

Conflicts of Interest

By Karen Painter Randall  
and Andrew Sayles

**Obtaining a valid waiver for a conflict involves many subjective assessments and factors that can form the basis for subsequent malpractice actions.**

# Informed Consent and Legal Malpractice

All attorneys have an affirmative duty to identify and address conflicts of interest. This responsibility exists in every phase of client representation, beginning with an initial meeting with a client and lasting beyond conclu-

sion of representation. Thereafter, attorneys have an ongoing obligation to prevent conflicts from developing and to resolve conflicts in the event they occur, and in some instances, remove themselves from the conflictive circumstances. By virtue of this affirmative duty, failure to properly advise clients in connection with conflicts of interest may result in subsequent claims of legal malpractice. Often, legal malpractice involves failure to obtain informed consent when a conflict of interest arises.

In the 1970s, malpractice claims against attorneys were so rare that malpractice insurance coverage was generally unavailable on the domestic market. Today, more than 70 percent of practicing attorneys have some sort of malpractice insurance, and it has been estimated that 10 percent of the attorneys practicing in America face malpractice suits at any given time. Michelle Craven, *To the best of one's ability: A guide to effective lawyering*, GEORGETOWN JOURNAL OF LEGAL ETHICS (Summer 2001). In

every claim for professional negligence, a plaintiff must establish that a defendant owed a duty to the plaintiff, which was breached, proximately resulting in damages to the plaintiff. As the jurisdictional rules of professional conduct (RPC) establish standards of conduct for attorneys, they create a strong foundation for a claim of deviation against an attorney. Often as part of a malpractice claim, a plaintiff will allege that a lawyer had a conflict of interest that impaired his or her ability to properly and objectively counsel his or her client, and informed consent was either improperly obtained or not obtained at all. If substantiated, these allegations provide the trier of fact with rational explanations for an attorney's improper legal advice: the attorney acted in the interests of another party, which led to the client's loss. As a result, a client is empowered to visit his or her own business losses or litigation risks upon his or her attorney by virtue of the alleged conflict of interest.



■ Karen Painter Randall, a certified civil trial attorney, is chair of the USLAW Professional Liability Practice Group Leadership Committee. She also serves as co-chair of the Professional Liability and chair of the Directors and Officers Litigation Practice Groups at Connell Foley, USLAW Network's New Jersey firm. Andrew Sayles is an associate with Connell Foley in Roseland, New Jersey, where his practice areas include business litigation, directors' and officers' litigation and professional liability.

This article serves to provide (1) a general overview of the ABA Model Rules addressing conflicts of interest; (2) a discussion of what constitutes informed consent; and (3) steps to ensure that informed consent is established to reduce overall liability exposure when addressing conflicts of interest.

### Conflicts Defined

Attorneys owe undivided loyalty to their clients. Therefore, a conflict exists if the interest of any other person or entity interferes with an attorney's ability to provide objective representation to his or her client. While there may be minor deviations among jurisdictions, most states base their RPCs on the American Bar Association Model Rules of Professional Conduct, commonly known as the Model Rules. Model Rule 1.7(a) provides that "a concurrent conflict of interest exists (1) if the representation of one client will be directly adverse to another client; or (2) if 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." Model Rule 1.7(a). Unless another party's interests are completely identical to those of your client, that party is adverse. The focus of a "materially limited" conflict is on the quality of the representation and the lawyer's incentive or failure to act, due to the conflict, in ways that could be detrimental to at least one of the clients.

If a conflict exists, Model Rule 1.7(b) permits attorneys to represent a client despite an actual or potential concurrent conflict of interest as long as

- (1) the attorney reasonably believes that the attorney 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 attorney in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Model Rule 1.7(b).

In 2002, the Model Rules were amended to specifically incorporate the ability of a client to waive future as-yet-undetermined

conflicts, known as an "advance waivers." See Alice E. Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?* GEORGETOWN JOURNAL OF LEGAL ETHICS (Summer 2006); see also ABA Formal Opinion 05-436.

Several other Model Rules address conflicts of interest in various circumstances. Model Rule 1.8 provides specific rules concerning conflicts of interest with current clients, identifies steps that attorneys may take to address these conflicts and identifies scenarios that create conflicts that can be waived with the client's consent. Model Rule 1.9 addresses duties owed to former clients. However, it specifically allows consecutive representations adverse to a former client as long as the matters are unrelated, and the lawyer has not acquired confidential information that is deemed material to the subsequent representation. Model Rules 1.10 through 1.14 provide further guidance for dealing with conflicts as attorneys, although they generally reiterate and refer to the principles set forth in Model Rule 1.7.

