Conflicts of Interest

About the Author

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Conflicts of Interest

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DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.

updated August 2011
INTRODUCTION

Carter Hampton is Board Certified in Civil Trial Law, Texas Board of Legal Specialization, a retired judge and former legal malpractice underwriter and claims executive for two major insurance carriers. A nationally recognized expert in Law Firm Risk Management and Loss Prevention, he has helped thousands of attorneys and firms across the nation and Canada. His 29 years of experience can be retained for a personalized on-site law firm review for all areas of practice and for all firm sizes, as well as firm retreats, as a “Hotline” or approved continuing legal education. Law Firm reviews are tailored for specific implementation and maintained under the Attorney Client Privilege. He is available as an expert in Insurance claims handling, management and bad faith cases.

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CONFLICTS

Conflicts. The one word answer for why the firm made the headlines in the newspaper today. Yes, the most severe legal malpractice settlements and verdicts all come from conflict claims. Visualize the sting of seeing “Breach of Fiduciary Duty” and “Punitive Damage” when reading the demand letter or pleadings.

While it’s true that conflicts are a complicated matter particularly in larger firms with thousands of clients, keep this short newsletter as a referral primer when a thought or concern arises. Remember the top ten causes of conflict problems and know the rules.

There are six primary Model Rules of Professional Conduct that govern most conflict situations as well as your own state code of professional conduct on rules to which lawyers should be familiar. These rules should be reviewed every time a conflict disclosure or waiver is prepared. Such time should be accounted for and may or may not be billed. Why do it and account for the time you ask? Draw near and I will tell you a horrifying tale.

Imagine you are in court defending the spurious claim, because it will not occur during your deposition. Plaintiff’s counsel has discovered all your time records prior to trial and now comes to the close of your direct examination. He finishes something like this. “Counselor, prior to asking your ex-client to sign this conflicts waiver (better yet if there is no writing) did you have an occasion to refer to the State Rules of Professional Conduct on Conflicts?” Whether this line of questioning goes forward or not, the damage is done. Follow-up “Counselor, prior to asking your ex-client to sign this conflict waiver did you review the case law in this great state, the court decisions concerning conflicts?” Again, the damage is done.

Plaintiff’s counsel gleans from your time records that you had not spent any time so she knew the answer or was prepared to impeach the answer. If your review had been time entered you would be defending the real facts.

The second thing to refer back to in this newsletter is the top ten problem areas and why, which came from real legal malpractice suits and claims.

10. Representing Multiple Plaintiffs – One is one Two or more is never one. Always follow the one client one lawyer rule. We are all granted the same rights not the same results.

9. Representing multiple defendants – who is the client? Is the client the board, president,
CONFLICTS OF INTEREST

shareholders, general partner or limited partner, etc. Picture a mine field.

8. Agreeing to a matter that is adverse to a current client.

7. Agreeing to a matter that is adverse to a former client.

Both 7 & 8 run the risk of alleged misuse of information acquired in confidence.

6. Representing all the parties in a transaction. The “I was only the Scribner” defense never works and both sides can sue you for malpractice.

5. Insured vs. Insurer. You really do need the three legs to balance the stool of the tripartied relationship.

4. Doing business with your clients. This creates the perception that the attorney has an advantage and that the dealings are unfairly weighted in your favor.

3. Changing the terms of your service (fee) agreement. Again the perception is that the client is at a disadvantage and you the attorney took advantage to line your pockets.

2. Prejudging the matter based upon a concern of not getting paid. Word to the wise, always place payment concerns in a separate letter that starts with the sentence: “Just a follow up on our conversation . . .”

1. The continued representation after a conflict develops. This is number one because it is a sleeper issue. Conflicts are checked at the beginning of the representation but should be checked again when facts unfold by way of witness or documents and/or when parties are added or subtracted. Does the firm have a procedure in place to catch subsequent activity?

Now keep up the good work!
COMMON AREAS WHERE CONFLICTS ARISE

• Representation of a client that is directly adverse to another client
• Representation of multiple parties
• Representation of a client when the lawyer has a financial interest in the client entity
• Representation of a client when the lawyer serves as an officer or director for the client entity
• Accepting stock in lieu of fees
• Lawyer engaging in business with a client
• Failure to document non-representation

FEATURES OF A GOOD CONFLICT SYSTEM

• The system is integrated with other systems; i.e., time and billing and case management;
• Provides easy access to conflict data for everyone in the office;
• Checks are conducted at the three key stages of the representation: before face-to-face consultations, before a new file is opened and when a new party enters the case;
• Searches check for varying spelling of names and all prior names;
• Conflict entries show the party’s relationship with the client;
• Checks are conducted when new attorney and staff members join the firm and their list of past clients;
• All parties connected with a case are entered into the system; and
• Conflict searches are documented in the file.
• A new client list is circulated weekly to all lawyers and staff in the office and is reviewed for possible conflicts.

