Abstract

This presentation will address conflicts and waivers, including prospective or “advance” waivers, screening procedures, and “Outside Counsel Guidelines,” and will provide the practicing attorney with some practical tips along the way. The presentation itself will likewise identify some recent updates and issues on this topic.

One cannot appreciate the importance of specific conflict waivers, prospective or “advance waivers,” screening procedures, and in many instances, “Outside Counsel Guidelines,” without having a general command of the basic conflict of interest rules. Under ABA Model Rule 1.7(a)(1), the lawyer cannot represent one client “directly adverse” to another current client of the lawyer or his/her law firm, even in an unrelated matter, without the informed consent, confirmed in writing, of each affected client.

There is often a misconception among lawyers, particular transactional lawyers, as to what “directly adverse” means in this context. “Directly adverse” conflicts do not necessarily have to arise in adversarial situations. Rather, a “directly adverse” conflict arises in any situation where the lawyer’s representation of one client affects the legal rights or interests of another current client the lawyer or his/her law firm represents in some other matter. Another common misconception about the conflict rules is the failure of lawyers to appreciate that, when dealing with two opposing current clients, the relatedness of the two matters is immaterial to the conflict analysis. If the lawyer (or his/her law firm) represents the adverse party in any ongoing representation, the lawyer has a conflict. The only way the lawyer can ethically undertake the adverse representation is for each of the affected clients to provide their informed consent, confirmed in writing.

The conflict rules change significantly if the adverse party is a former client of the lawyer or law firm. Under ABA Model Rule 1.9 regarding “Duties to Former Clients,” the duty of loyalty is lessened somewhat to those matters that are the same or substantially related to what the lawyer or law firm previously did for the former client. As such, it is not a conflict of interest for
the lawyer or law firm to be “directly adverse” to a former client so long as the new matter is not substantially related to the previous representation.

A single lawyer’s disqualifying conflict is often to be imputed to his/her entire law firm. ABA Model Rule 1.10(a) provides that “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.” ABA Model Rule 1.10(a)(2) provides an exception to this general rule of imputed conflicts if the situation involves the lateral hire of the affected lawyer. The affected lawyer must be timely screened from the matter and written notice of the screening procedures must be provided to the former client. However, the specific screening procedures implemented and the timing of their implementation must effectively protect the former client’s confidential information that is material to the screened matter.

A lawyer and his/her law firm can help to minimize the effects of conflicting representations by securing, at the outset of the representation, a prospective or “advance” waiver of conflicts that may arise in the future. Comment 22 to ABA Model Rule 1.7 addresses generally this concept of a prospective or “advance” waiver and the effectiveness of such a waiver. As to such a waiver’s effectiveness, the more sophisticated the client or client representative, the more likely the “advance” waiver will be upheld. Likewise, the more specifics the lawyer can include in the “advance” waiver (as to the types or subject matters of possible future adverse representations or the names of clients or types of clients the lawyer or law firm may represent pursuant to the “advance” waiver) and/or the more the lawyer and the client actively negotiate the terms of the “advance” waiver, the more likely the “advance” waiver will be upheld.

A client may also ask for the lawyer and his/her law firm to accept the client’s own terms and conditions in the form of “Outside Counsel Guidelines.” Very often, these “Outside Counsel Guidelines” will identify what the client will, or will not, pay for; how the billing and invoicing is to be handled; and how the lawyer is to provide updates and budgets for the representation. But equally as often, the “Outside Counsel Guidelines” contractually change (or seek to change) who the lawyer or law firm are to consider as “the client” for conflict of interest purposes. Commencing a representation without appreciating the commitments undertaken pursuant to “Outside Counsel Guidelines” could have unanticipated consequences for the lawyer and his/her law firm.
Introduction

These written materials accompany the above-titled ethics CLE presentation. The presentation itself will address conflicts and waivers, including prospective or “advance” waivers, screening procedures, and “Outside Counsel Guidelines,” and will provide the practicing attorney with some practical tips along the way. The presentation itself will likewise identify some recent updates and issues on this topic. It is hoped that these written materials accompanying the presentation will provide the audience member with a useful resource to consult when addressing some of these issues in his/her practice.

