



GUIDEBOOK TO PRACTICE FORMS AND LETTERS

Conflicts

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INTRODUCTION

It is a proven fact that attorneys who correspond with their clients regularly, and make sure their services and fees are reduced to writing have fewer complaints filed against them, fewer problems with their clients, and provide better legal services. Letters set the stage for the relationship and responsibilities between the parties. They protect both the lawyer and the client by providing a clear written description of the client's relationship with counsel. Many legal malpractice claims are successfully defended because the lawyer can produce a letter which establishes that he or she did not have responsibilities to the client. As such, it is wise to delineate these relationships in writing.

Using practice letters and letters does not have to be time consuming, difficult or offensive to the client. On the contrary, most clients welcome (and expect) a clear written description of their association with their lawyer. Providing these letters to potential clients will clarify and formalize your own relationship to the client, or potential client. This practice will also increase the likelihood that the legal matter is entered into your conflict of interest and calendaring systems.

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

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IMPORTANCE OF DISCLOSING CONFLICTS IN WRITING

Conflict-of-interest malpractice claims and related ethics complaints are among the most rapidly increasing types of allegations lodged against lawyers today. Legal consumers are no longer hesitant to cry foul when made aware of their lawyer's alleged conflicts. The increasing number of corporate mergers and acquisitions as well as the onslaught of law firm partnership mergers and dissolutions also help to foster a multitude of potential conflicts for firms. When a conflict exists and is not or cannot be waived by the relevant parties, lawyers may face many difficult consequences, including disqualification motions and orders; disciplinary actions; reversal of proceedings; forfeiture of fees and time invested in the case; and malpractice claims and ethics grievances.

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

APPLY THE RULES

The following ABA Model Rules of Professional Conduct should be reviewed in regards to a conflict of interest check. In addition, State Codes of Professional Responsibilities should be reviewed since there are different requirements that apply.

- ABA Rule 1.7 deals with conflicts in representing current clients. The conflicts may be connected to other clients, to the lawyer's own interests or duties, or to other sources. The conflicts are of two types: "directly adverse" and "materially limited" representations. ABA Rule 1.7 also provides for conflict waivers and identifies some conflicts too serious to waive.

- ABA Rule 1.8 is a heterogeneous collection of different types of current client conflicts. Most Rule 1.8 conflicts could be considered under ABA Rule 1.7(a)(2), as types of “materially limited representation” conflicts. ABA Rules 1.8(b) and 1.9(c)(1) both deal with misuse of client information.
- ABA Rule 1.9 governs former client conflicts.
- ABA Rule 1.10 and Other Imputation Rules – ABA Rule 1.10 imputes throughout private law firms conflicts arising under ABA Rules 1.7 and 1.9, except for certain “personal interest” conflicts. ABA Rule 1.8(k) imputes all ABA Rule 1.8 conflicts, except ABA Rule 1.8(j) (sexual relations with a client). ABA Rules 1.11(b), 1.11(c) and 1.12(c) govern conflict imputation for current and former government lawyers, former judges, etc.
- ABA Rules 1.11 and 1.12 – ABA Rule 1.11 governs conflicts for former and current government “officers and employees.” ABA Rule 1.12 governs conflicts for former judges, Alternative Dispute Resolution neutrals, and law clerks. ABA Rules 1.11 and 1.12 may be supplemented by laws or rules adopted by relevant government agencies, courts, or ADR organizations.
- ABA Rule 1.18 deals with conflicts and confidentiality issues relating to prospective clients. “A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.”

IGNORING THE WARNING

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.

The Conflict of Interest-Guidebook to Practice Forms and Letter provides sample documents to manage conflicts and potential conflicts. MLM’s Law Practice Management Booklet Series, Avoiding Conflicts of Interest offers information to help you identify, check for and manage conflicts of interest situations.