Information provided by the Tennessee Bar Association.
**TYPES OF NAMES TO BE ADDED TO CONFLICT LIST**

*(This is not a complete list.)*

<table>
<thead>
<tr>
<th>LITIGATION</th>
<th>CORPORATE/BUSINESS/REAL ESTATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insured</td>
<td>Owner/Spouse</td>
</tr>
<tr>
<td>Plaintiff(s)</td>
<td>Buyer(s)</td>
</tr>
<tr>
<td>Defendant(s)</td>
<td>Seller(s)</td>
</tr>
<tr>
<td>Insurer</td>
<td>Partner(s)</td>
</tr>
<tr>
<td>Guardian ad litem</td>
<td>Officer(s)</td>
</tr>
<tr>
<td>Spouse</td>
<td>Shareholder(s)</td>
</tr>
<tr>
<td>Expert witness(es)</td>
<td>Subsidiaries/Affiliates</td>
</tr>
<tr>
<td></td>
<td>Key employees</td>
</tr>
<tr>
<td></td>
<td>Property address</td>
</tr>
<tr>
<td></td>
<td>Any opposing party in a transaction</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>PROBATE</th>
<th>ESTATE PLANNING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deceased</td>
<td>Testator</td>
</tr>
<tr>
<td>Spouse/Children/Heirs/Devises</td>
<td>Personal representative</td>
</tr>
<tr>
<td>Trustee/Guardian/Conservator</td>
<td>Spouse/Children/Heirs/Devises</td>
</tr>
<tr>
<td></td>
<td>Trustee/Guardian</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>DISSOLUTION</th>
<th>CRIMINAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client</td>
<td>Client</td>
</tr>
<tr>
<td>Spouse</td>
<td>Co-defendant(s)</td>
</tr>
<tr>
<td>Children</td>
<td>Witness(es)</td>
</tr>
<tr>
<td>Grandparents</td>
<td>Victim(s)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>WORKERS’ COMPENSATION</th>
<th>BANKRUPTCY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Injured Worker</td>
<td>Client</td>
</tr>
<tr>
<td>Insurer</td>
<td>Spouse</td>
</tr>
<tr>
<td>Employer</td>
<td>Creditors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>YOUR FIRM</th>
<th>OTHER</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Lawyers</td>
<td>Declined clients and adverse parties, if known</td>
</tr>
<tr>
<td>Employees</td>
<td>Prospective clients</td>
</tr>
<tr>
<td>Spouses/Parents/Siblings/In-laws</td>
<td></td>
</tr>
</tbody>
</table>

When listing an individual, be sure to include all known names (i.e., former or maiden names). When listing lawyers and employees of the firm, consider including contract attorneys, temporary workers and free-lancers. Key vendors or service providers of the firm may also be included in the conflict system.
CONFLICT OF INTEREST SEARCH TERMS  
(Organized by Area of Practice)  

The following chart is a list of suggested search terms to use in your screening for conflict-of-interest. The list is not all-inclusive and your list that you use in your firm may depend on a number of other factors such as business set-up, locality, and specialty areas of practice.

**ANCILLARY BUSINESSES**
- Name of any business in which a firm member has an equity interest or Director/Officer role

**BANKRUPTCY**
- Client
- Spouse
- Client’s partners
- Client’s other businesses
- Client’s family members
- Creditors

**COMMERCIAL REAL ESTATE**
**BUSINESS/CORPORATE**
- Client
- Owner/Spouse
- Key employees
- Buyer
- Seller
- Partners/Shareholders
- Directors/Officers
- Brokers
- Lenders
- Any opposing party in a transaction
- Parcel number/location/address
- Title insurer

**CRIMINAL**
- Client
- Victim
- Witnesses
- Expert Witnesses
- Co-defendants
- Potential co-defendants

**DECLINED CLIENTS**
- Person declined
- Adverse parties if known
- Spouse if known

**ESTATE PLANNING**
- Testator/Testatrix
- Spouse
- Children/Heirs
- Devisees/Beneficiaries
- Personal Representative(s)
- Trustees

**FAMILY LAW - DISSOLUTION**
- Client
- Spouse (former & current)
- Children

**PATENT**
**PATENT PROSECUTION:**
- Subject matter of patent/trademark
- Inventors
- Research & Development personnel (within reason)
- Assignees of patent/trademark
- Affiliates, subsidiaries, parent & holding companies
- Graduate student assistants
- Foreign patent agents

**PATENT LITIGATION:**
- Client affiliates, subsidiaries, parent & holding companies
- Opposing parties & affiliates (to the extent identifiable)
- Opposing counsel
- Related parties
- Witnesses
- Experts

