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Consent Is a Process, Not a Piece of Paper: Practical Advice for Documenting Conflict Waivers

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Is it possible to practice law anymore, no matter your practice setting, without drafting or reviewing waivers of conflicts of interest from time to time?

For those of us old enough to remember, back in the last century, there was actually a time before the ABA amended its Model Rules of Professional Conduct to require documentation of conflicts of interest waivers under the core rules for current and former client conflicts (Model Rules 1.7 and 1.9). Those days are gone.

Today, these core conflict rules in almost 40 American jurisdictions require that waivers be accompanied by some form of writing, whether signed by the client or not. Moreover, ALAS, our ethics and loss prevention partners, and corporate clients, all relentlessly push us in the same direction, urging that any conflict waiver should be memorialized in writing. (I use the terms "consent" and "waiver" interchangeably here.)

All in all, this is a salutary development. Writings should mean better and clearer lawyer-client communication, fewer misunderstandings, and more protection for both lawyers and clients. But the increased use of, and demand for, written conflict waivers means that we need another new skill not widely known when many of us started practicing law, and still virtually never taught in law school: techniques for effectively and appropriately documenting the waiver.

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Over the last decade, as more and more jurisdictions' rules have mandated written waivers, we all have learned more about how to document them. What have we learned? This article will distill that experience into practical advice and basic guidance about the best ways to communicate in writing about waivers and the most effective ways to create a paper (or electronic) record reflecting them.

What constitutes a conflict and the precise, technical requirements of the ethics rules are not my topic, however. I will touch briefly on what the rules say about which conflicts are consentable, but whether a particular rule requires a writing signed by the client or not I leave for your further reading and research. Careful lawyers can identify these standards. More importantly, the rules form only a minimum standard for lawyers, and good lawyers strive to exceed that floor.

How does a good lawyer effectively document a waiver of a conflict of interest?

Consent is a *process*. Some lawyers seem to think that consent is a letter, typically a form letter. In truth, the ethics rules in every jurisdiction make clear that obtaining consent or waiver is a *process*, not a letter.

Once a conflict is recognized, a lawyer must inform the client about it, discuss with the client the consequences of the conflict, and, if a waiver is permissible, the lawyer *may*—but is not required to—request that the client consent to, or waive, the conflict. (Of course, if the lawyer wants to continue the representation, he must get consent or otherwise cure the conflict.) The pre-2002 ABA Model Rules spoke in terms of "consent after consultation"; the amended Model Rules now speak in terms of "informed consent." The rules in every jurisdiction, under either formulation, clearly contemplate an interactive discussion, probably oral, between client and lawyer, in which the client is given all the information and advice the client needs to make an informed decision about the possible waiver.

Consent is more than a piece of paper; consent is an intelligent, informed dialogue between the lawyer and client. And there should be some record of that dialogue. Most often, that dialogue is oral, and the conversation should be accompanied—or quickly followed—by appropriate documentation.

Check the ethics rules first. Within each jurisdiction's ethics rules, the numerous rules about conflicts of interest vary. Some require merely a confirming writing that need not be signed by the client, often using the language "confirmed in writing." The most common example of waivers requiring merely a confirming letter is a current-client conflict. *See* Model Rule 1.7(b). Other conflict rules require that a writing be signed by the client—for example, when obtaining the consent associated with entering into a business transaction with a client. *See, e.g.*, Model Rule 1.8(a). Other rules give guidance on who must consent or sign, such as the rule touching on representing a corporation and one of its officers or employees—in other words, someone other than the affected officer must consent for the organizational client. *See* Model Rule 1.13(g). The individual conflicts rules in each jurisdiction also have slightly differing substantive standards to be met before a conflict may be waived (for example, demanding the ability to provide competent and diligent representation to each affected client for current client conflicts), but no real standard for former client conflicts. Before you draft, identify and carefully read the applicable rule.

Of crucial importance to the consent process is correctly identifying who should—or who must—waive the conflict.

Electrons can be an ethically adequate substitute for ink. Many of us still struggle with all the different media options presented to us for client communication, but the rules in virtually every jurisdiction permit e-mail as a substitute for an old-fashioned paper letter. Those rules probably also permit a reply to an e-mail to substitute for an ink signature on paper sent by U.S. Mail. Your personal communication style matters and often dictates what medium you use (as it should). Still, consider a more important question with each situation: what medium of communication will allow this client to best receive and most effectively understand the information?

