



Avoiding Conflicts of Interest

A Malpractice Insurance Company's Perspective

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PROTECTING YOUR PRACTICE IS OUR POLICY.™

Avoiding Conflicts of Interest

A Malpractice Insurance Company's Perspective

PUBLISHED BY:

Minnesota Lawyers Mutual
333 South Seventh Street
Suite 2200
Minneapolis, MN 55402
www.mlmins.com
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MLM's Law Practice Management Series was developed to assist lawyers in assessing, maintaining and enhancing their quality of service and reducing their risk of malpractice. The booklets are based on "best practices" comprised of a compilation of information by ethics and malpractice experts over the years. To ensure quality, an Editorial Board of highly respected and authoritative leaders has been created. The Editorial Board influences the creation of the overall series, and provides advice and guidance on malpractice trends and what should be communicated on a range of issues.

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- The Basic of Client Files and Paperless Office Systems
- Avoiding Conflicts of Interest

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THE BOOKLET

MLM's *Avoiding Conflicts of Interest Booklet* is based on "best practices" comprised of a compilation of information by ethics and malpractice experts over the years. Their work has been modified into tips, checklists, and examples to provide attorneys with simple-to-use guidance.

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Original Publication Date: August 2012; Revised: June 2018; Reprinted: December 2016

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ABOUT MINNESOTA LAWYERS MUTUAL

Founded in 1982 by members of the Minnesota State Bar Association, Minnesota Lawyers Mutual Insurance Company (MLM) provides professional liability insurance and risk management services for the legal community. MLM is committed to being an efficient, accountable and permanent practice management resource. Additionally, we have returned a dividend to policyholders every year since 1987.

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PREFACE

There are literally hundreds of books and articles covering just about every aspect of law practice management. So, why write another one? And, why should you read it?

Minnesota Lawyers Mutual has been in the risk management business for over 30 years and we've seen plenty of well-planned, well-crafted and wonderfully maintained risk management materials. Unfortunately, we've also "paid the price" in instances where an insured attorney simply wasn't familiar with a particular risk management concept or didn't know "where to go" to find that information.

So, Minnesota Lawyers Mutual has developed a Law Practice Management Booklet Series written from the perspective of an *errors and omissions insurance company*. Our goal is to provide a single source of accurate, practical information and best practices for everything from conflict of interest, to client communications, to law office technology, with the additional commitment to keep it current and accessible.

By compiling all this information into checklists, avoidance tips and examples, we've turned a mountain of material into convenient, easy-to-scan, simple-to-use "chunks" of information organized by topic. In addition, you'll find reasonably detailed real-life experiences to ponder.

Using the tools in this book will help you "cover all the bases" from a risk management perspective. Use the checklists and tips as guidelines, not requirements set in stone. At the same time, understand that each of the items is included in this book for a particular reason. Hopefully, you'll be able to match your needs with our material and in doing so, avoid potential malpractice claims.

TABLE OF CONTENTS

Introduction

- An Infinite Variety of Conflict Possibilities.....1

Recognizing Conflicts

- What is a Conflict of Interest? 2

Importance of Systems

- Three Good Reasons 11

Screening

- A Critical Step to Avoid Risk 13

System Requirements

- The Essentials..... 17

Types of Systems

- Systems: Simple to High Tech 22

Managing Conflicts

- There is a Conflict... Now What? 29

Consequences and Claims

- A Serious Matter..... 36
- Importance of Prompt Reporting Cannot Be Over Emphasized 37

Appendices

- Appendix I: ABA Model Rules of Professional Conduct (2010)..... 39
- Appendix II: Non-Engagement Letter..... 49
- Appendix III: Engagement Agreement..... 50
- Appendix IV: Common Party Search Checklist..... 53

An Infinite Variety of Conflict Possibilities

Conflicts of interest spawn alarming numbers of ethics complaints, attorney and law firm disqualifications, and legal malpractice claims. Yet, many attorneys continue to ignore these warnings and insist that conflicts of interest are not a problem within their respective practices.

Consequently, conflict of interest identification systems and procedures either are not implemented or they rely exclusively upon attorney memory. If an actual or potential conflict is identified, attorneys nevertheless accept representation without disclosing the conflict in writing and, in turn, obtaining written client consent. Both situations are unacceptable by today's risk management standards and unnecessarily expose attorneys to expensive and embarrassing consequences.

Conflicts of interest are not the exclusive headache of large, urban, multi-office law firms. Conflicts of interest arise within and affect law practices of every size, geographical location and discipline. The number of clients, adverse parties, and interested nonparties with whom attorneys become involved throughout their careers is truly staggering and invariably underestimated. Additional factors, such as client and attorney mobility, and economic and professional pressures, create an environment in which an infinite variety of conflict of interest possibilities exist.

This booklet, *Avoiding Conflicts of Interest: A Malpractice Insurance Company's Perspective*, serves as a resource to help you identify, check for and manage conflicts of interest situations, and offers guidance on what to do if you find yourself in a conflict of interest situation.

What is a Conflict of Interest?

A conflict of interest is a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a client. A conflict of interest can adversely affect a lawyer's judgement, loyalty and ability to safeguard the interest of a client or prospective client.

What is it about a conflict of interest that is so bad? The answer is quite simple. Loyalty and independence of judgment are essential to the effective representation of a client. In fact, they are fundamental to the health of the lawyer/client relationship. A conflict of interest may make it impossible to exercise the essentials of loyalty and judgment.

Although evidence sufficient to establish a violation of the Rules of Professional Conduct does not necessarily establish a cause of action for legal malpractice, courts look to the rules with increasing frequency for guidance in considering issues of conflict of interest in disqualification and legal malpractice cases.

The following ABA Model Rules of Professional Conduct should be reviewed in regards to a conflict of interest check (*see Appendix I*). In addition, state codes of professional responsibilities should be reviewed because there are different requirements that apply.



Refer to Appendix I on page 39 to review the rules.

- 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

RECOGNIZING CONFLICTS

- Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
- Rule 1.12 Former Judge, Arbitrator, Mediator or Third-Party Neutral
- Rule 1.13 Organization as Client
- Rule 1.18 Duties to Prospective Client

The problem surrounding conflicts of interest are complicated by the fact that conflicts of interest are subtle: There are no hard and fast rules to avoid many conflict of interest problems. The rules that do exist are not absolute and contain conditions, exceptions and discretionary factors. The following material provides details regarding common situations in which conflicts occur, examples and avoidance tips.

The rules discussed in the following can be found in full in **Appendix I**.

Rule 1.7 Conflict of Interest: Current Clients

Every attorney owes duties of loyalty, confidentiality, communication and competency to every client. Under Rule 1.7, it is incumbent upon attorneys to identify situations which may threaten these duties and, after objective, reasoned analysis, choose the course of action that will best preserve them. Although not all are delineated under Rule 1.7, available courses of action include declining representation, withdrawal from ongoing representation or representation after full disclosure, consultation and client consent.

