

Chapter 2

Conflicts of Interest

Conflicts of interest can pop up at any time. The best practice is to perform a preliminary conflicts check before the initial consultation with a potential client, and then another, more comprehensive, conflicts check after the initial consultation but before accepting the representation. Finally, another conflicts check should be performed each time a new party enters into the legal matter. If a conflict is found and the conflict is one that is not consentable, or is consentable, but informed consent is not obtained, then the lawyer must decline the representation or, if already representing the client, withdraw from the representation. Otherwise, the lawyer may face grave consequences, including disqualification, mandatory withdrawal, disciplinary actions, reversal of proceedings, forfeiture of fees, and possibly malpractice claims. A non-engagement letter or a disengagement letter (see samples) should be sent to document such declination or termination of the representation.

Types of Conflicts

Generally, conflicts of interest fall into two categories. Conflicts may arise from directly adverse representations or where the representation of a client is materially limited as a result of the lawyer's other responsibilities or interests. A directly adverse conflict arises when you are called upon to represent one client against another client. A lawyer cannot represent two opposing parties in the same litigation. Moreover, a lawyer may not act as an advocate in one matter against a client the lawyer currently represents or previously represented in some other matter. Former clients also present a conflict with the matters one substantially related to one another.

Even when there is no directly adverse conflict, a conflict of interest may nevertheless exist if there is a significant risk that the lawyer's representation may be materially limited as a result of the lawyer's responsibilities to other clients, to third persons or entities, or as a result of the lawyer's own personal interest.

- This type of conflict may arise in the context of dual or multiple representations (i.e., representing a husband and a wife, or a buyer and a seller, or two or more clients forming a business entity).
- It also may arise in the context of a financial interest (i.e., owning a percentage of a client's business).
- Further, a conflict may arise in the context of a hidden interest (i.e., romantic or sexual involvement with a client). Nor should you enter into any business transactions with your clients, or knowingly acquire an ownership or other pecuniary interest adverse to your clients.¹
- You should not enter into an agreement to limit your malpractice liability without first making sure that your client is represented by independent counsel.

You should closely scrutinize the circumstances of each representation to determine whether the clients have "differing interests" that may call for different attorneys representing each client. It is also your duty to reject or disengage from any representation which is going to cloud your independent professional judgment and not allow you to render objective advice.

Consentable Versus Non-Consentable Conflicts

You must independently and objectively decide whether a conflict is consentable. “When a *disinterested* lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.” Annotated Model Rule of Professional Conduct at p. 124 (ABA 2d ed. 1992) (emphasis added). When in doubt, the lawyer should decline the adverse representation.

While clients may consent to representation notwithstanding a conflict, some conflicts are non-consentable. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client. Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to a representation burdened by a conflict of interest. Representation is prohibited if, under the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation as required by Rules of Professional Conduct 1.1 and 1.3. See also Restatement (Third) of the Law Governing Lawyers § 122(2)(c) (2000). For this reason, representing opposing parties in the same litigation is uniformly prohibited. This conflict cannot be waived and is non-consentable. Other conflicts are non-consentable because applicable law prohibits the representation. For example, under federal criminal statutes, certain representations by a former government lawyer are prohibited, despite the informed consent of the former client.

Consentable Conflicts

Not all representations containing the types of conflicts described above have to be declined or terminated, if the potential or existing client gives informed consent. The following types of transactions can be entered into, but only with the client’s informed consent:

► **Business transaction or acquiring pecuniary interest adverse to the client - LA RPC Rule 1.8 (a)¹**

You may not enter into a business transaction or acquire an ownership or other pecuniary interest adverse to the client unless:

1. the transaction is fair and reasonable to the client;
2. the terms are fully disclosed and given to the client in writing, in a manner clearly understood by the client;
3. the client is advised in writing well in advance of the transaction and is given a reasonable opportunity to seek advice of independent counsel; and
4. the client consents in writing.

► **Using information relating to a client’s representation – LA RPC Rule 1.8 (b).**

You may not use information relating to the representation of an existing or former client to the disadvantage of the client, unless the client has been fully informed and consents to its use.

► **Compensation from another party - LA RPC Rule 1.8 (f).**

You may not accept compensation for representing a client from any person other than the client unless the client gives informed consent, or the compensation is provided by contract with a third person, such as an insurance contract or a prepaid legal service plan; there is no interference with a lawyer’s independence or professional judgment or with the client-lawyer relationship; and the information relating to the representation of a client is protected as required by Rule 1.6 (Confidentiality of Information).