Carefully identify who should give the waiver. Of crucial importance to the consent process is correctly identifying who should—or who must—waive the conflict. Typically, each affected client must provide a waiver, but who is the client? For individuals, the answer is usually easy, but what about a corporation? With one notable exception, the ethics rules do not address this question, and you must look to underlying law governing the organization's operations—corporate law for corporations, for example, plus the corporation's charter or bylaws. The exception? Model Rule 1.13(g) requires a lawyer jointly representing an organization and an officer or employee to be sure that someone other than the represented employee gives the waiver required of the organization. Think it through.

Clearly identify in writing who is giving the waiver. For anyone other than an individual client, once you identify the organization or entity giving the consent and the person doing so on its behalf, state this clearly and accurately, whether in the body of the writing or in the signature area. For individual clients, sometimes someone other than the client—perhaps a guardian, conservator, or attorney-in-fact—may be consenting for the client, and you should state that person's name and capacity clearly and accurately.

Consider independent counsel. The amended ABA Model Rules, as adopted in most jurisdictions, now expressly recognize the long-understood principle that conflict waivers given with the advice of independent counsel—that is, counsel not burdened by any conflict of interest—are superior to uncounseled waivers. Some particular conflict rules (for

example, Model Rule 1.8(a) on business transactions with clients) even require that a lawyer tell a client that the client should talk with an independent lawyer. This is good advice in many situations. A lawyer seeking a conflict waiver should always at least consider recommending that the client consult with independent counsel, even if the client is unlikely to follow that advice, and the lawyer should memorialize any such recommendation.

Some lawyers, in some conflict situations, feel so strongly about the value of a counseled waiver that they even offer to pay for the client's consultation with conflicts counsel themselves, believing it money well spent. Remember, too, that many clients already have another lawyer handy who could readily advise a client on a waiver—for example, in-house counsel for a corporate client—even when that lawyer is not working on the matter, or a lawyer already hired by an individual client to do other work, such as estate planning or domestic relations work.

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Think about how many writings to use. If more than one client or person must waive, how many writings are needed? Well, that depends. Usually, the answer has more to do with a lawyer's communications style, or with the manner in which the recipients may respond to joint or separate letters. In joint representations, a single, joint communication to multiple clients is a powerful communications tool—for example, one letter to two jointly represented co-defendants may serve as a distinct and healthy signal to each that they are equal in the lawyer's eyes, because they are being told the same thing, at the same time, in the same way. Apart from joint representations, there are times when multiple clients must consent, but where each must be (or should be) told different things, given their different situations, or where confidential information of one of the clients should not be shared with the other client. For example, consider a former-client conflict, where different standards govern the waiver by the current client (Rule 1.7(b)) and the waiver by the former client (Rule 1.9(b)). In situations like this, using different writings is very important.

Consider a consent separate from an engagement letter. Even if only one client's consent is needed, think about the merits of including the conflict waiver in the engagement letter versus sending it in a separate writing. Sometimes, an extra paragraph in an engagement letter may be the best way to effectively communicate and memorialize consent. Other times, including a waiver as Paragraph 5 of 13 in a four-page engagement letter may look like it is buried in the fine print. Understanding that the future is unknowable, you should consider whether the waiver is (or may later seem to be) "important" enough to merit its own separate letter or e-mail.

Clearly identify the conflict. It sounds too basic to mention, but it is truly remarkable how many conflict waivers fail to clearly identify the conflict being waived. What case or deal is involved? Whose interests or what interests conflict? Spell it out. Especially when addressing a sophisticated or counseled client, also consider citing the relevant ethics rule: that rule number may better convey meaning to a client's lawyer (or a judge later evaluating the waiver) or may enhance its effectiveness.

Describe the conflict accurately and completely. Also remarkable are the number of occasions on which smart, experienced lawyers do not work to the same level of accuracy and completeness in a conflict waiver that they would in drafting an answer or contract. You must get it right. Any material inaccuracy means that the waiver may not be valid—even if you accurately described the conflict in a face-to-face meeting and obtained consent, will the waiver be effective if the written evidence of it incorrectly describes it?

