicts. Examples include *In re 3DFX Interactive, Inc.*, 2008 WL 8448326 (BAP 9th Cir Feb 6, 2008) (unpublished), where conflicts counsel handled a mediation in a sub-proceeding within a broader bankruptcy case in light of lead counsel’s current client conflict in the sub-proceeding, and *TQ Delta, LLC v. 2Wire, Inc.*, 2016 WL 5402180 (D Del Sept 26, 2016) (unpublished), where the court directed the retention of conflicts counsel to handle discovery from lead counsel’s former client.

Oregon RPC 1.2(b), which mirrors ABA Model Rule of Professional Conduct 1.2(c), allows a law firm to limit the scope of a representation as long as the limitation is reasonable under the circumstances and the client consents. If the need for third-party discovery or the equivalent arises that involves a client the law firm represents in other unrelated matters, the firm should discuss with

the litigation client the option of retaining conflicts counsel to handle that specific piece of the broader case. In effect, the law firm is limiting the scope of its representation to avoid the conflict with the third-party it represents in other unrelated matters. Although not required to be reflected in writing, prudent risk management practice suggests confirming the litigation client's authorization for the limitation and the corresponding retention of conflicts counsel in a contemporaneous document—either paper or electronic.

### ***Limitations***

There are two principal limitations to using conflicts counsel.

First, for the lead firm, it can be critical to quickly recognize the emerging conflict and to promptly associate conflicts counsel. The risk of deferring a decision is that a court reviewing the situation in the context of a disqualification motion may determine that the lead firm waited too long and waded in too deeply. Oregon RPC 1.2(b) and its ABA Model Rule equivalent effectively address conflicts by structuring the representation to avoid them altogether. By contrast, they cannot “un-do” a conflict that already exists. In *In re Cellcyte Genetic Securities Litigation*, 2008 WL 5000156 (WD Wash Nov 20, 2008) (unpublished), for example, the federal district court in Seattle disqualified a law firm that argued that if it needed to cross-examine one of its other clients who

might be a trial witness it could retain conflicts counsel at that time. The court found that it was already likely that the firm would be required to cross-examine the other client and had not actually retained conflicts counsel.

Second, for conflicts counsel, it can be equally important to carefully segregate its work into the specific tasks for which the firm was retained. OSB Formal Opinion 2005-120 (rev 2015) notes that disqualifying conflicts are not automatically imputed to co-counsel, citing *First Small Business Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn2d 324, 738 P2d 263 (1987). In *First Small Business*, the Washington Supreme Court reversed a trial court order disqualifying a law firm because there was no evidence that the firm had actual knowledge of confidential information obtained from another lawyer who briefly served as co-counsel before withdrawing in the face of a conflict. To avoid this potential trap, a firm coming in as conflicts counsel should have its own separate engagement agreement with the client involved setting out its narrow scope of responsibilities and should maintain its own separate file. Conflicts counsel must clearly have some communications with lead counsel to understand the case generally and its particular assignment. But, those interactions should be oriented around the tasks for which it was retained rather

straying into matters that might inadvertently open conflicts counsel to its own risk of imputed disqualification.

### **ABOUT THE AUTHOR**

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