What remains consistent across Model Rules addressing conflicts of interest is that an attorney is required to maintain undivided loyalty to his or her clients in the face of a potential conflict, properly advise clients of the facts and circumstances relating to a conflict of interest and obtain informed consent from clients in connection with continued representation in light of a conflict. These obligations squarely belong to the attorney and form the basis for malpractice claims if he or she fails to comply with them. See *Dunton v. County of Suffolk*, 729 F.2d 903, 909 (2d Cir. 1984).

### What Is Informed Consent?

Conflicts of interest law is complex, diverse and difficult to apply. It abounds with terms requiring attorneys to exercise judgment, such as "reasonably believes," "full disclosure," "reasonable opportunity," "substantial risk," "substantially related matter," "materially limited," "appearance of impropriety," and so forth. The failure of an attorney to properly interpret and apply these subjective, fact-specific terms is often alleged in subsequent malpractice actions. While a violation of an applicable RPC does not establish, per se, an independent cause of action for legal malpractice or other tort,

it is generally probative. Thus, most jurisdictions admit evidence of a violation of an RPC for the purpose of establishing an independent cause of action. In many instances, legal malpractice plaintiffs use the failure of an attorney to properly obtain informed consent as the basis for their claims.

Informed consent presents the greatest potential for subsequent malpractice

Most jurisdictions admit evidence of a violation of an RPC for the purpose of establishing an independent cause of action.

claims. The Model Rules define informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." See Model Rules, 1.0(e). In most jurisdictions, informed consent must also be confirmed in writing to the client. Again, the Model Rules attempt to delineate what is required:

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Model Rule 1.0 (b).

In jurisdictions with a written requirement, courts have acknowledged the existence of implied informed consent. See *CenTra, Inc. v. Estrin, infra*.

The "confirmed in writing" requirement in the Model Rules lacks specificity, but at a minimum, written consent should contain a simple statement of the facts consti-



tuting the conflict, refer to a consultation with the attorney, and note consent by the client. Prudent counsel should also fully state what disclosures were made and what explanations were given in terms of the common representation, the advantages, risks and available alternatives.

In addition to providing informed consent and obtaining written confirmation of

sent associated with a conflict and which conflicts can be waived.

The plaintiffs in *CenTra* owned and operated the Ambassador Bridge, spanning from Detroit, Michigan, to Windsor, Ontario, and had been represented by the defendant law firm's Michigan office for approximately 20 years. The defendants, through an attorney based in its Toronto office, subsequently represented a third party whose interests were adverse to the plaintiffs. Namely, the third party opposed the plaintiffs' desire to expand the Ambassador Bridge. On several occasions, the plaintiffs received correspondence from the defendants' Toronto office on behalf of the third party regarding the Ambassador Bridge. Despite receipt of correspondence from the defendants' Toronto office, the plaintiffs retained the defendants' Michigan office to assist in the creation of a bond offering to finance efforts to expand the Ambassador Bridge. At about the same time, the defendants' Toronto office was retained by the third party to oppose a formal plan to expand the Ambassador Bridge. On behalf of the third party, the defendants issued a letter to the U.S. Coast Guard objecting to the expansion, which resulted in a demand that the plaintiffs undertake an environmental assessment that would cost approximately \$800,000. The plaintiffs subsequently filed a complaint alleging breach of contract, breach of fiduciary duty and legal malpractice based on the defendants' simultaneous and adverse representation of both the plaintiffs and third party. Specifically, the plaintiffs alleged that the defendants failed to obtain informed consent regarding the conflict of interest, in violation of Michigan's RPC 1.7(a)(2). *Id.* at 408–09. The defendants moved for and obtained summary judgment on the grounds that the plaintiffs had waived concurrent conflict of interest based on their continued retention of the defendants. *Id.* at 409.

On appeal, the Sixth Circuit Court of Appeals reversed the district court order granting summary judgment and found that genuine issues of fact existed on whether the plaintiffs had waived the alleged conflict, whether that conflict even could be waived by consent and whether the plaintiffs had given informed consent. *Id.* at 406. In reaching its conclusion, the court acknowledged the cross-jurisdictional reach of its ruling, noting that the Michi-

gan RPCs at issue were consistent with the Restatement (Third) of the Law Governing Lawyers (Restatement) and the ABA Model Rules. *Id.* at 409–10.