Just as important as basic accuracy is that you be straightforward about whether there is a conflict: do not overstate or understate the conflict. Some lawyers love to use the adjective "potential" to describe a conflict, probably as an unconscious device to downplay its seriousness. But, if a conflict is only "potential," who needs a waiver? If there is a conflict of interest, just say so, clearly and directly. If you have no present conflict, but still want to carefully (and prudently) alert the client to the possibility of one in the future, then say that instead, pointing out clearly that there is no conflict of interest now, but that you nevertheless want to fully disclose certain facts that might (or might not) matter to the client.

Carefully present an advance waiver as distinct from a waiver of an existing conflict. Advance waivers—a consent given today to waive a conflict that may arise in the future—are special and deserve their own article. Some jurisdictions and courts are unfriendly to them, though *some* forms of advance waivers are clearly permissible in virtually every U.S. jurisdiction. When permissible and appropriate, they are a powerful tool that all lawyers need to be able to use.

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For our purposes, however, any writing memorializing an advance waiver must clearly state that the conflict being addressed does not presently exist, but may (of course, it may not) arise in the future. All of the other guidance in this article about waivers still applies, sometimes with even more force. For example, the true test of an advance waiver is generally held to be whether the parties accurately had in their active contemplation the conflict or type of conflict that ultimately arose, and the most convincing evidence of this is often the writing that survives. So, how well can you predict the future? The case law teaches that the more accurately and specifically you discuss and describe in writing the future conflict of interest that actually does later arise, the more likely a court will enforce the advance waiver.

Disclose the primary risks and benefits of the waiver. Perhaps the hardest part of drafting a waiver is putting down in writing for a client both the risks and benefits of giving the waiver.

Some of these are easy—for example, pointing out cost savings and easier tactical coordination as benefits of a joint representation. Some are harder for lawyers to bring themselves to commit to writing—for example, the risk, where one client allows a lawyer to represent it adverse to another of the lawyer's clients (assuming that the second client agrees), that the lawyer may pull punches for fear of offending the second client. Perhaps most awkward of all to draft is a waiver of a "prior work conflict," a conflict arising when the lawyer or law firm's interest in protecting its own prior work, or its possible mistake, creates the conflict, but the client wishes the lawyer to continue working on the matter. The drafter must artfully explain why the lawyer or law firm's interests differ from the client's, and disclosure that is full enough to obtain informed consent may require painful admissions. ("Dear Client: We missed that filing deadline, and you could sue us, but….")

How much detail must you put in writing about the waiver's risks and benefits? There is no clear answer. Because the purposes of the writing include both current communication and establishing a record for the future, there is a strong argument for clear identification of risks and benefits, even if a lengthy treatment is left for oral discussion, with only a summary reflected in the writing. It serves both the lawyer and the client well when the writing consistently tracks the oral discussion between them, even if there is less depth to the written discussion.

Address confidentiality, and address it clearly. Especially in joint representations, but also in many other situations, the treatment of attorney-client confidentiality can be crucial. Joint-representation conflict waiver letters should carefully explain that confidential information may and will be shared between the joint clients, but not with others. (Some veteran ethics and loss prevention lawyers, who have seen far too many joint representations dissolve into ugly disputes over confidentiality, believe that written clarity on this issue is as or more important than good waiver language itself.) In other waiver situations, a condition of the waiver may be that one client's confidential information will be tightly confined to a group or department within the law firm; if so, this should be carefully laid out in the writing.

Any later readers [of the waiver] must also understand it, whether they are judges, jurors, or disciplinary counsel.

State any conditions to consent. A client will sometimes consent, but make that consent conditional. For example, a client hiring a large law firm's specialized Connecticut state tax expert may readily agree that the law firm may be adverse to it on other unrelated matters; indeed, that may be the only basis on which the law firm will take on the state tax matter. In the same situation, the client may agree that the firm may be adverse, but only up to the point of litigation. Or, the client may consent, provided the particular tax lawyer (or tax department) working on its matter is not adverse to it. Or the client may consent provided the firm implements a screen that prevents material information relating to the representation from being disclosed to those not working on the matter. Any such conditions should be clearly memorialized in the writing, and conscientiously policed following the waiver.