Lawyer Conflicts of Interest 101

One cannot appreciate the importance of specific conflict waivers, prospective or “advance waivers,” screening procedures, and in many instances, “Outside Counsel Guidelines,” without having a general command of the basic conflict of interest rules. Under ABA Model Rule 1.7(a)(1), the lawyer cannot represent one client “directly adverse” to another current client of the lawyer or his/her law firm, even in an unrelated matter, without the informed consent, confirmed in writing, of each affected client. See ABA Model Rule 1.7(b)(4). There is often a misconception among lawyers, particular transactional lawyers, as to what “directly adverse” means in this context. “Directly adverse” conflicts do not necessarily have to arise in adversarial situations. Rather, a “directly adverse” conflict arises in any situation where the lawyer’s representation of one client affects the legal rights or interests of another current client the lawyer or his/her law firm represents in some other matter. Thus, for example, Comment 7 of ABA Model Rule 1.7 provides:

Directly adverse conflicts can also arise in transactional matters. For example, if the lawyer is asked to represent the seller of the business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.
If one considers the competing interests of the buyer and the seller in such a transaction, it becomes easier to identify how the representation of one will be “directly adverse” to the legal interests of the other. In such a transaction, it is in the buyer’s interest to pay as little as possible in the transaction and to require as many conditions, commitments, and performance guarantees of the seller as possible. In contrast, it is in the seller’s interest for the buyer to pay as much as possible and for there to be as few conditions, commitments, and performance guarantees as possible. If the lawyer is representing the buyer in such a transaction, he/she is negotiating against the seller or the seller’s lawyer to protect the buyer’s interest in the transaction. The opposite is true if the lawyer is representing the seller in the transaction.

Another common misconception about the conflict rules is the failure of lawyers to appreciate that, when dealing with two opposing current clients, the relatedness of the two matters is immaterial to the conflict analysis. If the lawyer (or his/her law firm) represents the adverse party in any ongoing representation, the lawyer has a conflict. Furthermore, under the ABA Model Rules of Professional Conduct, the only way the lawyer can ethically undertake the adverse representation is for each of the affected clients to provide their informed consent, confirmed in writing. Comment 18 to ABA Model Rule 1.7, addressing “informed consent,” provides, in part:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved.1

1 See also ABA Model Rule 1.0(e)(“‘Informed consent’ denotes 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.”). Moreover, Comment 6 to Rule 1.0 explains:

The communication necessary to obtain [informed] consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some
As to the concept of the informed consent being “confirmed in writing,” Comment 20 provides:

Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

The waivability of a conflict of interest is another consistent topic of concern. Only in the rarest of circumstances is a conflict not waivable. One prerequisite of waivability is that “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” See ABA Model Rule 1.7(b)(1). The conflict is

circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.
unwaivable if the representation is prohibited by law or if the representation involves “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.” See ABA Model Rule 1.7(b)(2) and (3). It is almost certainly also the case that one lawyer in a law firm cannot, even with waivers, represent the buyer in a transaction when another lawyer in the same law firm represents the seller in the same transaction.

There are situations in which a lawyer can ethically “represent” multiple sides in the same transaction; however, such a representation requires special precautions to be considered, and specific disclosures and joint representation conflict waivers to be obtained that address, for example, the lawyer’s inability to advise and/or advocate on behalf of one of the jointly represented clients against the other jointly represented clients. Certainly, however, if the interests of the clients are fundamentally antagonistic or if it is unlikely that the lawyer will be able to maintain impartiality among the jointly represented clients, this type of joint representation is unlikely to be permissible.

The more likely situation in which a conflict will be unwaivable at all is one for which the lawyer cannot disclose enough about the nature of the conflict, or about the risks and benefits of waiving the conflict, such that any consent given is not an informed one. In that regard, Comment 19 of ABA Model Rule 1.7 provides, in part:

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The conflict rules change significantly if the adverse party is a former client of the lawyer or law firm. Under ABA Model Rule 1.9 regarding “Duties to Former Clients,” the duty of loyalty is lessened somewhat to those matters that are the same or substantially related to what the lawyer or law firm previously did for the former client. As such, it is not a conflict of interest for the lawyer or law firm to be “directly adverse” to a former client so long as the new matter is not substantially related to the previous representation. With respect to matters being “substantially related,” Comment 3 to ABA Model Rule 1.9 provides:

Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has
previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Imputed Disqualification and Screening Procedures to Prevent Such Imputed Disqualification in Certain Circumstances

ABA Model Rule 1.10(a) addresses the general rule of imputed conflicts. The Rule provides that “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.” The Rule does provide exceptions to imputation, specifically when “the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.” ABA Model Rule 1.10(a)(1). ABA Model Rule 1.10(a)(2) also provides an exception to this general rule of imputed conflicts if the situation involves the lateral hire of the affected lawyer. Thus, if “the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer’s association with their prior firm,” and if the law firm timely screens the tainted lawyer(s) pursuant to the screening provisions of the Rule, the entire law firm will not be disqualified from the representation and others will be able to “directly adverse” to the former client, even in a substantially related matter. Those provisions, per ABA Model Rule 1.10(a)(2), are as follows:
(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.