First, the court found that genuine issues of material fact existed regarding whether the conflict created by the defendants was a conflict that could be waived. The court emphasized that under the Model Rules, Michigan's rules and the Restatement, whether a client may consent to representation despite a conflict depends on the circumstances, and the ultimate determinant is the extent to which the interests are truly adverse. *Id.* at 413. This arises from the fundamental principle that an attorney owes undivided loyalty to a client. Thus, although the defendants argued that the dual representation involved separate matters—compliance in creating a bond offering and objection to a public works project—the court found that fact issues existed concerning whether the defendants “reasonably believed that the conflict would not adversely affect [their] relationship with [their] clients and whether a disinterested lawyer would conclude that [plaintiffs] should agree to the representation.” *Id.*

Second, the court found that even if the conflict could be waived through consent, additional fact issues existed on whether the plaintiffs received adequate information regarding the conflict. The court noted that Michigan, in accordance with the Model Rules and Restatement, required that a client provide “consent after consultation,” which it equated to informed consent. *Id.* at 414. The defendants argued that their prolonged representation of the plaintiffs and the equally lengthy efforts by the defendants' Toronto office in objecting to the plaintiffs' bridge expansion efforts, sufficiently informed the plaintiffs of the concurrent conflict and that the plaintiffs' continued use of the defendants as counsel constituted implied, informed consent. *Id.* The court disagreed and found that assumed knowledge of the conflict was not enough, as a matter of law, to adequately meet informed consent requirements: “Courts interpreting the ABA and Restatement rules have made it clear that it is not sufficient to leave the client to infer the full nature of a conflict from only bits and pieces of actual or constructive knowledge.” *Id.* at 415.



**Whether a client may consent to representation despite a conflict depends on the circumstances, and the ultimate determinant is the extent to which the interests are truly adverse.**

the informed consent, if required in a jurisdiction, an attorney must also believe that he or she can competently and diligently represent each affected client. See Model Rules 1.1 and 1.3. Again, these are subjective determinations that must be fully and comprehensively explored. An attorney seeking a client's consent when a conflict emerges should act expecting that a subsequent malpractice claim may arise. Accordingly, an attorney should explore every foreseeable outcome and potential adverse circumstance, expecting that an expert in a subsequent malpractice claim will do the same, but with the benefit of hindsight.

### **Liability Arising from Absence of Informed Consent**

In *CenTra, Inc. v. Estrin*, 538 F.3d 402 (6th Cir. 2008), the court reversed a district court summary judgment ruling and found that the plaintiffs could proceed with claims for breach of contract, breach of fiduciary duties and legal malpractice against the defendant attorney and law firm arising from conflicts of interest. A discussion of *CenTra* is informative. It highlights mistakes in identifying a conflict, common misperceptions regarding informed con-

In support of its decision concerning informed consent, the court cited to the Ninth Circuit ruling in *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345–46 (9th Cir.1981):

It is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them. . . he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons [why] it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each other.

*CenTra*, 538 F.3d at 415–16.

The court also referred to the Second Circuit decision *Int'l Bus. Machs., Corp. v. Levin*, 579 F.2d 271, 282 (2d Cir. 1978), rejecting the argument that it was enough that the client knew generally of the conflicted attorneys' adverse work. The *CenTra* court noted that the Model Rules "specifically imposes upon an attorney the affirmative burden of providing disclosure and obtaining consent. Clearly, full and effective disclosure of all the relevant facts must be made and brought home to the prospective client." *CenTra*, 538 F.3d at 416.

A client's knowledge that his or her law firm has, on previous occasions, represented parties that opposed the client in different matters does not provide an adequate foundation for informed consent with respect to a simultaneous representation of two adverse clients with opposing interests in a specific dispute. *Id.* at 417. The *CenTra* court also confirmed that an attorney has an ongoing duty to identify and maintain the informed consent of a client on the basis that informed consent exists on a "conflict-by-conflict" basis. *Id.* at 418. Further, the court rejected the defendants' contention that the consent applied also to future conflicts, finding that any arguable consent that may have existed concerning prior conflicts could not be imputed to a future conflict that had yet to occur. *Id.*

### Dealing with Conflicts and Informed Consent

The foregoing discussion details the current Model Rules' requirements on conflicts of interest and the central role of informed consent in those circumstances. Further, it demonstrates that if a client is not fully informed of the circumstances involved in

a conflict, informed consent may not exist. As demonstrated in *CenTra*, the potential for malpractice claims based on the failure to obtain conclusive informed consent for concurrent or future conflicts creates significant malpractice concerns.