Use plain, clear language. Need I say more? If so, then only this: the immediate audience of the waiver must understand it, but that is not enough. Any later readers must also understand it, whether they are judges, jurors, or disciplinary counsel. There is no substitute for plain, clear language. (And, a little repetition is more valuable to clarity than some may think.)

Try viewing the writing retrospectively. None of us can always accurately predict the future. Still, any prudent lawyer will try to draft any conflict waiver not only for its immediate audience—the consenting client—but also for the potential future audience, whether that be disciplinary counsel, a judge considering a motion to disqualify, a juror in a malpractice case, or even the same client rereading the waiver months down the road to recall what it agreed to. There is no substitute for one last cold read of a waiver, after a night's sleep or a walk around the office, aiming at independent, retrospective vision.

Consider a second reader. For years, many firms have required second-partner review of opinion letters issued in transactions, and the benefits of this policy are well known. So, too, with waiver letters. I can hardly recall any waiver letter (especially mine) that did not benefit from a fresh read by a second set of intelligent eyes. No law firm is so small or so busy that a second reader is unavailable, and even lawyers whose firms have staff counsel draft waivers would benefit from being sure that waiver letters on their matters are the product of more than one mind. No ALAS loss prevention partner is likely to refuse a firm lawyer's request to look over a consent letter. ALAS has long suggested that loss prevention partners review all but the most routine conflicts waivers.

Consider using the writing as a script. Many experienced lawyers realize that the process of preparing a writing concentrates and clarifies thinking on the conflict. Taking these steps *before* a substantive client conversation can dramatically assist in preparing a cogent presentation to the client, even if the presentation lasts only a few minutes on the telephone. Preparing the writing before this

crucial conversation also allows you to promptly put the writing before the client for review and consideration.

Send it promptly. Highlighting the first point—that consent is a process, not a piece of paper—the ethics rules clearly say that, when a conflict of interest exists, consent must be obtained before a lawyer may ethically move forward with the representation. Under most ethics rules, however, the confirming writing may follow within a reasonable time. Inevitably, some lawyers use this lawyer-friendly nuance as an excuse to fail to send any writing at all, or they simply forget to do so. Prudent lawyers understand the substantial virtues of promptness here: an immediate confirming letter or writing is more effective, from every perspective.

Will a judge or jury be more likely to believe that the client reviewed and agreed to the waiver if it includes the client's signature? Of course.

Consider a waiver signed by the client, even if the rules do not require it. Neither the ABA Model Rules nor the rules of any American jurisdiction require that clients sign all waivers of conflicts of interest. Some rules require no writing at all; others require a confirming writing that need not be signed by the client; still others require a writing signed by the client to waive some conflicts. In any particular jurisdiction, different conflict rules require different writings, too. On this point, comply with the applicable rule, but always consider going further, as there may be good reasons for going beyond what a particular rule requires.

Will the fact that a lawyer asked her client to actually sign something inject an appropriate level of seriousness or even drama into the request? (After all, for some waivers, drama and seriousness are just what is needed.) Is there a particular need to worry that the lawyer needs a record that the client agreed to the waiver? (Client personnel change and individual clients die.) Will a judge or jury be more likely to believe that the client reviewed and agreed to the waiver if it includes the client's signature? Of course. Consistent with ALAS's recommendation, many firms now have policies that require all conflict waivers to be signed by the client.

If you plan on getting it signed, then get it signed. If you decide to have a client sign a waiver, then insist that the client do so. In the dispute that arises later, in whatever context, how will you explain that you thought the wavier was a serious enough matter to ask the client to sign a document, and you even put in a signature line for the client, but you then failed to follow up and get it signed? Was there really an agreement? Did the client really understand it? Was it not that important? If the ethics rules require a client signature in that particular circumstance, you may also have violated the rules by moving forward without getting it signed. Finally, it should be safe in most jurisdictions to consider that an affirmative response to an e-mail is an adequate, albeit less-than-ideal, substitute for a pen-and-ink signature. Whatever form the client's signature or affirmative response takes, make sure it is properly retained in the client's permanent file.

Be careful out there.

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