RECOGNIZING CONFLICTS

Rule 1.7 also specifically addresses conflicts of interest created through simultaneous, adverse representation of multiple clients, whether jointly in the same proceeding or separately in different proceedings. Rule 1.7 conflicts of interest have been characterized by some courts as “open file” conflicts.

- **Adverse Interests**

Rule 1.7(a)(1) prohibits the simultaneous representation of clients whose interests are directly adverse. All simultaneous, directly adverse interest conflicts are not necessarily as obvious. Attorneys must analyze whether the clients’ interests are, in fact, directly adverse; and if interests are directly adverse, is there nevertheless a reasonable belief that representation of one client will not adversely affect the attorney-client relationship with the other client.

Rule 1.7(a)(1) Conflicts:



- An attorney who represents both the plaintiff and defendant in a civil lawsuit. Advancement of the plaintiff-client's position necessarily precludes advancement of the defendant-client's position, thus compromising the duties of loyalty, competency, confidentiality and communication to each client, the very core of the attorney-client relationship.

- **Outside Interests**

Rule 1.7(a)(1) prohibits the idea that attorneys should exercise independent professional judgment on behalf of every client. The rule focuses on the quality of representation, rather than on the attorney-client relationship

RECOGNIZING CONFLICTS

itself. Although representation under Rule 1.7(a)(2) can sometimes amount to a *per se* conflict, most cases require an analysis of whether outside interests, including the attorney's own interests or duties, will inhibit the attorney's ability to represent the client zealously and objectively.

Rule 1.7(a)(2) Conflicts:

← EXAMPLE

- Representation of both husband and wife in an “amicable” dissolution.
- Third-party payment of attorney's fees.
- Representation of multiple defendants in a civil or criminal case.
- Representation of individual corporate clients by corporate counsel.
- Representation of minors at parents' request.
- Representation of buyer and seller in business or real estate transaction.
- Officer and/or director positions on client boards of directors.

Business involvement with clients, an alarmingly popular practice fraught with ethics and legal malpractice implications, are also subject to Rule 1.7(a)(2) scrutiny. These situations are also addressed under Rule 1.8.



Although “open file” conflicts may, in the discretion of the attorney, be handled by immediately disclosing the actual or potential conflict and obtaining client consent, be forewarned that anything less than full disclosure may result in a malpractice action.

Rule 1.9 Duties to Former Clients

Rule 1.9 prohibits “closed file” conflicts which involve representation adverse to a former client in the same or substantially related matters. The primary goal of Rule 1.9’s prohibition is to preserve client confidentiality. Generally, where a new client’s interests are materially adverse to the interests of a former client and the representation may involve the use or disclosure of confidences of that former client, the representation is prohibited, absent disclosure and client consent.

Under the facts and issues of a conflict situation, there must be a substantial, relevant relationship or overlap between the subject matters of the two representations. If a substantial, relevant relationship exists, certain presumptions apply. It is irrefutably presumed that the attorney received confidences from the former client and the attorney will not be heard to claim otherwise. It is also presumed, but subject to rebuttal, that these confidences were conveyed to the attorney’s affiliates.

See *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953) (establishes the rule that a former client may automatically disqualify a lawyer who had formerly represented him, so long as the new matter was “substantially related” to the former representation and the new representation was adverse to the former client’s interest).

Under Rule 1.9, the firm should ask the simple question: “Would the former client have confided in his/her attorney had he/she known the attorney would advance the position now asserted?”

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.8 specifically proscribes a broad range of conduct, much of which involves attorney self-dealing.

← EXAMPLE

Rule 1.8 Conflicts:

- Investment in a client-involved business.
- Accepting stock in lieu of fees.
- Making loans to clients.
- Initiating a sale or purchase of property to a client.

Interestingly, most proscriptions with Rule 1.8 are already covered under Rule 1.7(a), although innocuously, Rule 1.8, with its straightforward list of “do’s”, “don’ts” and “how to’s” effectively reemphasizes the paramount objective to preserve quality of representation. The rule gives fair and adequate warning to all attorneys that involvement with clients in any capacity other than legal advisor is courting disaster. Plain and simple.

In order to overcome the presumption that the quality of representation has been diminished by attorney involvement in proscribed situations under Rule 1.8, the attorney must establish that:

Rule 1.8 Checklist

- The transaction and its terms are fair and reasonable to the client;
- The transaction and its terms are fully disclosed;
- The disclosure is in writing;
- The disclosure is communicated in a manner that can be reasonably understood;
- The client is given a reasonable opportunity to seek the advice of independent counsel; and
- The client consents in writing.

RECOGNIZING CONFLICTS

Once again, the most effective form of protection from ethics complaints, disqualifications and legal malpractice claims arising out of Rule 1.8 conduct and involvement is abstinence. Otherwise, the most important aspect of client consent under Rule 1.8 is the opportunity to confer with independent counsel regarding the fairness and foreseeable problems associated with an attorney-client business involvement. Attorneys should insist that their clients speak with independent counsel or else decline the pecuniary involvement. It should go without saying that all terms, disclosures, independent counsel opinions and client consents related to a Rule 1.8 involvement should be in writing.



Although the above requirements are straightforward and often achievable, many attorneys do not jump through required Rule 1.8 hoops, either because they are not aware the requirements exist or more likely, they believe that their relationships with clients, unlike those of attorneys being sued, are impervious to discord and finger pointing. Unfortunately, the wealth of malpractice claims, ethics complaints and disqualifications involving long-term clients shatters this myth and often at a very high price.

Officer and Directorships and Equity Arrangements

Serving as director or officer of, or having a business interest in, a client company raises myriad ethics issues for attorneys which are difficult to resolve. While the Rules of Professional Conduct do not specifically prohibit attorneys from simultaneously acting as outside legal counsel and serving as officers or directors on behalf of, and having equity interests in, corporate clients, Rules 1.7, 1.8 and 1.13 (Organization as Client) proscribe involvement with clients that will jeopardize the attorney duties of loyalty,

RECOGNIZING CONFLICTS

confidentiality, communication and competency. Consequently, attorneys and their law firms are often placed in what they perceive as the precarious position of either accepting an officer-director position or risking mutiny by an important client.



Realistically, attorney involvement with corporate clients in any capacity other than as legal counsel is risky and should be avoided altogether. The number of lawsuits filed against officers and directors has increased substantially in recent years, and attorneys and their law firms risk non-coverage in most instances. The public loves to hate the legal profession and the public is generally the fact finder. If greed is the perceived motivation for accepting a directorship with and/or retaining an equity interest in the client's enterprise, the facts are really not important.

Many attorneys appreciate, intellectually, the conflicts and exposures inherent in serving as both counsel and officer-director-investor. These same attorneys, however, maintain that their particular situations are different and that their relationships with corporate clients, particularly closely held corporations, are bulletproof. Otherwise, the company would not have extended the invitation to serve as an officer and/or director. Consider that most attorney-directors who have been sued once had the same confidence in their clients.

