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Nuts & Bolts: The Mechanics of Conflict Waivers

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Conflict waivers aren't something most lawyers deal with every day.

When confronted with the need for waivers, many lawyers may be uncomfortable with the mechanics of translating theory into practice. In this column, we'll survey three aspects of the "nuts and bolts" of conflict waivers. First, we'll discuss where lawyers can turn for templates. Second, we'll look at the core of an effective waiver: "informed consent." Finally, we'll address what "confirmed in writing" means in the context of conflict waivers.

Before we do, three qualifiers are in order.

First, we'll assume that the lawyer or law firm involved has a sound conflict checking system, has properly identified the conflict involved and that the conflict is waivable. On this last point, it is important to remember that not all conflicts are waivable—with trying to represent both sides in the same litigation or transaction being paradigm examples.¹

Second, we'll focus on waivers for current and former client conflicts commonly encountered by a wide spectrum of practitioners under, respectively, RPCs 1.7 and 1.9.² Specialized situations such as taking stock in lieu of fees or advance waivers involve more detailed considerations warranting careful review.³

Third, we'll assume that the circumstances permit disclosure of the information necessary to fully inform the clients involved of the nature of the conflict. Comment 19 to RPC 1.7 notes the rare circumstance when a conflict waiver cannot be sought because one of the clients refuses to allow the lawyer to disclose the facts necessary to permit the other clients involved to make an informed decision. In that situation, the lawyer ordinarily must decline the representation that is dependent on the waiver or withdraw from the representation that is already underway.

Templates

Unless you have recently done conflict waivers involving essentially the same situation, rifling through your firm's word processing system usually isn't either the most efficient or the most prudent way to locate a template.

The WSBA's *Legal Ethics Deskbook* has a detailed chapter on conflicts that includes both waiver forms and associated checklists.⁴ The *Legal Ethics Deskbook* is available in both paper and electronic formats through the WSBA website. Forms 11-1 and 11-3 address, respectively, current and former client conflicts.

Many malpractice carriers also have a wealth of practice aides available to their insureds—including conflict waiver templates.⁵

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Larger firms often have their own templates developed by the firm's general counsel and superintended by firm records or intake staff.

With all templates, however, two caveats apply.

First, templates are a starting point rather than an end product. Templates from bar organizations, malpractice carriers or internal general counsel will typically have the “boilerplate” considerations dictated by the conflict rule involved—such as generic explanations of “adversity” in a conflict sense and general discussions of the duties of loyalty and confidentiality that lie at the heart of most conflicts.⁶ As we'll address in the next section, however, true “informed consent” rests on the particular facts of individual situations and how those unique facts are explained to the clients involved.

Second, national templates—and Washington templates used in out-of-state matters—should be cross-checked for any local variations. A Washington conflict arising from the work of a firm limited license legal technician, for example, might require a modest adjustment in the wording of a national template from a malpractice carrier because most jurisdictions do not have LLLTs or equivalents.⁷ Similarly, a Washington firm clearing a conflict in an Oregon matter would need to adjust the wording of a Washington template in recognition of the Oregon requirement that waivers include a recommendation

that the clients concerned seek independent counsel on whether the waiver requested should be granted.⁸

Informed Consent

“Informed consent” is the crux of any effective conflict waiver. RPC 1.7(b)(4) addressing current client conflicts, for example, predicates waivers on “each affected client gives informed consent.”

Given its central role in waivers, “informed consent” is a defined term under RPC 1.0A(e):

“Informed consent” denotes 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.

Comment 6 to RPC 1.0A explains this definition further in practical terms:

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

As both the text and the comment suggest, the clients involved must be provided with sufficient information to understand both the positives and the

negatives of granting a waiver. The apocryphal CLE example of the lawyer who says “but if we tell the clients that, they’ll never grant the waiver” is a great illustration of what *not* to do. In addition to meeting our obligations under the RPCs, lawyers have a practical incentive to make sure that their clients give truly informed consent: they and their law firms are relying on the resulting waivers. Unwaived conflicts are a staple of regulatory discipline for the lawyers involved and disqualification for their law firms.⁹ Moreover, because the conflict rules reflect the underlying fiduciary duty of loyalty, unwaived conflicts can also lead to civil damage or fee disgorgement claims based on breach of the fiduciary duty of loyalty.¹⁰

On a practical level, it is often easier to explain a conflict to a client in person or over the telephone rather than simply sending an email or letter without any advance notice. While no public statistics exist, anecdotal evidence suggests that the human dynamic of a personal interface also likely increases the odds of obtaining the waiver. The specifics of the communication will necessarily vary with the circumstances and the clients. A conversation about a waiver with an in-house counsel at a large corporation will typically be different from one with a nonlawyer client. Although there is no “sophisticated user” limitation on conflict waivers, lawyers should prudently assess the client’s ability to provide the

requisite informed consent.¹¹ The Washington Supreme Court, for example, found that a waiver failed to meet this standard in *In re Hall*, 180 Wn.2d 821, 329 P.3d 870 (2014), when a lawyer read selective parts—but not all—of a proposed waiver to an elderly, visually-impaired client.¹² Lawyers also need to accept that at the end of the day, clients are free to reject waivers for good reasons, bad reasons or no reason at all.¹³ In that event, the law firm will ordinarily need to decline the proposed representation that is dependent on the waiver.¹⁴

Confirmed in Writing

Conflict waivers are required to be “confirmed in writing.”¹⁵

This term of art is defined by RPC 1.0A(b):

“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

“Writing,” in turn, is defined broadly by RPC 1.0A(n):

“Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Under RPC 1.0A(b), the client ordinarily does not have to sign the waiver.¹⁶ Prudent risk management, however, counsels obtaining a client signature. As RPC 1.0A(n) suggests, an affirmative reply email is the functional equivalent of a “pen and ink” signature in this context.