**IMMIGRATION LAW**
- Client
- Spouse (former & current)
- Children

**RESIDENTIAL REAL ESTATE**
- Client
- Owner/Spouse
- Buyer
- Seller
- Brokers
- Lender/Mortgage Company
- Any opposing party in a transaction
- Parcel number/location/address
- Title insurer

**WORKERS COMPENSATION**
- Client
- Employer
- Insurer
- Expert Witnesses
- Witnesses (if any)
- Adverse family members
- Guardian ad litem

**LITIGATION**
- Client
- Insured
- Plaintiffs
- Defendants
- Insurance carriers
- Guardian ad litem
- Spouse
- Witnesses (if any)
- Expert Witnesses
- Co-Counsel
- Co-plaintiffs/Co-Defendants
- Opposing counsel

Information provided by Minnesota Lawyers Mutual.
# REQUEST FOR CONFLICT SEARCH

FILE NAME _____________________________________________________________

CLIENT/COMPANY NAME __________________________________________________

CLIENT/COMPANY PRIOR NAMES ____________________________________________

OPPOSING PARTY NAME ___________________________________________________

OPPOSING PARTY KNOWN PRIOR NAMES _____________________________________

CLIENT MATTER ________________________ RESPONSIBLE ATTORNEY _____________

## RELATED PARTIES

<table>
<thead>
<tr>
<th>NAME</th>
<th>RELATIONSHIP</th>
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- ■ NEW MATTER (to open new file)
- ■ ADDITIONAL INFORMATION (to update file)
- ■ SEARCH ONLY (do not add any information)

Requested by _____________________________________ Request Date _________________

- ■ NO CONFLICT FOUND

- ■ NAMES FOUND AS FOLLOWS:

Searched by _____________________________________ Search Date _________________

*Form provided by the Oklahoma State Bar.*
CONFLICT BULLETIN

To: All Attorneys and Staff

Date:

If anyone knows of a CONFLICT that would arise if we represented or were adverse to the following parties, kindly contact ______________________________ immediately.

CLIENT: _____________________________________________________________________

( ) New   ( ) Existing

ADVERSE PARTIES: ___________________________________________________________________________________
_____________________________________________________________________________________________________

OPPOSING COUNSEL: ________________________________________________________________________________
_____________________________________________________________________________________________________

BRIEF DESCRIPTION OF MATTER: _____________________________________________________________________
_____________________________________________________________________________________________________ 
_____________________________________________________________________________________________________

**********

Please check the appropriate box below and return to ____________________________________________________________________________________________________________ .

( ) I know of no conflict.
( ) Yes, there is a conflict. Please notify the responsible attorney.

_____________________________    _____________________________
(initials)       (date)

Form provided by Minnesota Lawyers Mutual.
CONFLICTS OF INTEREST

CONFLICTS OF INTEREST AUDIT

1. Do you know the meaning of “undivided loyalty”? ☐  ☐

2. Do you have a reliable system for screening new clients and cases for potential conflicts of interest? ☐  ☐

3. Do you have routine procedures to obtain basic conflict of interest information before opening a file? ☐  ☐

4. Are your conflicts procedures provided in writing so that all staff are familiar with them? ☐  ☐

5. Do you check for subject matter conflicts as well as client conflicts? ☐  ☐

6. Do you screen for conflicts before receiving confidential information and fees from new clients? ☐  ☐

7. Do you maintain a master index; either as a notebook, card system, or computerized list? ☐  ☐

8. Does your master index include all of the following:
   - Client name ☐  ☐
   - Affiliates or partners of client ☐  ☐
   - “Also known as”: name ☐  ☐
   - Directors or officers of client ☐  ☐
   - Adverse parties ☐  ☐
   - Co-plaintiffs or co-defendants ☐  ☐
   - Known relative of client and other parties ☐  ☐
   - Common law spouses of client and others ☐  ☐
   - Lawyers for any names in the index ☐  ☐

9. Is one person assigned responsibility for maintaining the master index? ☐  ☐

10. Do you routinely circulate new case summaries to all attorneys and support staff, and do the summaries contain a space for indicating any potential conflict? ☐  ☐

11. If a potential conflict is found, does your firm have one or more attorneys designated to determine if an actual conflict exists? ☐  ☐

12. If a potential conflict is found, do you either decline to take the case or notify the client of the potential conflict in writing? ☐  ☐
13. Do you have a standard letter for conflict disclosure? □ □

14. Do you decline cases where there is actual conflict regarding the client, the subject matter, or some other aspect of the case? □ □

15. Have you discussed the conflicts rules in the NC State Bar’s Rules of Professional Conduct and adopted RPC and FEO opinions within your firm? □ □

16. Are you aware of the State Bar ethics opinion RPC 188, which says a lawyer is disqualified from representing a client in a transaction where the lawyer or a close relative will receive a valuable commission from the transaction? □ □

17. Do you screen new associates and staff when they come into the firm for potential conflicts arising from their prior employment? □ □