► **Multiple client settlements – LA RPC Rule 1.8 (g).**

You may not enter into an aggregate settlement of the claims of or against multiple clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent in a writing signed by the client, in a writing signed by the client or a court approves a settlement in a certified class action. The lawyer’s disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

¹ Most legal malpractice insurance policies exclude from coverage claims arising out of legal services performed by the insured attorney for a client, if at the time of the act or omission in the performance of the legal services, the attorney owned a greater than 10% interest in the client’s business.

► **Former clients – LA RPC Rule 1.9 (a).**

If you formerly represented a client in a matter, you shall not represent another person in the same or a substantially related matter if that person's interests are materially adverse to the interests of the former client, unless your former client gives informed consent, confirmed in writing.

► **Imputation of conflicts of interest - LA RPC Rule 1.10 (a).**

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

► **Special conflicts of interest for former and current government officers and employees – LA RPC Rule 1.11 (a)(2) and Rule 1.11 (b)(1) &(b)(2).**

A lawyer who has formerly served as a public officer or employee of the government shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public government officer or employee, unless the government agency gives its informed consent, confirmed in writing, to such representation. Additionally, no lawyer in a firm with which that lawyer is associated may represent this client, unless the disqualified lawyer has been timely screened from any participation in the matter, is not given any part of the fee, and the former government agency is notified immediately in writing.

► **Former judge, arbitrator, mediator or other third-party neutral - LA RPC Rule 1.12 (a) and Rule 1.12 (c)(1) & (c)(2).**

You may not represent a client in connection with a matter in which you participated personally and substantially as a judge, other adjudicative officer, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing. Additionally, your firm may not represent this client, unless you are timely screened, you are not given any part of the fee, and written notice is given to the appropriate tribunal.

► **Organization as client – LA RPC Rule 1.13 (a) and Rule 1.13 (g).**

If an organization is your client, you represent the organization acting through its duly authorized constituents. If you represent an organization, you may also represent any of its directors, officers, employees, members, shareholders, or other constituents subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is being represented, or by the shareholders.

► **Financial assistance to clients – LA RPC Rule 1.8 (e).**

Financial assistance to clients is allowed under certain circumstances.

Non-Consentable Conflicts

Some conflicts cannot be waived and are deemed non-consentable. Some examples of prohibited representations include, but are not limited to:

- Preparing an instrument giving yourself or any person related to you any substantial gift from your client, including a testamentary gift, unless you and your client are related. LA RPC Rule 1.8 (c).
- Negotiating an agreement giving yourself literary or media rights to a portrayal of the representation. LA RPC Rule 1.8 (d).
- Directly adverse representation in the same matter. LA RPC Rule 1.7(a)(1).
- Despite the prohibition in Rule 1.8(e) against providing financial assistance to clients, it is permitted under certain circumstances. (See in the Fees, Billing and Trust Accounts section.)
- Agreeing prospectively to limit your liability to a client for malpractice unless the client is independently represented in making the agreement or settle a claim or potential claim for malpractice liability with an unrepresented client or former client without first advising the client in writing that independent representation is appropriate. LA RPC Rule 1.8 (h)(1) and (h)(2).
- Acquiring a proprietary interest in the cause of action or subject matter of the litigation, except you may acquire a lien authorized by law to secure your fees/expenses and contract with your client for a reasonable contingent fee in a civil case. LA RPC Rule 1.8 (i)(1) and (i)(2).

Informed Consent

You've determined that there is a conflict and that the conflict is consentable. What do you do next? (Remember, if the conflict is non-consentable, your job is finished except for mailing the non-engagement or disengagement letter.) First, you must conclude that the conflicting representation will not damage your client's case. The Rules of Professional Conduct require that this decision is made using objective, reasonable and independent standards. Second, each client must consent to the representation after being informed of the conflict. And the consent that is required is "informed consent." Rule 1.0 Terminology paragraph "e" defines "informed consent" as "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." Informed consent is voluntarily and knowingly granted after full disclosure of all relevant information that likely would influence the client's decision.²

So, what should be included in the client's informed consent letter?