Finally, if outside counsel assumes the role of officer-director, in part, to keep the client with the firm, that attorney's independence is already diminished. If full disclosure of the conflicts of interest and the potential loss of attorney-client privilege does not discourage a client's request that outside counsel serve in a dual capacity, the firm should consider declining the offer anyway. If the client is loyal and satisfied

RECOGNIZING CONFLICTS

with the legal representation, declination of an offered corporate position will not alienate the client, especially if the client is aware of the potential unavailability of malpractice insurance should the attorney-director commit an error.

Closely Held Corporations

The aforementioned risks, attendant with dual roles as outside counsel-officer/director/investor, are less obvious and perhaps less problematic with closely held corporations. Particularly within small, close corporations, shareholders, directors and management tend to be the same individuals, and divergent responsibilities are not as pronounced. Also, outside counsel is often intimately involved with the day-to-day business decisions of the company already and the assumption of the role as director or officer is a matter of formality rather than function.

On the other hand, outside counsel for closely held corporations are certainly not immune from being sued either in the corporate capacity or for legal malpractice. Typically, one or several shareholders are either foisted from the company or there are irreconcilable opinions regarding the direction of the company.

Subsequent lawsuits brought by disenfranchised shareholders often allege that the attorney colluded with defendant-shareholder(s) and violated the fiduciary obligation to the company rather than individual shareholders.



If the attorney is also a director or board member, the argument is made that the attorney, as director, has an affirmative duty to align with the shareholder-faction, which safeguards the health of the company. This conflict of interest is always problematic and is difficult to explain to plaintiff-shareholders and to juries.

Three Good Reasons

All lawyers in private practice know a good conflicts checking system is an integral part of their law firm administrative systems. And while performing the conflicts check is not always exciting, it is well worth the effort when one considers the risk of lost time and money down the road. There are three main reasons that we recommend a good conflicts checking system for every law practice, regardless of its size.

Damage Control

A good conflicts checking system can prevent an otherwise innocuous malpractice claim from looking much worse. The very fact that a conflict can be associated with a malpractice claim makes the defense of the lawyer's claims much more of an uphill battle. For example, imagine that a deal between two business partners goes bad and the lawyer, while not responsible for the actual loss of money, drafted the buy-sell agreement. The two business partners then argue that the lawyer favored one business partner over the other. Regardless of how the conflict can be explained away or defended, the actual conflict can inflate the jury's perspective of the malpractice claim while the claim itself could have easily been defended.

Awareness of Responsibilities

Second, a good conflicts checking system helps make lawyers aware of their ethical responsibilities. Various disclosures and waivers are required by each state in accordance with their respective rules of professional conduct or professional responsibility. Knowing when to do a conflict analysis regarding former or current clients keeps lawyers out of ethical trouble.

While ethics issues and ethics complaints may not directly affect the lawyer's pocketbook, many lawyers have spent their own time defending these complaints – time that could have been better spent in the office billing hours.

Avoid Waste

To avoid wasting your client's time and money, as well as your own, remember to actually do the conflicts check **BEFORE** you start working on a prospective client's matter. If you start on the case, delay the conflicts check, and **THEN** find a conflict, you may have to go back to this client and explain why you can no longer work on his or her case. No one likes to send business away, but knowing whether you should or shouldn't take it in the first place will prevent future problems for you and your potential client.

Information travels at the speed of light and knowing that we have good systems to back us up goes a long way towards preventing a conflicts problem in the future. It is definitely time and money well spent. Twenty-five years ago, we lived in a much simpler world. Today, the information regarding our clients is much more complex and constantly changing. Our clients, both individual clients and business entities, also have more complex relationships (for example, extended families, business subsidiaries, etc.) and we can't rely on our cluttered human brains to keep it all straight.



Many lawyers in smaller firms think they can keep a conflicts checking system in their head. They're wrong. Getting a system down on paper or in your computer is a far better way to approach this issue.

A Critical Step to Avoid Risk

Malpractice claims and ethical complaints arising out of conflicts of interest, unfulfilled client expectations and fee disputes are often attributable to dilatory gathering and processing of prospective client and matter information. The methods by which attorneys screen and accept new clients or matters are critical to effective malpractice claim and ethical complaint avoidance. Attorneys must devise and implement standardized guidelines for both analyzing whether to accept representation and for satisfying all necessary procedural requirements once representation has commenced.

The following section will discuss effective prospective client and matter screening and intake, why they are necessary and how they can be performed consistently.



Attorneys sued for or threatened with legal malpractice often comment that, in retrospect, they should have followed their instincts and declined the representation which resulted in the claim. The original fee is not worth the subsequent sleepless nights, preoccupation and lost billable hours invariably associated with such claims.

Thorough and consistent prospective client and matter screening promotes early identification of actual and potential conflicts of interest, and also encourages more subtle analysis of client and matter type. Although the legal profession uses statistics to assist in identifying the types of errors most commonly committed and in what areas of practice, many malpractice claims cannot be neatly compartmentalized into “administrative errors” or “substantive errors.” Many claims ultimately can be traced back to poor communications between attorney and client at the beginning of the relationship, resulting in unfulfilled expectations

and expensive misunderstandings. The screening process is critical to determining whether the attorney and prospective client and matter are fundamentally compatible and is the first step in effective malpractice claim and ethics complaint avoidance.

Prospective Clients

Whenever a prospective client seeking legal assistance contacts an attorney, the attorney should politely but firmly decline to discuss the matter in detail until a preliminary conflict of interest check can be performed. As the adjective suggests, preliminary conflict of interest checks should ideally be performed before the prospective client divulges additional confidential information which may conflict the attorney out of current or future representations.

Rule 1.18 imposes a confidentiality obligation upon information imparted by prospective clients. An attorney may not use information about a prospective client unless and until it becomes generally known and can never reveal that the prospective client revealed this information before the information became generally known. Because of the ambiguous position of prospective clients, it is important to keep foremost in mind that confidentiality and competence is owed to them.

This duty of confidentiality also extends to prospective clients even though an attorney-client relationship is never established. See *ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 90-358 (1990)* (divulgence of information from prospective client to attorney which is critical to representation of an existing or new client in the same or

related matter requires the attorney to withdraw or decline representation unless a waiver of confidentiality is obtained from the prospective client).

In order to ascertain whether the proffered legal matter is within an attorney's area(s) of expertise and whether the legal matter creates an actual or potential conflict of interest, limited but important information first should be gathered over the telephone including:

Screening Checklist

Prospective Client Information

- Name, work and home addresses, and telephone numbers.
- Employment or business affiliation(s).
- Employer and ALL subsidiaries, parent corporation(s), officers and directors, general and limited partners, principal shareholders.