18. Do red flags go up when you are asked to:
   - Serve as an officer or director of a client corporation
   - Engage in business with a client or acquire a financial interest in a client matter
   - Acquire a financial interest in your client’s business
   - Represent adverse parties in “friendly” suits where there seems to be no opposing interests
   - Represent multiple parties with different interests
   - Represent more than one party seeking recovery from a fixed pool of money □ □

19. Do you avoid acting for two or more clients in the same matter without their written informed consent? □ □

20. Do you avoid acting for a client in a matter in which you, your relative, friend or partner has a financial interest which would reasonably be expected to affect your professional judgment? □ □

TIP: An ideal conflicts database might include: clients, persons declined as clients, adverse parties, maiden names, parent and subsidiary corporations, individual directors and officers of corporations, trade names, alter egos, co-plaintiffs and co-defendants, known allies of clients or adverse parties, firm attorneys and staff, business interests of attorneys and staff, subject matter of representation.
FACT PATTERN: THE PROBLEM WITH MULTIPLE CLAIMANTS

We recently received a call from a lawyer who was representing multiple claimants in a big personal injury claim. The lawyer had invested a great deal of money and time in the case. His work had evidently paid off because he had received a very substantial offer from the defendants’ insurance company. Unfortunately, the insurance company had made a “lump sum” offer to settle all of the claims, and was not willing to change the offer. The lump sum offer was insufficient to compensate all the claimants fully.

The lawyer was dismayed to read RPC 251. Not so much the general holding of RPC 251, because it approves of a lawyer representing multiple claimants in a personal injury case, even though the available insurance proceeds are insufficient to compensate all claimants fully. But there are some restrictions. First, the lawyer must obtain informed consent from each of the claimants, and second, the lawyer cannot advocate against the interests of any client in the division of the insurance proceeds. (It should go without saying that if there is a conflict of interest between the clients on the issue of liability; for example, if there are potential crossclaims amongst the clients, the lawyer cannot, or should not, represent all of the claimants.) There is, of course, the potential for competition between the claimants for their share of the insurance proceeds when the insurance coverage is not sufficient to compensate all claimants fully. That risk perhaps can be managed. The lawyer may facilitate mediation among the clients to determine how the fund will be divided. He may also recommend how the fund should be divided, as long as he can do so impartially. He must not, however, advocate against the interests of any client. If the clients agree to accept the settlement and agree on the division of proceeds, all is well.

Now, here’s the part of RPC 251 that dismayed our caller. RPC 251 says: “The lawyer must also withdraw from the representation if one or more of the claimants do not agree to accept the settlement offer. If the lawyer must withdraw, the lawyer may continue to represent one or more of the claimants only with the consent of the claimants whose case the lawyer relinquishes.” The lawyer who called me had invested hundreds of thousands of dollars in the case and now had a large settlement offer on the table. Was he now faced with the prospect of having to withdraw from the case, depending entirely upon the actions of his clients? I think he was.

What can one do to avoid this unfortunate situation? Well, first of all, realize the dangers inherent in agreeing to represent multiple clients. It may be wiser not to do so. If one chooses to represent multiple clients, it may be possible to obtain consent of all the clients at the beginning of the case that, in the event the lawyer is forced to withdraw because the clients cannot agree to accept a settlement offer, the lawyer is authorized to withdraw from the representation of the client or clients who are not in agreement with the settlement offer and may continue representing one or more of the clients. Remember that consent means “informed consent.” “Informed consent” as defined by the Rules means “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation appropriate to the circumstances.” This might be difficult to do in advance. In any event, informed consent of the multiple clients, at whatever stage in the case it is obtained, must be confirmed in writing.

The take away is to think hard about agreeing to represent multiple clients in a personal injury case. If you choose to do so, lay the necessary groundwork that may help prevent the unfortunate situation of having to withdraw from the entire representation months or years down the road.
ADDITIONAL RESOURCES

“ETHICS: NOT ALL RELATIVE.” Downloadable PDF Published by The American Bar Association. Available at www.abanet.org or by phone at 800.285.2221; product code: 51105671701PDFA03. Price is $19.95 regular and 14.95 for members of the ABA.

FREIVOGEL ON CONFLICTS. Available at: www.freivogelonconflicts.com

“THE INTERSECTION OF CONFLICTS OF INTEREST AND IMPUTATION OF KNOWLEDGE.” Downloadable PDF Published by The American Bar Association. Available at www.abanet.org or by phone at 800.285.2221; product code: 54302002206PDFA06. Price is $19.95 regular; $14.95 for members of the ABA; and $9.95 for members of the Government and Public Sector Division and Law Student Division.

“MANAGING CONFLICT OF INTEREST SITUATIONS.” Published by PracticePro. Available at: http://www.practicepro.ca/practice/conflicts.asp