1. The full disclosure of all relevant information, including actual and foreseeable adverse risks associated with the representation, transmitted in writing to the client in a manner reasonably understood by the client. Tell the client that he now has a choice to make – stay with you and your conflict, or go with a lawyer that does not have a conflict. If he chooses the latter, additional costs may be incurred by the client for the conflict-free new lawyer to catch up. Also, explain to the client that, while you believe it is unlikely, one of the risks of your continued representation is your disqualification from the representation if it is determined that you have violated the conflict rules.
2. An acknowledgment that the client was given a reasonable opportunity, confirmed in writing, to seek the advice of independent counsel in consenting to the conflict, and whether or not the client sought independent counsel.
3. The client's consent in writing, which includes client acknowledgement that by allowing you to continue the representation, he is foregoing his right to retain another conflict-free lawyer. However, it should be understood by the client, that the client's representation in writing may still not prevent your disqualification, if a court so rules.
4. An acknowledgment that all affected clients were sent the informed consent letter, with the same disclosures described in number 1 above.
5. If applicable, an assurance that any disqualified lawyer will be timely screened from any participation in the matter, will not be given any part of the fee, and will not reveal any protected confidential information.

Having such a detailed informed consent letter, signed by the client, will likely insure against a client asserting that he did not give informed consent because the disclosure of the risks and relevant information was inadequate.

Any conflicts of interest checking system should:

- ▶ Be integrated with other office systems;
- ▶ Provide conflicts data for everyone in the office;
- ▶ Check for varying spellings of names;
- ▶ Show any party's relationship with the client; and
- ▶ Remind lawyers to document all conflict search results with memos in the file.

2 Schneider, Harry H. Jr., "An Invitation to Malpractice; Once a Conflict of Interest is Spotted, Take Action Promptly," ABA's Standing Committee on Lawyer's Professional Liability.

Additional Resources for Conflicts of Interest

See sample informed consent letter.

The “Conflict of Interest” Rules of Professional Conduct:

- ▶ Rule 1.7 - Conflict of Interest: Current Clients;
- ▶ Rule 1.8 - Conflict of Interest: Current Clients: Specific Rules;
- ▶ Rule 1.9 - Duties to Former Clients;
- ▶ Rule 1.10 - Imputation of Conflicts of Interest: General Rule;
- ▶ Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees;
- ▶ Rule 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral; and
- ▶ Rule 1.13 - Organization as Client;
- ▶ Rule 1.18 - Duties to Prospective Clients.

Books and Articles

- ▶ ABA, *The Business Lawyer*, Conflict of Interest Issues, 50 Bus. Law 1381 (1995).
- ▶ *Lawyers Liability Review*, Vol. 14, No. 10 (Oct. 2000).
- ▶ Mallen, Ronald E., Smith, Jeffrey M., *Legal Malpractice No. 2*, Chapter 14, Fiduciary Obligations in General; Chapter 15, Fiduciary Obligations - Conflicting Interests; Chapter 16, Fiduciary Obligations Adverse Representation (4th ed. 1996).
- ▶ National Reporter on Legal Ethics and Professional Responsibility, *Kansas Formal and Informal Opinions*, Opinion No. 95-04, Conflict of Interest; Adverse Representation (University Publications of America).
- ▶ Ciolino, Dane S., *Louisiana Rules of Professional Conduct*, 4th Edition (Louisiana State Bar Association, 2016) see <http://lalegaethics.org/louisiana-rules-of-professional-conduct/>
- ▶ Frank L. Maraist, *et al.* 21 LA. CIV. L. TREATISE, LOUISIANA LAWYERING §8.1, *et seq.* (2013 ed.)
- ▶ Louisiana State Bar Assn. Rules of Prof. Conduct Committee, *Conflict of Interest: Simultaneous Representation of Driver and Guest-Passenger*, Public Opinion No. 08-RPCC-016 (March 29, 2008)
- ▶ Louisiana State Bar Assn. Rules of Prof. Conduct Committee, *Conflicts of Interest and the Part-Time Prosecutor*, Public Opinion No. 07-RPCC-011 (February 15, 2007)
- ▶ CNA Sample Conflict of Interest Waiver Letter. See www.lsba.org/goto/cnaattorneytoolkit

Case Management (Conflicts) Software

- ▶ Practice Master 16.2, Software Technology, Inc., (402)423-1440
- ▶ Amicus Attorney V, Gavel & Gown Software, (800)472-2289
- ▶ Abacus Law, Abacus Data Systems, (800)726-3339
- ▶ Thomson Elite, (800)977-6529
- ▶ Tussman Program 7.1, Tussman Programs, Inc., (800)228-6589
- ▶ Lexis Nexis Practice Management, (800)328-2898
- ▶ Lawtopia's PC Law, (866) 306-9007
- ▶ Orion Law Management Systems, Inc. (800) 305-5867