Matter Information

- Area of law involved.
- Alleged dispute origination and dates.
- Identity of parties, both friendly and adverse.
- Interested non-parties, persons and entities involved in the matter, including subsidiaries, parent corporations, officers and directors, general and limited partners, and principal shareholders.
- All other interested persons.



Do not accept new clients over the telephone or via e-mail, regardless of the referral source, the case type or the potential fee involved.

Acceptance of representation over the telephone or by e-mail is analogous to buying a home sight unseen. The house looks great in the listing photograph but is actually infested with termites.

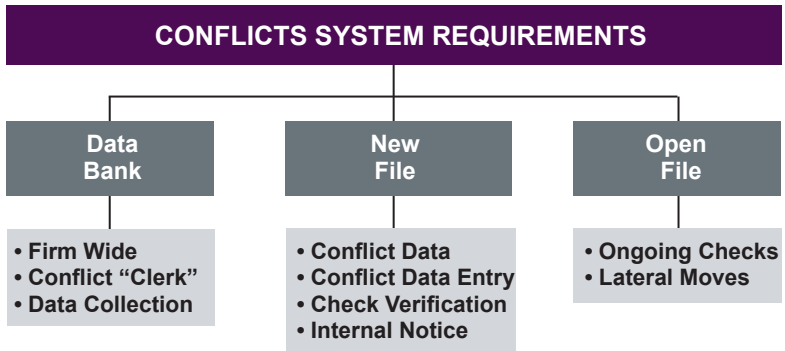
Existing Clients, New Matters

Screening new matters for existing clients is distasteful to many attorneys who feel that such screening will harm the long-standing client relationships that are frequently involved. Unfortunately, long-standing clients are not as hesitant to harm the relationship if initial divulgence of confidential information creates a conflict of interest so adverse that they are forced to retain other counsel. Consequently, attorneys should follow the same procedure cited above and obtain limited but important information regarding the proffered legal matter.

SYSTEM REQUIREMENTS

The Essentials

There are basic and essential requirements of an effective conflicts system, whether automated or manual. These requirements translate to any size practice. The following outlines these requirements:



Systems Checklist

DATA BANK



Firm-Wide

The conflicts system must be implemented and used firm-wide. Both attorneys and support staff should be thoroughly trained regarding the system's logistics and capabilities, and should be contacted periodically to discuss any grievances regarding the system.



Conflicts "Clerk"

One staff person in the office should be responsible for maintaining the conflicts system. Centralization increases accountability and compliance, since only one person is handling the conflicts data check and entry. A "conflicts clerk" should be appointed to whom all other firm members direct new client/matter intake forms and conflicts update sheets.

Systems Checklist (continued)

At least one back-up conflicts clerk should be trained on, and periodically responsible for, the conflicts system to remain familiar and efficient with the system. Back-up personnel are obviously necessary if the primary conflicts clerk is indisposed.

The conflicts system data bank must contain the names and affiliations of all individuals and entities listed above, as well as the matter name and number with which the individual or entity is involved. The conflicts clerk should devise and disseminate to all attorneys and support staff a code list which will be used to identify the relationship the individual and/or entity has to the matter, for purposes of data entry into the conflicts system.



Data Collection

The new client/matter intake form should have a section devoted to identification of conflicts of interest information with all of the above listed categories represented. The responsible attorney must ascertain as much conflicts information as possible, during both the initial contact and first interview with a prospective or existing client. The attorney is then responsible for filling out the new client/matter intake form, including the conflicts information section. Full names and accurate code categories must be used.

PRE-FILE OPENING REQUIREMENTS/NEW FILE



Conflicts Data Check

Prior to acceptance of representation, the new client/matter intake form shall be sent to the conflicts clerk. Prospective client names and all other names set forth in the conflicts section are cross-checked against the data bank. If a match is found, the names are noted

Systems Checklist (continued)

and the appropriate files are pulled and brought to the responsible attorney to determine the existence of, and necessary action regarding, any actual or potential conflicts of interest. (A “negative” search, one that reveals no actual or potential conflicts of interest, does not conclusively establish the absence of conflicts; it is, however, the best method of early identification.)



Conflicts Data Entry

Immediately following the initial conflicts check and before the client file is opened, the conflicts clerk will enter the conflicts data into the data bank, whether an automated component or manual file boxes. The conflicts clerk must then indicate on the new client/matter intake form that a conflicts check was performed and the conflicts data entered into the system. The conflicts clerk should also designate whether any actual or potential conflicts of interest were identified. Verification on the new client/matter intake form that conflict checks are being performed significantly increases the probability of performance on a consistent basis.



Conflicts Check Verification

No new matter should be opened until a conflicts check has been completed and the conflicts data entered into the system. Verification must be completed on the new client/matter intake form. It is tempting to bypass the preliminary conflicts check if immediate action is required, but resist the temptation. If a “rush” check is needed, the conflicts clerk or back-up person should be contacted for immediate assistance.



Internal Notice

In conjunction with the centralized data bank check, an e-mail notice should also be circulated to all attorneys and support staff whenever representation of a new client is contemplated. Support staff add an important dimension to the firm's "memory bank" and should be included in this process. The notice identifies the new client's name and all entities' name on the new client/matter intake form, along with a brief description of the matter involved and the billing attorney.

If upon review, any attorney feels a potential conflict may exist, the attorney may contact the billing attorney immediately. Administrative assistants can respond with relevant information from the new client/matter intake form.

This data bank system will require time and effort at the outset in order to enter previous conflicts data. Once this information has been entered into the data bank, the conflicts of interests avoidance system is not difficult to maintain. It is imperative that the firm have such a system and that attorneys and staff members understand how the system works.

Declined prospective clients should be routinely entered into the conflicts data bank when the declined client communicates confidential information during the initial meeting which could create a subsequent conflict.

OPEN FILE REQUIREMENTS



Ongoing Conflicts Checks

Any new parties or interested non-parties, which become known to counsel during representation, should be

Systems Checklist (continued)

checked against and added to the data bank to monitor any actual or potential conflicts of interest which arise subsequent to acceptance of representation.



Lateral Hires

Prospective lateral hires should provide the client screening committee or the appropriate shareholders with a listing of all files that he or she has worked on during, for example, the previous two years. The listing shall include: Client(s) name; business form (e.g., corporation, partnership, trust, sole proprietorship); adverse party(ies) name(s) and business form; any other party(ies) to lawsuit or transaction; interested parties; and disclosure of any participation on the board of directors of any organization, the shares of which are publicly traded or of any clients the lateral hire intends to bring to the firm. The lateral hire should also provide the reviewing attorneys with the list of all files he/she intends to bring to the firm as active files.

