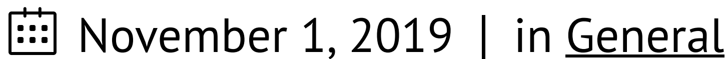
BAR BULLETIN

Conflicts Revisited: Current Client Conflicts



NOVEMBER 2019 BAR BULLETIN

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Clients love loyal lawyers! (And our common law fiduciary duty of undivided loyalty and the Rules of Professional Conduct mandate it.)

At the same time, the RPC conflict rules are among the most technical areas we encounter in legal ethics and law firm risk management. In this month's issue and next, we revisit the conflict rules we first studied in law school and have since wrestled with in practice.

This month, we'll focus on current client conflicts. Next month, we'll address former client conflicts. In each article, we will survey the rule, discuss associated waivers, address the consequences for failure to comply and, finally, relate some practical steps to avoid them.[1]

Current Client Conflicts

The heart of current client conflict regulation is RPC 1.7 and the rule addresses two variants of those conflicts. RPC 1.7(a)(1) regulates multiple client conflicts.[2] RPC 1.7(a)(2) concerns conflicts between the interests of a client and the lawyer or the lawyer's firm.[3] Although both facets are focused on current clients, the concepts are distinct.

Multiple client conflicts under RPC 1.7(a)(1) arise when a firm is asked to take on a matter — or finds itself in the middle of a matter — where one client is adverse to another. Comments 6 and 7 to RPC 1.7 note that adversity for conflict purposes can occur in both litigation and transactional settings when a lawyer or law firm advances a legal position for one client against the interests of another client, even if the matters are "wholly unrelated."

In *Bird v. Metropolitan Cas. Ins. Co.*,[4] for example, a law firm was disqualified as plaintiffs' counsel for handling a case against a defendant that was a current firm client on other matters. Similarly, in In *re*

Botimer,5 a lawyer was disciplined for advising various family members in their business ventures when their interests were adverse.

By contrast, Comment 6 to RPC 1.7 notes that simply because two clients are economic competitors does not generally present a conflict under the RPCs. For example, an employment law firm could ordinarily handle termination claims for two local grocery stores that compete against each other.

RPC 1.7(a)(2) conflicts are sometimes referred to as "material limitation conflicts" because they arise when a lawyer's professional judgment on behalf of a client might reasonably be questioned in light of other competing interests. The range of competing interests is not catalogued in the rule's text, but the general concept is that the firm might "pull its punches" in representing a client to protect a competing interest.

In *In re Cellcyte Genetic Corp. Securities Litigation*,6 for example, a law firm was disqualified under RPC 1.7(a)(2) because it appeared reasonably probable that firm lawyers might have to cross-examine clients the firm represented in other matters. As the court put it, quoting an ABA ethics opinion, the firm "will be tempted to 'soft pedal' ... [its] ... zeal in furthering the interests of one client to avoid an obvious clash with those of another."7

Another such circumstance is when a law firm, having drafted transactional documents for a client, represents the client in litigation in which the terms of the documents are in issue. The risk in that situation is that the firm may be tempted to sculpt the trial presentation in a manner that directs attention away from the firm's draftsmanship.

In re Holcomb[8] concerned a "personal interest of the lawyer" conflict in which a lawyer was disciplined (under an analogous predecessor version of the rule) for encouraging a client to continue litigating a meritless case in order to generate fees to pay off a debt the lawyer owed the client.

Waivers

RPC 1.7(b) addresses conflict waivers. Courts have generally described a lawyer's fiduciary responsibility toward each current client as a duty of "undivided loyalty."[9] Some conflicts are "non-waivable" because the lawyer cannot competently represent two (or more) clients who are opposing each other in the same matter without compromising the duty of undivided loyalty. Examples of "nonwaivable" conflicts include attempting to represent both the plaintiff and the defendant in the same lawsuit, or representing counterparties negotiating against each other in the same transaction.

By contrast, waivers are generally permitted when the matters a law firm is handling for two current clients are unrelated — for example, if a firm representing Client A in a land use matter and Client B in an employment matter is asked by Client B to represent it in unrelated negotiations over a licensing contract against Client A. In that circumstance the firm can ethically proceed if both clients consent.

Waiver is permitted when the matters involved are unrelated, because this scenario poses a lower risk that the lawyer will compromise either the duty of loyalty or confidentiality. The decision to grant or deny a waiver rests solely with the clients. The client to be represented and the client to be opposed must both consent.