The *CenTra* ruling, although dealing with a claim of implied informed consent, confirms that an attorney must take comprehensive steps to inform his or her clients of an existing or potential conflict of interest and establish that the client has given informed consent to the continued representation. Further, the *CenTra* court questioned the adequacy of advance conflict waivers, stating that informed consent is required on a conflict-by-conflict basis. Thus, an attorney may be exposed to greater liability if he or she seeks to obtain a waiver for future conflict based on unknown or unanticipated factual developments than if he or she seeks it on a conflict-by-conflict basis.

Problems associated with conflicts also stem from poor client selection, usually a direct result of improper or limited conflict checks. For example, the conflict check in *CenTra* failed to reveal a potential conflict. *CenTra*, 538 F.3d at 407. Courts have ruled that internal conflict search records and the procedures and policies implemented in connection with conflict checks are discoverable in a legal malpractice claim founded upon a conflict of interest. See *Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A.*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002). Thus, attorneys should ensure that their conflicts searches check not only the names of proposed clients, but also adverse parties and related parties. In the event that this process identifies a potential conflict, internal communications should be circulated to the relevant attorneys regarding the potential conflict. The purpose of these efforts is to build accountability into the conflict search process, not only to protect your client's interests, but also to reduce the potential for a subsequent malpractice action based on a conflict of interest.

When a conflict is identified, attorneys have several options. First, an attorney can decline representation or remove him- or herself from representation. However, given the increasing complexity and sophistication of law firms, clients' expectations of flexibility, and the present econ-

omy, rejecting clients or representation is often undesirable. Moreover, even if representation is declined based on a conflict, be careful that knowledge obtained from the declined client does not create additional conflicts. Prudence requires an attorney to send a written letter to a client declining representation, confirming the basis for declining it. Second, if the jurisdiction per-

■ ■ ■ ■ ■  
**If a client is not fully informed of the circumstances involved in a conflict, informed consent may not exist.**

mits, a law firm can "screen" an attorney or office creating a conflict. See Model Rule 1.18. However, this also requires informed consent and involves the subjective determinations set forth above. Third, a client can consent to representation despite the existence of, or potential for, a conflict of interest. As a threshold matter, the conflict must be in fact a conflict that can be waived or subject to representation with consent. The ABA imposes a heightened requirement that informed consent be obtained in writing; however, some jurisdictions do not have this written requirement. In circumstances involving advance waivers, routine assessments regarding the conflict must be conducted to assure that unforeseen developments do not negate informed consent.

An attorney must conduct a comprehensive and objective assessment of his or her ability to represent separate clients in light of a concurrent or potential conflict of interest. Some scholars have questioned whether an attorney can truly evaluate his or her ability to represent a client in light of a concurrent or potential conflict of interest. See Leonard E. Gross, *Are Differences Among the Attorney Conflict of Interest Rules Consistent with Principles of Behavioral Economics?* GEORGETOWN JOURNAL OF LEGAL ETHICS (Winter 2006) (arguing that attorneys will be improperly influenced by eco-  
**Informed Consent**, continued on page 79

---

**Informed Consent**, from page 25  
economic considerations to fully and properly advise their clients of potential conflicts). If presented with a large and complex representation, an attorney with doubts concerning representation under Model Rule 1.7 may advise a client to consult with an independent attorney regarding the representation, a practice recommended under Model Rule 1.8. Again, the purpose is to establish informed consent.

An attorney must diligently take exhaustive steps to establish informed consent. Even if not required in a specific jurisdiction, informed consent should be confirmed in writing. The written confirmation should disclose enough details so that a client is aware of the implications of waiver and consent. A comprehensive waiver should be signed by the client(s) and outline steps

that will ensure that confidential information or material is not disseminated with the associated parties. Further, it should include an acknowledgment that the client has had the opportunity to consult with independent counsel, identify steps to take in the event that the consent is later withdrawn or circumstances change that create a conflict that cannot be waived, and confirm that the conflict letter is being sent to all conflicted parties. Finally, it should demonstrate and confirm that the attorney will act with undivided loyalty to each client: if including this statement gives pause to an attorney, he or she should reconsider proceeding with representation.

The assessment for conflicts of interest should continue throughout the course of representation. As noted in *Centra*, informed consent is required on a

conflict-by-conflict basis. If advance waivers are used, routinely assess the client's interests to ensure that conflicts have not developed.

### **Conclusion**

Model Rule 1.7 provides attorneys with the necessary means to represent multiple clients despite the potential for conflicts of interest. However, the foregoing discussion demonstrates that the process of obtaining a valid waiver for a conflict involves many subjective assessments and factors that can form the basis for subsequent malpractice actions. Attorneys who are mindful can reduce their potential liability by ensuring that informed consent is properly obtained and documented. 