The information will be checked against the conflict data bank to determine whether there is any potential or existing conflicts, which could jeopardize existing relationships of both the firm and the prospective hire. Lateral hires are often the source of conflict problems but the erection of ethical walls regarding conflict files is not as persuasive in small firms as within larger firms where sheer numbers of and geographical separation between attorneys affords courts greater comfort in allowing continued representation. See *Nemours Found. v. Gilbane, Aetna, Federal Insurance Co.*, 632 F.Supp. 418. (Sixteen attorney law firm successfully erected “ethical walls”).

Systems: Simple to High Tech

The purpose of a conflicts check is to ensure that your commitment to your client's matter will not be distracted by your commitment to any other person. Many attorneys mistakenly believe that this commitment can be upheld by a brief moment of thought, comparing their client's circumstances to that of the firm's other clients or shareholders.

Professional liability insurers and risk management professionals continually stress the importance of a conflict checking system in law firms to help identify potential conflicts at the time the attorney-client relationship is established. Consistently, it has been shown that a check for conflicts of interest that does not include the use of a thorough list or database will leave the firm vulnerable to an embarrassing and potentially negligent conflict problem.

Establishing a reliable conflict checking system in your firm can be a relatively easy thing to do. However, the system is only as good as the information that it contains. Therefore, creating a conflict checking system and maintaining it should be viewed as an ongoing and permanent commitment to securing your clients' trust. Your devotion to their best interests will never be questioned.

The elements necessary for conducting an effective conflicts check in your law practice are:

- Establishing a thorough, well-maintained list of names.
- Ensuring that the conflict checking procedure becomes a part of the firm's routine.
- Requiring that everyone in the firm is trained in the procedures and involved in the system.



The best conflict checking system is one that will work and that the members of the firm will find easy-to-use and maintain. There is nothing inherent in a computer-based conflicts program that makes it superior to a well-maintained manual system. However, since computer-based conflicts programs provide a thorough check rather quickly, it is more likely to be used routinely by the firm and it is less likely to overlook a single name buried in a large database.

Forms-Based Conflicts System

In a forms-based conflicts system, you search for conflicts by checking a list of the firm's clients (current and former), a list of "other parties," and a list of lawyers who have represented other parties involved in your client matters. These searches must be conducted prior to the new client signing a retention agreement with your firm.

The primary conflict review occurs when you check the client list. You are looking to see if any person, who is an adverse party to a new matter, is currently being represented by the firm in another matter or has been represented by the firm in the past.

If a review of the client list reveals no potential conflicts, you should then review the other party's list and the lawyer's list to see if there are any relationships involving the firm's current or past legal matters that the new client would probably want to know about.

The best way for the law firm to establish and maintain these lists is to keep them in three separate binders.

The client list in the first binder is updated every time a new client retains the firm to handle a legal matter. A client data

TYPES OF SYSTEMS

sheet containing basic information about that client is added to the binder in alphabetical order and is permanently stored in the binder.

The second and third binders containing lists of other parties and lawyers are always being updated as a client's matter is ongoing. As you learn of new parties and individuals, as well as attorneys that become involved in your client's matter, you fill out a short conflicts file memorandum form indicating the name of the person and their relationship to the legal matter involving one of your clients.

Be aware that of the three binders described above, it is the list of other parties related to your legal matters that will easily become the largest volume. Knowing exactly which names to add to that list can change depending upon the areas of practice that you are involved in. The list should include any person significantly involved in any of your legal matters or closely associated with your firm. The parameters described here are wide and may include witnesses, heirs and parties, as well as investigators, adjusters or the third-party vendor who fixes the firm's computers.

Using Software to Search for Conflicts

One common misunderstanding involving law office software is that there is a category of software products called "conflicts checking software." Although there are a handful of software programs that purport to be used exclusively for conflicts checking, for the most part, there are no software titles available for lawyers to perform this exclusive task.

In the world of law office software, conflict checking tools are commonly available in case management software programs.

TYPES OF SYSTEMS

The connection between conflicts checking and case management software makes sense. After all, if you take the time to enter detailed information about your clients, former clients, witnesses, opposing counsel, interested parties and just about everyone else who has ever come in contact with the firm in a software program, what it starts to resemble is a large database of firm information that can be used for several purposes – including conflicts checking.

Since case management products became affordable for use in small law offices in the days of Windows 95, this category of software has rapidly secured its spot as the hub of a law firm's information system. Case management software performs two vital functions for a law practice: It is a comprehensive database of information concerning the firm's clients; and it also serves as a calendaring/docket-control system that can be accessed throughout the firm.

The manufacturers of case management software understand that lawyers want to have the ability to quickly and easily perform conflict checks across the program's entire database. Therefore, performing a conflict check in a case management program is usually as simple as pushing a single button after entering a name to search for within the system. The searches are so quick and so thorough, that after determining that the name "John Smith" was not found in the lists of current clients, former clients, and other parties, it will then search the calendars of the lawyers in the firm and even the note pads within the electronic client files to see if someone has come in contact with the name in an informal way.

For those lawyers interested in the conflicts checking features of case management software, but don't have an interest in establishing a firm-wide database program, you may want to

consider purchasing a single-user version of a case management application and use it exclusively for maintaining the conflicts database. With this type of set-up, the software program would be installed on one workstation within the firm, and the computer user would become the firm's designated conflicts checking clerk.

Case management software comes with many dynamic features for tracking client information all throughout the firm – but there is no requirement that the purchaser use the software for all that it can do. Just as many users log on to Microsoft's Outlook for nothing more than to send and receive e-mail, it is perfectly acceptable for your firm to purchase a case management software product simply for its conflicts checking abilities.

A Simplified Tool You Already Own

Not all automated conflicts checking systems for law firms need to be in a specialized software application. You can create a simple, searchable database in any word processing program. By taking advantage of the search features in your word processor, you can easily create a dynamic conflicts checking tool.

To create this simple database in Microsoft Word 2007, start by creating a table in your document by selecting "Insert/Table" from the ribbon. (Inserting a table in previous versions of Word requires the same command from the "Table" menu.) Indicate in the Insert Table screen that you want your table to have 8 columns and 100 rows, and then click OK. When the table is inserted in the word document, label the tops of each column as follows: Date, Contact, File, Matter Type, Relation Code, File Status, Misc. Information.

TYPES OF SYSTEMS

Date	Contact	File	Matter	Relation Code	File Status	Misc. Informa
12/31/92	John Q. Public	Public v. Smith PUB181-92	Liability Claim	Client, Party	Closed 9/19/94	
4/14/99	Judge Julius Hoffman	State v. Heydan HEY067-99	Federal Violations	Judge	Open	Judge is Bud Andr's Uncle.
11/13/01	Eric Bischoff	Hogan v.	Civil Litigation	Witness	Open	

Once the table is created with column headings, it should be permanently saved in the firm's computer network. As new files are opened at the firm, enter names of persons related to the matter in the table just as you would enter them in the binders of your forms-based conflicts system. Over time, the document will become quite lengthy as the names of many persons associated with your case files are added to the table. (To add more rows to the table, put your cursor in the bottom right cell and client the Tab key. Let the table get as long as you like.)

