

Here's a quiz: What are the three most important ethical issues that lawyers face? Answer: Conflicts, conflicts, conflicts.

When dealing with conflicts of interest, lawyers often consider the possibility of obtaining a "waiver" of the conflict. While the term is useful as a short-hand expression, it is inaccurate and misleading in three respects. First, the rules of ethics do not allow a client simply to waive a conflict; the client must give informed consent. Second, the client's consent must be confirmed in writing. Finally, in some instances conflicts are not consentable.

Consider the situation in which a lawyer is asked to represent multiple parties who are forming a business. What must a lawyer do to obtain an effective consent to a conflict of interest?

Informed consent. S.C. Rule of Professional Conduct 1.0(f) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Comment 6 to SCRPC states that informed consent "[o]rdinarily ... 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." With regard to conflicts of interest involving multiple clients, comments 16, 17 and 27-31 to SCRPC 1.7 provide further guidance on informed consent. In particular, comment 16

states that when "representation of multiple clients in a single matter is undertaken, the information should include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."

Consider the following letter to prospective clients:

Dear [name]:

This letter will confirm our understanding about my role in the formation and operation of [name of entity], a corporation that will be created to [description of activities].

It is my understanding that you wish for me to represent both of you in this matter, and to represent the new corporation once it is formed, handling all of the legal work in connection with the formation and operation of this corporation. My fee for this work will be as follows: [Description of fee arrangement. If the lawyer receives an interest in the business in payment of fees, additional disclosures will be required under SCRPC 1.8(a)].

The Rules of Professional Conduct for lawyers require me to obtain your informed consent to retain me to represent both you and the corporation and to confirm that consent in writing. In deciding whether you wish to consent to my representation of you and the corporation, please consider the following factors:

Neutrality. Because I will be representing both of you and the corporation, my ethical obligation is to treat you equally, not favoring one of you over the other. I will raise for mutual discussion any issue that I think is

material to either of you individually or to the corporation.

Full disclosure/no confidentiality. I have an obligation to provide each of you with complete information relating to my representation. You must understand that any information you share with me is not confidential as to the other party, and I will disclose all material information I receive from you to the other party.

Withdrawal in the event of a dispute. If a dispute develops between the two of you or between you and the corporation that we cannot resolve, I must withdraw from representation.

Attorney-client privilege. If a dispute between the two of you or between you and the corporation results in litigation, any communications among us will probably be admissible in evidence and will not be subject to a claim of attorney-client privilege.

Fees and expenses. If you do not encounter serious disagreements, multiple representation can minimize legal fees and expenses by reducing the number of lawyers involved in the matter. However, if a conflict develops and I am required to withdraw, you will be forced to retain separate counsel unfamiliar with the matter. As a result your legal fees may well increase.

Other problems/alternative of separate representation. Other unforeseen problems can also develop if I represent you and the corporation. These problems can be avoided if each of you hire your own attorney on a fee-for-service

es basis. Of course, hiring separate attorneys is likely to be more expensive than if you employ only one lawyer.

If you wish me to represent you despite the risks that I have outlined in this letter, I am willing to do so. I will, of course, always attempt to fulfill my obligations as your attorney, and I will inform you if I believe that a conflict of interest has developed.

If you understand the risks involved and are still willing to consent to my representation, please either sign this letter and return it to me, keeping a copy for your files, or send me an e-mail stating your consent. Your consent will also be inferred if by your conduct you indicate that you are authorizing me to proceed with the representation.

Please let me know if you have any questions or concerns about your consent to my representation.

Sincerely,

Name of Firm

We have been advised of our right to separate counsel and of the risks of multiple representation. We hereby consent to [name of firm] representing both of us and the corporation that we plan to form with full knowledge of the possible risks that can flow from such representation.

[signatures]

Confirmed in writing. Some rules of professional conduct require the client to sign the consent. See SCRPC 1.5(c) (contingency fees) and 1.8(a) (business transactions with clients). SCRPC 1.7(b)(4) does not; it only requires that the client's consent be "confirmed in writing." See

SCRPC 1.0(b). Nonetheless, prudent lawyers will not proceed with the representation without either signed consents from the clients or an e-mail expressing their consent. See SCRPC 1.0(o), authorizing e-mail as a sufficient writing under the rules. Comment 7 to Rule 1.0 indicates that client consent can be inferred from the client's conduct, and the form presented above includes a sentence to that effect to provide some

proceed with multiple representation. Comment 27 to SCRPC 1.7 discusses this factor. Second, a lawyer who represents multiple clients in a business formation must be impartial. If the lawyer does not believe that she can be impartial, she should not undertake multiple representation. See comment 29. When a lawyer has a long-standing professional relationship with one of the parties to the business forma-

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protection to a lawyer who proceeds with the representation even if the clients fail to sign the consent letter or send a confirming e-mail.

Nonconsentable conflicts. Some conflicts are nonconsentable. The clearest case of a nonconsentable conflict arises in litigation when a lawyer represents multiple clients in a matter before a tribunal and one client is asserting a claim against another client—for example, multiple representation of a driver and passenger in an automobile accident, when the passenger has a claim against the driver. See SCRPC 1.7(b)(3). This rule has no application to business transactions, but even in that setting conflicts are sometimes not consentable. Rule 1.7(b)(1) states that a lawyer may not represent multiple clients in a single matter unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." In making this determination a lawyer should consider a number of factors. In a business formation, the following are important considerations:

First, the lawyer must determine whether there is a fundamental antagonism between the parties or whether they appear to have a common interest even though some differences exist. In most business ventures, the latter should be the case; if it is not, the lawyer should not

proceed with the others, the likelihood that the lawyer can be impartial is diminished. Third, generally in multiple representation, the lawyer must share any information received from one client that is material to the representation with the other clients. See comment 29. If one of the parties has a substantial interest in maintaining confidentiality of information from the others, the lawyer probably should not undertake multiple representation. Fourth, in multiple representation all of the clients must assume a greater role for decision making than when they are separately represented. See comment 30. If one of the parties is less capable of assuming this responsibility because of lack of experience or sophistication, multiple representation becomes questionable. On the other hand, multiple representation may provide better protection for an unsophisticated person's interests if that person would choose not to be represented should the lawyer decline multiple representation.

Conflicts of interest can arise in a variety of settings, both transactional and adversarial. While the settings vary, in most instances the conflicts are waivable. To be more precise, a lawyer may represent the clients despite the conflict if the clients give their informed consent, confirmed in writing, and the conflict is consentable. ■