As to what constitutes an effective screen, ABA Model Rule 1.0(k) defines “screened” as “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” While the definition itself provides little, if any, guidance as to what the lawyer or law firm is expected to do to establish an effective screen, Comment 9 to ABA Model Rule 1.0 provides some guidance:

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form,
relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

As to the timing for the implementation of the screening procedures, Comment 10 to ABA Model Rule 1.0 notes that, “[i]n order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.”

Kentucky’s equivalent of Rule 1.10(a) (Kentucky SCR 3.130 (Rule 1.10(d))² predefined the ABA’s adoption of Rule 1.10 screening procedures and, as written, the applicability of Kentucky’s version is not limited to lateral hire situations. But importantly for present purposes, in conjunction with Kentucky’s adoption of this “screening rule,” the Kentucky Bar Association’s Ethics Committee issued KBA E-418 (Nov. 2001) to provide guidance, in part, as to what constitutes an adequate screen. Those provisions include that the personally disqualified lawyer “(i) will not participate in the matter; (ii) will not talk to any other member of the firm about the matter or share documents related to it; (iii) will not impart (and prior to screening has not imparted) any confidential information to the firm; (iv) will not have access to any files or documents relating to the matter; or (v) will not receive a direct and specific apportionment of fees or other financial benefit generated in the matter.” KBA E-418, at p. 3.

Particularly in jurisdictions that have adopted the ABA’s more restrictive version of Rule 1.10, the use of screening procedures to prevent the imputation of a tainted lawyer’s disqualifying conflict to his/her entire firm is limited to former client conflict situations. That is even true of Kentucky’s Rule. It cannot be used alone to remedy any current client conflict situations. That being said, a lawyer or law firm – in conjunction with seeking waivers from current clients – may offer to implement these types of screening procedures or, alternatively, one or both client may condition their willingness to waive a conflict on the law firm implementing such procedures.

Prospetaive or “Advance” Waivers

A client can agree to waive, in advance, a future conflict of interest that might later arise after the client has retained the lawyer and while that representation is ongoing. In fact, the lawyer may condition his/her representation on the client’s willingness to agree to such a

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² Kentucky SCR 3.130 (Rule 1.10(d)) provides: “A firm is not disqualified from representation of a client if the only basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 and: (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and (2) written notice is given to the former client.”
waiver. Comment 22 to ABA Model Rule 1.7 addresses generally this concept of a prospective or “advance” waiver and the effectiveness of such a waiver:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

In essence, the test as to whether an “advance” waiver is likely to be upheld and enforceable is whether the consent that the client gave was an informed one. The more sophisticated the client or client representative, the more likely the “advance” waiver will be upheld. Likewise, the more specifics the lawyer can include in the “advance” waiver (as to the types or subject matters of possible future adverse representations or the names of clients or types of clients the lawyer or law firm may represent pursuant to the “advance” waiver) and/or the more the lawyer and the client actively negotiate the terms of the “advance” waiver, the more likely the “advance” waiver will be upheld.

A typical “advance” waiver in an engagement letter would read something like this:

We also want to explain that the Firm represents many other companies and individuals. It is possible that, while we are representing the Company, some of our present or future clients may (a) be direct competitors of the Company or otherwise may have business interests that are contrary to the Company's
interests; or (b) seek to engage the Firm in connection with an actual or potential transaction, pending or potential litigation, or other dispute resolution proceeding in which such client’s interests are, or potentially may become, adverse to the Company’s interests. We therefore ask for the Company’s consent in advance to our Firm’s representation of existing or new clients in any matter (transactional, litigation, or otherwise) adverse to the Company, so long as such other matter directly adverse to the Company is not substantially related to our representation of the Company. In so agreeing, the Company will be waiving any conflict of interest that exists or might be asserted to exist that might preclude, challenge, or otherwise disqualify the Firm in any representation of any other client with respect to any such matter.

By signing below or sending a confirming email, the Company evidences its consent to (a) the advance waiver of conflicts of interest, as set forth in the preceding paragraph; and (b) our ability to disclose the Company’s willingness to waive, in advance, the conflicts of interest.

We have italicized and bolded, for purposes of these written materials, the language in the “advance” waiver provision that carves out matters that are substantially related to the legal services or representation the lawyer and his/her law firm are providing to the consenting client. This language has been purposefully chosen. It mimics the “substantially related” language found in Rule 1.9’s former client conflict rule. In other words, this type of “advance” waiver in an engagement letter makes the relatedness of the two matters relevant to the current client conflicts analysis.