You need not worry about searching for potential conflicts in such a long list because your word processor has a quick search tool for finding a needle in a haystack. The "Find" command in Word 2007 can be selected by choosing "Home/Editing" in the ribbon. (In Microsoft Word 97 or 2000, the search tool can be found if you click on the "Edit" menu and choose "Find.") After that, just enter the name you are searching for and if the name appears somewhere in the table, it will be indicated during the search.

If the name of an individual that is about to retain your firm appears somewhere on the list, you may have a potential conflict of interest with another matter. It is up to the attorney who is assigned to the matter to determine if a conflict of interest exists, using the criteria in ABA Model Rule 1.7 and your local rules of professional conduct.

The conflicts checking database you create in your word processor is really no different than the manual, form-based system – it just holds more information, has an easy search feature and does not need to be printed and kept in binders.

TYPES OF SYSTEMS

Like all databases, it should be backed-up regularly on tape or disk and copies of the backup should be kept off-site. The system meets the needs of most small law firms, but larger firms should consider employing the larger database capabilities found in case management software.



Remember, a conflict of interest can be waived by your client if the individual agrees to the waiver in writing after you have fully disclosed the potential conflict. Therefore, if you are on the fence as to whether a conflict of interest does exist, advise your prospective client of the relationship you have discovered in your search and let the prospective client decide whether the connection is too close for comfort.

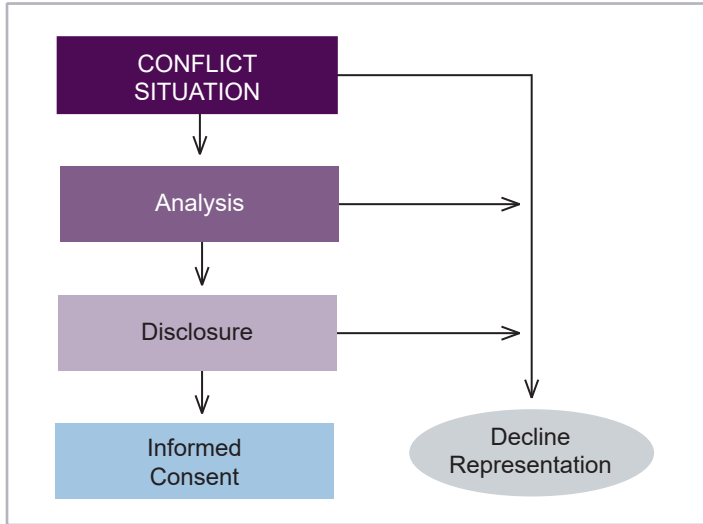
CONFLICTS CHECKING SYSTEMS	
System	Summary
Manual Forms-Based	<ul style="list-style-type: none"> • Search for conflicts by checking list of firm's clients, a list of "other parties" and a list of lawyers who have represented other parties. • Best way is for the law firm to establish and maintain the three lists in three separate binders.
Software	<ul style="list-style-type: none"> • Common conflicts checking tools are often found in case management software programs. • Software performs two functions: It is a comprehensive database for information concerning clients and serves as a calendaring/docket-control system. • It is simple to perform conflicts checks across entire database.
Word Processing	<ul style="list-style-type: none"> • Create a simple searchable database in any word processing program. • No different than a form-based system, just holds more information, has easy search features and does not need to be printed and kept in binders.

There is a Conflict... Now What?

The most sophisticated conflicts check system will be worthless as a risk management tool if, once identified, conflicts of interest are dismissed as insignificant or the firm's course of action is not documented. What should attorneys do when they have identified either a potential or actual conflict of interest?



Although client consent is often seen as the path to salvation for attorneys facing conflicts of interest, it is important to realize that consent is only a defense if it is "informed" consent.



Seek Objective Analysis

If an actual or potential conflict of interest is identified, the attorney(s) involved should contact a “disinterested” attorney, either within the firm or, if a solo practitioner, another member of the bar whose judgment is trusted. Objective analysis is critical, especially when the involved attorney is feeling pressure to accept representation. Many bar associations employ ethics

MANAGING CONFLICTS

counsel on staff to provide objective conflict analysis free of charge for the association’s members.

Law firms should establish formal policies regarding conflict of interest review which incorporates objective analysis of, but not limited to, the following issues:

Conflict Analysis Checklist

- Can “informed” consent be legitimately obtained?
- Are potential clients competent to make an “informed” consent?
- Can one lawyer adequately represent all client interests if consent is obtained?
- If a client is precluded from consenting, will the client be financially unable to retain other representation?
- Type and complexity (existing or foreseeable) of legal problem involved.

Disclosure

If an attorney believes it is appropriate to seek consent to waive the conflict, the next step is adequate disclosure to all of the parties who are affected by the conflict.

Disclosure Checklist

Attendees

While informing the client(s) of the actual or potential conflict of interest, the foreseeable ramifications and the effect of consent to the representation invite another attorney, a paralegal or administrative assistant to be present during the discussion. And, of course, have all relevant potential and existing clients present during the disclosure.

Disclosure Checklist (continued)



Pertinent Information

To receive informed consent, attorneys are required to provide a description of the service to be performed, the nature of the conflict and identify the parties affected by the conflict. In addition, attorneys must identify who they will represent and who they will not represent, the scope of their representation to them and communicate that the information received by each client cannot be held in confidence against the other.



Informed Consent Memo

The attorney should write an “informed” consent memorandum to the file which outlines the details of the conference.

Obtaining Informed Consent

If an attorney, after reasoned analysis and adequate discussion, determines that a conflict of interest is surmountable by disclosing the conflict and obtaining “informed” consent, the attorney should obtain written consent. The written consent should take the form of a clearly worded letter and should include the oral disclosure suggested above. This approach leaves little room for argument later about the ambit of disclosure.

At a minimum, an attorney should write a combined “informed” consent letter to all involved clients confirming the informed consent and obtain from all clients involved a simple consent form waiver. The letter and waiver should include:

Informed Consent Letter

- An acknowledgement that even though the representation may be potentially adverse, they are prepared to proceed with the representation.
- An outline of the process to be followed if the interests cannot be represented together in the future, whether your representation will continue for at least one of the parties and details regarding fee entitlements in the event that one of the clients has to seek alternative representation.
- A statement that the clients have been asked to obtain independent legal advice with respect to the waiver being signed.

Waiver

- That the parties understand information explained in the letter.
- That the parties have no further questions.
- That the attorney is not guaranteeing success of the venture.



The safest course of action regarding conflicts of interest situations is obviously to avoid them by either declining or promptly withdrawing from representation. This blanket avoidance plea is probably unrealistic and, in some instances, unnecessary, but the attorney who determines that the conflict is surmountable must disclose the conflict, in writing and obtain “informed” consent, in writing, in conformance with the suggested methods above.