Beyond these technical definitions, the written document—whether in paper or electronic form—provides two practical benefits to law firms.

First, in addition to documenting the client’s consent, the written waiver offers a venue to memorialize the discussions with the client—both written and oral—that led to the client’s “informed consent.” Because the memories of even the most honorable people can fade over time, the conflict waiver serves as the lawyer’s contemporaneous record of the disclosures on which the client’s consent was predicated. If questions arise later, the waiver document can serve both as a reminder to the client and as proof to a court examining an asserted conflict later.¹⁷

Second, clients sometimes condition approval of waivers on agreed limitations or voluntary screening of particular lawyers.¹⁸ Including those conditions in the waiver itself offers a continuing reminder of the limitations involved. In *In re Jore*, 298 B.R. 703 (Bankr. D. Mont. 2003), for example, a bank client granted a Seattle law firm a waiver allowing it to represent a debtor but

conditioned the waiver on the law firm not handling litigation in the bankruptcy against the bank. Several months later, however, the law firm represented the debtor against the bank in a hearing the bankruptcy court described as “quite contentious.”¹⁹ The court eventually disqualified the law firm for exceeding the scope of the waiver granted and ordered it to disgorge over \$1 million in fees. *Jore* offers a dramatic example of the importance of both documenting—and remembering—any conditions incorporated into the waiver.

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¹ See RPC 1.7, cmts. 17 and 28 (discussing non-waivable conflicts).

² See RPC 1.7(b) (conflict waivers for current client conflicts); RPC 1.9(a) (conflict waivers for former client conflicts). See also RPC 1.8 (addressing a disparate collection of specific current client conflicts).

³ See RPC 1.8(a) (conflicts arising from investments in or business transactions with clients); RPC 1.7, cmt. 22 (advance waivers); see also Mark J. Fucile, *Taking Stock: Navigating Risk When Investing in Clients*, 73, No. 5 WSBA NWLawyer 12 (June 2019); Mark J. Fucile, *Advance Waivers as a Practice Management Tool*, 72, No. 8 WSBA NWLawyer 9 (Dec. 2018).

⁴ WSBA, *Legal Ethics Deskbook* §11.9 (2d ed. 2020).

⁵ Other national authorities also have readily accessible templates available online. See, e.g., <https://www.freivogelonconflicts.com/waiverconsentforms.html>.

⁶ For this reason, portions of templates that discuss legal considerations required by the conflict rules involved should not ordinarily be deleted without consultation with, for example, firm internal general counsel.

⁷ See Washington RPC 1.10(f) (generally imputing LLLT conflicts “[w]hen LLLTs and lawyers are associated in a firm[.]”).

⁸ See Oregon RPC 1.0(g) (requiring the referenced recommendation as a part of the Oregon definition of “informed consent”). Cross-border practice can sometimes raise complicated choice-of-law issues under RPC 8.5(b). Comment 5 to RPC 8.5 permits lawyers and clients in that situation to—with the client’s informed consent—designate controlling law on conflicts prospectively in, for example, a written engagement agreement.

⁹ See, e.g., *In re Egger*, 152 Wn.2d 393, 408-412, 98 P.3d 477 (2004) (regulatory discipline for unwaived conflict); *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 at *9-*13 (W.D. Wash. Apr. 22, 2016) (unpublished) (disqualification for unwaived conflict).

¹⁰ See generally *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (unwaived conflict cast as breach of the fiduciary duty of loyalty by attorney); *Behnke v. Ahrens*, 172 Wn. App. 281, 294 P.3d 729 (2012) (same).

¹¹ Comment 6 to RPC 1.0A notes that a lawyer’s explanation preceding a client’s informed consent should be calibrated to “whether the client . . . is experienced in legal matters generally and in making decisions of the type involved[.]”

¹² *Hall* also cites to the “communication” rule—RPC 1.4. See 180 Wn.2d at 829. RPC 1.4(b) requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

¹³ See, e.g., *Bird v. Metropolitan Cas. Ins. Co.*, 2011 WL 149861 (W.D. Wash. Jan. 18, 2011) (unpublished) (disqualifying law firm that proceeded with representation despite the fact that client declined to grant necessary conflict waiver); *Qwest Corp. v. Anovian, Inc.*, 2010 WL 1440765 (W.D. Wash. Apr. 8, 2010) (unpublished) (same); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, 2007 WL 4014992 (W.D. Wash. Nov. 15, 2007) (unpublished) (same).

¹⁴ *Id.* Although rare, clients can also revoke waivers. See RPC 1.7, cmt. 21; see, e.g., *R.O. by and through S.H. v. Medalist Holdings, Inc.*, 2021 WL 672069 (Wn. App. Feb. 22, 2021) (unpublished) (discussing revocation of waiver).

¹⁵ See, e.g., RPCs 1.7(b)(4), 1.9(a).

¹⁶ *But see* RPC 1.8(a)(3) (requiring client signature for conflict waivers involving business or investment transactions with clients).

¹⁷ *See, e.g., Bellevue Farm Owners Association v. Stevens*, 2020 WL 2318095 at *25-*27 (Wn. App. May 1, 2020) (unpublished) (trial court reviewed conflict waivers *in camera* when deciding motion to disqualify).

¹⁸ *See, e.g., Spur Products Corp. v. Stoel Rives LLP*, 142 Idaho 41, 122 P.3d 300 (2005) (former client alleged that voluntary screen included in a conflict waiver had been breached).

¹⁹ 298 B.R. at 714.