SAMPLE FORMS & LETTERS

Following are samples of:

- Conflict of Interest Search Form - Internal Document (Form CI01)
- Common Party Search Checklist - Internal Document (Form CI02)
- Non-Engagement Letter - Conflict of Interest (Form NE02)
- Engagement Agreement - Hourly, Potential Conflict of Interest (Form CE02)
- Engagement Waiver Clause - Waiver of Potential Conflicts of Interest (form CI03)
- Letter to Disclose Conflict and Seeking Consent to Continue Representation (Form CI04)

Conflict of Interest Search Form - Internal Document
(Form CI01)

To: File Room

Requesting Attorney: _____

Date: _____

Prospective Client Information

Name: _____

Address: _____

Phone: (Work) _____

(Home) _____

Principals: _____

Related Entities: _____

Prior Representation of Client,
Principals or Related Entities: _____

File Name: _____

Adverse Party Information

Name: _____

Address: _____

Principals: _____

Related Entities: _____

Check Completed By: _____

Date: _____

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Common Party Search Checklist - Internal Document (Form CI02)

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

LITIGATION

- Client
- Insured
- Plaintiffs
- Defendants

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
- Related parties
- Witnesses
- Experts

IMMIGRATION LAW

- 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

- 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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Non-Engagement Letter – Conflict of Interest
(Form NE02)

[Date]

[Name and Address of Client]

RE: Potential Claim Against [_____] Certified Mail No.
Return Receipt Requested

Dear [Client]:

Thank you for your visit yesterday. As we discussed during our meeting, before [Name of Firm] could accept representation of your matter, we must investigate whether this representation will adversely affect existing or former clients' interests or there is some other element that would undermine our ability to adequately represent your interests.

After you left our offices yesterday, we performed a formal conflict of interest check and found that our firm does indeed have a conflict of interest involving your intended adversary in this case, [Company that there is a potential claim against]. Unfortunately, this conflict cannot be resolved in a manner that would allow us to represent you in this matter. Consequently, [Law Firm] is formally declining representation of you in your potential action against [Company that there is a potential claim against].

Please be aware that whatever claim, if any, that you have may be barred by the passage of time. Since deadlines may be critical to your case, I recommend that you immediately contact another firm for assistance regarding your matter.

Although we were not able to assist you in this matter, I hope that you will consider [Law Firm] in the event you require legal services in the future. Thank you again for your consideration.

[Name of Firm]

By _____

[Name of Attorney]

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Engagement Agreement - Hourly, Potential Conflict of Interest
(Form CE02)

[Date]

[Name and Address of Client]

Dear _____:

I enjoyed meeting with you on _____ to discuss your 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 judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, 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 of 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 your 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.

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

While the 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 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.

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

² Use if joint representation.

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 this Agreement.

[Name of Client]

Date of Acceptance

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Engagement Waiver Clause - Waiver of Potential Conflicts of Interest Form
(Form CI03)

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, there is always a possibility for the existence of such multiple interests 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 judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, 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.

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Letter to Disclose Conflict and Seeking Consent to Continue Representation
(Form CI04)

[Date]

[Name and Address of Client]

Re: Consent to continued representation

Dear [Client's Name]:

I have been representing you in your claims against _____ for _____. As we discussed, the statute of limitations on your claims of [identify claims] has expired. Your claim of [_____ however, continues to be viable. I would be pleased to continue to represent you in that claim, but the Rules of Professional Conduct [ABA Model Rule 1.7(b) - consult the rule in your jurisdiction] require that I may not represent a client if my representation of that client may be materially limited by my own interests unless I reasonably believe that the representation will not be adversely affected and you consent to my continued representation.

I believe that I can represent you in the [identify claim] claim against [adverse party]. The fact that you may have a claim against me for not filing the [identify claims] claims within the statutory time period will not, in my opinion, materially limit my loyalty to you as my client. If you and my insurance carrier cannot resolve that matter short of litigation, however, we will have to reassess this issue.

As we discussed, you may consult independent counsel regarding any claim you may have against me and regarding your consent to my continued representation of you in the [identify claim] claim. By executing this letter, you shall be deemed to have (i) consented to my continued representation of you in the [identify claim] against [adverse party]; (ii) understood the potential conflict of interest arising out of that representation; (iii) waived any conflict of interest that has arisen as a result of that representation; and (iv) acknowledge that you have been advised that you may consult with independent counsel regarding the waiver of any conflict of interest and consent to my continued representation of you.

If you consent to the above, please execute this letter in the place indicated below and return a fully executed original to me. If you have any questions or concerns, or wish to discuss any aspect of this letter, please contact me as soon as possible.

Sincerely yours,

[Name of Firm]

By _____ [Name of Attorney]

ACCEPTED ON _____ (Date) BY: _____ (Client)

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Publication Date: June 2015