Declining Representation

Non-engagement letters are formal declinations of representation. Whenever a law firm declines representation, a non-engagement

letter should be sent to the individual or entity seeking representation to dispel any notion that an attorney-client relationship was formed during the initial consultation or conversation. This is important because significant malpractice judgments have been awarded to plaintiff non-clients who successfully establish both attorney-client relationships allegedly created during initial consultations and detrimental reliance thereon. See *Togstad v. Veseley, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. 1980) (Attorney found liable for negligently handling a medical malpractice action. The dispute was whether an attorney-client relationship existed which the jury believed had been formed. Judgment of \$650,000 could have been avoided with initial use of a non-engagement letter). These judgments are particularly distressing because, in most instances, they could have been avoided had counsel taken several minutes to dictate and send non-engagement letters.

If a law firm accepts representation of a matter but cannot represent multiple parties due to conflict of interest concerns, a non-engagement letter should be sent to every non-client. For example, if an attorney is retained by a personal representative to handle the probate of a will, non-engagement letters should be sent to all devisees and other interested parties, regardless of whether they initially met with the attorney, specifically declining representation and informing them of their duty to seek independent counsel, if necessary.

Finally, beyond malpractice claim avoidance, law firms can use non-engagement letters as marketing tools. A law firm may decline representation of a matter because the subject matter is outside the firm's areas of expertise. The prospective client is, however, one which the firm would like to represent on other matters. The law firm should use a non-engagement letter as an opportunity to express its interest in representing the prospective client on future matters.

Non-Engagement Letters

As with engagement agreements, non-engagement letters should be used consistently by every attorney in every law practice. In order to facilitate consistent use and content, several form letters should be stored in the firm's word processing system, subject to necessary modification.



Attorneys should not attempt to calculate and include exact statutes of limitation dates for the simple reason that their calculations might be wrong and the non-client detrimentally relies, once again, upon the attorney's opinion.

These letters should address, at a minimum, the following issues:

Non-Engagement Letter Checklist



Declination of Representation

Although it may sound obvious, non-engagement letters should specifically decline representation. Reference to facts sufficient to identify the matter in which representation is declined is wise.

It is generally unwise to offer substantive analysis and conclusions regarding the merits of declined matters. Although, in the same letter the firm may responsibly indicate that its conclusions are legal opinions and other counsel should be consulted, non-clients may read no further than the law firm's conclusions and decide against speaking with another attorney. Detrimental reliance, once again, rears its ugly head.



Statutes of Limitation

Non-engagement agreements should alert non-clients to the statutes of limitation and other time sensitive dates. Attorneys should not attempt to calculate and include exact expiration dates for the simple reason their

Non-Engagement Letter Checklist (continued)

calculations might be wrong and the non-client detrimentally relies, once again, upon the attorney's opinion.

A caveat to the calculation rule exists when the attorney knows of an imminent deadline; communication of the expiration date is appropriate, if not required.



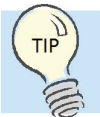
Duty to Seek Other Counsel

Non-engagement letters should recommend consultation with another attorney, in order to obtain a second look at the matter. Referrals to specific attorneys are discouraged since the referring attorney may be liable for “negligent referral” if the successor attorney does a poor job. There may be economic reasons why one firm wishes to decline representation that would not preclude other firms from accepting the matter.



Explanation of Conflict

As stated earlier, if a law firm accepts representation of a matter but for conflict of interest reasons cannot represent all interested parties, the firm should send non-engagement letters to those individuals and/or entities which cannot be represented. A thorough explanation of conflict of interest and attorney/client privilege issues should be made and all other previously discussed elements addressed.



Non-engagement letters are well worth the small effort required to review and send to non-clients in order to avoid misunderstandings and, more importantly, expensive litigation.



Refer to Appendices II and III on pages 50-52 to view sample Non-Engagement and Engagement Letters.

A Serious Matter

Conflicts of interest clearly is an issue that the legal profession needs to take seriously when it comes to reducing claim costs and liability insurance premiums. Attorneys who are involved in “open file” conflicts of interest face numerous and serious consequences.

Ethics Complaint

The attorney may also be the subject of an ethics complaint and possible disciplinary action.

Legal Malpractice

The attorney may be sued for legal malpractice which, unlike ethical proceedings, requires damages proximately caused by the conflict. The client must prove the standard of care, departure therefrom, proximate cause and damages.

Disqualified

The attorney and, if relevant, the attorney’s law firm, may be disqualified either by motion of a party or through the court’s own initiative. The result is the attorney and, if relevant, the attorney’s law firm, is precluded from representing any party in the litigation.

Lose Fees

The attorney may also lose fees by representing clients in a conflict situation because it is a breach of the attorney’s fiduciary duty. Complete forfeiture of the attorney’s right to fees incurred from and after the point in time that the irreconcilable conflict occurred is warranted.

The Importance of Prompt Reporting Cannot Be Over Emphasized

Identifying and checking for a conflict of interest needs to be a routine part of every lawyer's practice. Every time you have a new client, you should consider if a real or potential conflict of interest exists on that matter and you should continually assess whether any new circumstances give rise to a conflict of interest.

Prompt reporting not only allows claim repair to be utilized, prompt reporting is a condition of the insurance policy. Failure to comply with policy conditions could jeopardize the coverage afforded by the policy. The earlier you react, the better. For example, the Minnesota Lawyers Mutual policy states:

NOTICE OF CLAIMS AND DISCIPLINARY ACTIONS

In the event of a CLAIM, disciplinary action, disciplinary investigation or notice to appear before a review board, the INSURED must:

- (1) give immediate written notice to US; and
- (2) forward every demand, notice, summons or other communication received by the INSURED or his or her representative to:

Mail or Delivery

Minnesota Lawyers Mutual Insurance Company
333 South Seventh Street, Suite 2200
Minneapolis, MN 55402

Fax

(800) 305-1510

You must give US notice during the POLICY PERIOD or within 60 days after the end of the 06-09 POLICY PERIOD for coverage to apply.

CONSEQUENCES AND CLAIMS

Claim repair is the implementation of activities that can correct or minimize a situation that may lead to a client sustaining a loss. With significant resources and experience, options previously not considered may come to light. Often, a fresh look at the issues may prove the catalyst to successful resolution of tricky details. Importantly, in cases where a loss has already occurred, claim repair can assist in minimizing damages.

It is also important to have a clear understanding of the definition of CLAIM in your professional liability policy as definitions may differ from policy to policy.