Assuming a conflict is waivable, the waiver must be based on the "informed consent" of the clients. Comment 18 to RPC 1.7 states:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.10

The explanation of the risks must be communicated so that the particular client involved understands them. In *In re Hall,*11 for example, a waiver was held inadequate where it failed to discuss

material risks and was presented to an elderly person with failing eyesight who had difficulty reading it.

Waivers under RPC 1.7(b)(4) must be "confirmed in writing," which can include an exchange of electronic authorizations such as a reply email. While not required by RPC 1.7(b), prudent practice suggests incorporating the explanation of the risks involved into the waiver document so that the lawyer will have a contemporaneous written record memorializing the basis of the client's informed consent.12

Consequences and Practical Risk Management

As the cases cited earlier illustrate, conflict failures can lead to regulatory discipline, disqualification, civil claims for breach of fiduciary duty, and sanctions through the remedial device of fee forfeiture.13 In other instances, conflicts — absent a proper waiver — have been held to void attorney-client fee or related agreements on public policy grounds.14 If failing to check for and clear conflicts is part of a firm's systematic business practices, a Consumer Protection Act claim cannot be ruled out.15 Moreover, these risks are not mutually exclusive.16

At the same time, relatively simple and practical steps — if consistently applied — can go a long way toward reducing conflict risks. First, and in many ways foremost, firms must routinely run conflicts checks

before taking on new matters. The Western District in *Jones v. Rabanco, Ltd.*,17 offered this pithy advice to a firm being disqualified after wading into litigation before running a conflicts check: "The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level."

Second, firms must ensure that conflict databases contain adequate information to properly assess conflicts. The Western District in *Atlantic Specialty Insurance Company v. Premera Blue Cross,*18 supplied equally memorable advice to a firm being disqualified after failing to include a client's affiliates in its conflicts system: "[T]he law firm's ignorance of … [client's] … corporate affiliations cannot be used as an excuse to both enter into—and withdraw mid-stream—from attorney-client relationships at the firm's whim."

Finally, as the *Hall* case discussed earlier illustrates, conflict waivers must be cast in terms appropriate for the client and must adequately address the risks involved for truly "informed consent" to result.

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1 This article is only intended as an overview of general conflict issues. For more in-depth treatment of these and associated topics, the WSBA has published two very accessible resources: The Legal Ethics Deskbook and The Law of Lawyering in Washington.

2 A law firm lawyer's conflicts are generally imputed to the lawyer's firm as a whole under RPC 1.10(a).

3 RPC 1.8 includes specific applications of the general standard set out in RPC 1.7(a)(2).

4 2011 WL 149861 (W.D. Wash. Jan. 18, 2011) (unpublished).

5 166 Wn.2d 759, 214 P.3d 133 (2009).

6 2008 WL 5000156 (W.D. Wash. Nov. 20, 2008) (unpublished).

*7 Id. at *3, quoting ABA Formal Op. 92-367 (1992).*

8 162 Wn.2d 563, 173 P.3d 898 (2007).

9 See, e.g., Mazon v. Krafchick, 158 Wn.2d 440, 452, 144 P.3d 1168 (2006).

10 See also RPC 1.0(e) (defining "informed consent").

11 180 Wn.2d 821, 329 P.3d 870 (2014).

12 Comment 22 to RPC 1.7 discusses advance waivers of future conflicts. See also ABA Formal Op. 05-436 (2005) (addressing advance waivers under ABA Model Rule 1.7, comment 22).

13 See generally Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992) (examining both concepts at length); Behnke v. Ahrens, 172 Wn. App. 281, 294 P.3d 729 (2012) (same).

14 See, e.g., Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736, 153 P.3d 186 (2007) (fee agreement modification); LK Operating, LLC v. Collection Group, LLC, 181 Wn.2d 48, 331 P.3d 1147 (related agreement).

15 See generally Short v. Demopolis, 103 Wn.2d 52, 691 P.2d 163 (1984) (discussing CPA claims against law firms).

16 See, e.g., Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002) (illustrating the multiple risks presented by conflicts).

*17 2006 WL 2237708 at *1 n.1 (W.D. Wash. Aug. 3, 2006) (unpublished).*

*18 2016 WL 1615430 at *14 (W.D. Wash. Apr. 22, 2016) (unpublished).*

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