If you are insured through Minnesota Lawyers Mutual and need to report a claim, please call or write our claim department at:

Minnesota Lawyers Mutual Insurance Company
Attn: Claim Department
333 South Seventh Street, Suite 2200
Minneapolis, MN 55402

Phone: (800) 422-1370
www.mlmins.com

CLIENT-LAWYER RELATIONSHIP

- 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
- Rule 1.13** Organization as Client
- Rule 1.18** Duties to Prospective Client

Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by the Rules.
- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by **Rule 1.6**.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims or against the 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. The lawyer's disclosure shall include the existence and nature of all the claims or please involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's ability to a client for malpractice unless the client is independently represented in making the agreement; or
 - (2) settle a claim or potential for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.

- (j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties to Former Clients

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer had acquired information protected by **Rules 1.6 and 1.9(c)** that is material to the matter; unless the former client gives informed consent, confirmed in writing.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

**Rule 1.10 Imputation of Conflicts of Interest:
General Rule**

- (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:

- (1) 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; or
 - (2) the prohibition is based upon **Rule 1.9(a)** or **(b)** and arises out of the disqualified lawyer's association with a prior firm; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.
- (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by **Rules 1.6** and **1.9(c)** that is material to the matter.
- (c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in **Rule 1.7**.
- (d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by **Rule 1.11**.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

- (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
 - (1) is subject to **Rule 1.9(c)**; and
 - (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
- (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

- (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
 - (1) is subject to **Rules 1.7** and **1.9**; and
 - (2) shall not:
 - (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
 - (ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by **Rule 1.12(b)** and subject to the conditions stated in **Rule 1.12(b)**.
- (e) As used in this Rule, the term “matter” includes:
 - (1) any judicial or other proceeding, application, request for a ruling or other determination, contact, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
 - (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Rule 1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

- (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or 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.
- (b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which

the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

- (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associate may knowingly undertake or continue representation in the matter unless:
 - (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.
- (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Rule 1.13 Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer to the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

- (c) Except as provided in paragraph (d), if:
 - (1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law; and
 - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not **Rule 1.6** permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.
- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization 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 to be represented, or by the shareholders.

Rule 1.18 Duties to Prospective Client

- (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as **Rule 1.9** would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
 - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (ii) written notice is promptly given to the prospective client.

APPENDIX II: NON-ENGAGEMENT LETTER

[Date]

[Name and Address of Client]

Re: Consultation of [Date of Consult]

Dear _____ :

Thank you for [meeting with me]\speaking with me by telephone] on _____ to discuss _____. I greatly appreciate the confidence you have expressed in our firm, but we are not in a position to represent you on this particular matter.

[Please be advised that your claim may be barred by the passage of time as a result of the applicable statute of limitations. Therefore, you should consult another attorney **immediately** about your claim.]

[Please be advised a default judgment may be entered against you if an answer or other action is not taken in a timely manner. Therefore, you should consult another attorney **immediately** about responding to this claim.]

I would also like to emphasize that in declining to represent you, the firm is not expressing an opinion on the merits of your case. We neither had an opportunity to investigate the facts in this matter nor to research the applicable law.

[Since we did not undertake to provide you with any legal advice regarding this matter, no charge is being made for any legal fees or expenses.]

[I am enclosing all of the original documents and materials you left with me following our meeting.]¹

In the future, should you require legal assistance regarding some other matter, I hope you will contact me.

Sincerely yours,

[Name of Firm]

By _____
[Name of Attorney]

¹Keep a copy of any documents which establish basic information on the case including the statute of limitations.

Note: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY be liable for any direct, indirect, or consequential damages resulting from the use of this material.

APPENDIX III: ENGAGEMENT AGREEMENT

[Date]

[Name and Address of Client]

Re: Consultation of [Date of Consult]

Dear _____ :

I enjoyed meeting with you on _____ to discuss representation by this firm. This letter will confirm our agreement and if after reviewing it, you have no further questions about the terms of my representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}].

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] My rate per hour for work is \$____. Often, from time to time, other members of the firm, as well as our staff, may engage in work on this matter, and their rates are as follows: partners, \$____ per hour; associate attorneys, \$____ per hour; legal assistants, \$____ per hour.

Previously, we discussed orally the potential for a conflict of interest in my [firm's] representation of you [client]. As I explained, a conflict may arise whenever the interests of a current client might affect, or be affected by, the personal, business, financial, or professional interests of a lawyer, a professional or business associate or relative of the lawyer, another current client, or a former client. When there are such multiple interests, there is always a possibility for the existence to interfere with the lawyer's ability to serve one set of interests without adversely affecting other interests. Whenever such interests become conflicting, it is necessary for the lawyer to withdraw from all attorney-client relationships affected by such conflict, and it is then necessary for each person to hire a new lawyer.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgement or performance, and describe the potential adverse effects on each client].

APPENDIX III: (continued)

ENGAGEMENT AGREEMENT

Despite possibilities for such conflicts of interest, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests.

Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, and telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of ____% of the balance owed as attorney fees. To secure any balance you owe us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you.]

To achieve the best possible representation, you will need to cooperate with us fully and provide us all the information we need to assist you. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise it is best to schedule an appointment to discuss your accumulated questions and concerns. So that we may maintain continuous contact with you throughout the representation, please notify us immediately if there is any change in your address or telephone number.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to the representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. Failure to pay [fees or]¹ expenses or make deposits when due will be cause for such termination.

In this joint representation, I must and will treat you [both] equally in all regards, including all communications.² I will communicate all matters to both of you and will share all communications from each of you with the other.

While this agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise, you are agreeing pursuant to this paragraph to submit any fee dispute between us to _____ arbitration with [your

APPENDIX III: (continued) ENGAGEMENT AGREEMENT

bar's program name]. You understand that you have the right to use other court forums to address fee disputes but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration panel, whether for you or me, will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Sincerely yours,

[Name of Firm]

By _____
[Name of Attorney]

I understand and accept the terms of the Agreement.

[Name of Client]

Date of Acceptance

¹ Do not use this phrase if this is a contingent fee agreement.

² Use if joint representation.

Note: This material is intended as only an example which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will MINNESOTA LAWYERS MUTUAL INSURANCE COMPANY be liable for any direct, indirect, or consequential damages resulting from the use of this material.

APPENDIX IV: COMMON PARTY SEARCH CHECKLIST

When checking the names of a new client for potential conflict of interest, it is necessary to take your search beyond the names of your current and former clients. The list below suggests other parties that should be included in your search.

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
- Expert witnesses
- Witnesses (if any)
- Adverse family members
- Guardian ad litem

APPENDIX IV: (continued) COMMON PARTY SEARCH CHECKLIST

LITIGATION

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

PATENT

- Client (by name and type of products)

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
- Expert witnesses
- Witnesses (if any)
- Adverse family members
- Guardian ad litem
- Employers
- Persons residing with client

RESIDENTIAL REAL ESTATE

- Client
- Owner/Spouse
- Buyer
- Seller
- Brokers
- Lender/Mortgage company
- Any opposing party in a transaction
- Parcel number/locations/address
- Title insurer

WORKERS COMPENSATION

- Client
- Employer
- Insurer



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