Moreover, the lawyer and the client can, in fact, negotiate the terms of the “advance” waiver. One of the practical reasons for a lawyer and law firm to insist upon an “advance” waiver is that the lawyer or law firm, at the start of an attorney-client relationship with a client, may not know how much work the lawyer or law firm can expect from a client with whom or which it has never had a relationship. As noted above, pursuant to Rule 1.7 regarding conflicts of interest involving current clients, if the lawyer represents a client on any matter, the lawyer cannot be “directly adverse” to that client on any other matter, no matter how unrelated the other matter is, unless the lawyer has the informed consent, confirmed in writing, of all affected clients (including, notably, the client who will be the adverse party in the new matter). Furthermore, pursuant to Rule 1.10(a), the particular lawyer’s disqualifying conflict under Rule 1.7 is imputed to that lawyer’s entire law firm.

If the client persists in refusing to sign an engagement letter with a broader “advance” waiver, the lawyer or law firm can attempt to negotiate an “advance” waiver whereby the client agrees to the “advance” waiver for a period of years and consents to waive any conflict of
interest such that the lawyer and his/her law firm can be adverse to the client in unrelated matters during that period of time. The lawyer and client could agree that the waiver will be effective for the duration of any adverse matter that was commenced within that time period. The lawyer and the client can likewise agree to revisit the “advance” waiver provision in light of the law firm’s and client’s ongoing relationship, the types of matters for which the client has retained the law firm over that time period, the amount of legal work the client has given the law firm during that time period, and the parties’ respective expectations.

Outside Counsel Guidelines

Over the last two decades or so, many larger organizational clients have developed “Outside Counsel Guidelines” that they ask their retained outside lawyers and law firms to accept as terms and conditions of the representation. Very often, these “Outside Counsel Guidelines” will identify what the client will, or will not, pay for; how the billing and invoicing is to be handled; and how the lawyer is to provide updates and budgets for the representation.

But equally as often, the “Outside Counsel Guidelines” contractually change (or seek to change) who the lawyer or law firm are to consider as “the client” for conflict of interest purposes. Often, a client will include in the “Outside Counsel Guidelines” a “Three Musketeers Provision”– “All for One, and One for All” – whereby the lawyer and the law firm contractually agree that, for conflict of interest purposes, the law firm will be deemed for conflict of interest purposes to not only represent the specific organization or entity that it is actually representing, but it will also be deemed to represent every member of the entity’s corporate family structure. Two examples of such a “Three Musketeers Provision” are as follows:

[Client] expects Outside Counsel to undertake a conflicts check before representing [Client] or any party adverse to [Client] in any matter. For purposes of trying to identify potential conflicts of interest, [Client] is deemed to include any entity listed on Appendix E, or any list of [Client] entities after the date hereof.

* * *

For purposes of determining whether a proposed representation may be conflicting (and would thus require a waiver), a law firm’s representation of [Client] and any entity of which [Client] directly or indirectly owns 50% or more of the equity or similar interests will be deemed representation of the entire group.

Under normal circumstances and aided by a carefully crafted engagement letter that specifies exactly who is a client, and who is not a client, the only entity that the lawyer or law firm need consider for conflict of interest purposes would be the actual client the lawyer is representing. See, e.g., ABA Model Rule 1.7, Comment 34 (“A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule
Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.

But by accepting the representation pursuant to “Outside Counsel Guidelines” with a “Three Musketeers Provision,” the lawyer and the law firm have contractually agreed that all such constituents are clients for conflict of interest purposes. As such, the lawyer who undertakes a representation pursuant to “Outside Counsel Guidelines” must carefully read the “Guidelines” and recognize the dangers and the implications of its provisions.

Some “Outside Counsel Guidelines” also have “Most Favored Nation Provisions,” whereby the lawyer and the law firm are asked to contractually agree to charge the client hourly rates no higher than the hourly rate it charges its best clients or its best non-government clients. Likewise, some “Outside Counsel Guidelines” require the law firm to provide the client with free CLE presentations if it offers such presentations for free to other clients of the firm.

These are just some of the provisions a lawyer or law firm may find in a client’s “Outside Counsel Guidelines,” but they are also some of the more dangerous and expensive if overlooked or if the lawyer undertakes the representation of the client pursuant to “Outside Counsel Guidelines” and either does not read them and/or does not alert others in the law firm of their existence.

Conclusion

There is nothing unethical about “advance” waivers or about a lawyer asking a client to consent to waive a future conflict of interest. There is also likely nothing unethical about many provisions that the lawyer may be asked to contractually accept in a set of “Outside Counsel Guidelines.” Perhaps, however, both scenarios provide an opportunity for the lawyer and the client to communicate with one another about their respective expectations.

The concepts behind the rules for current client conflicts, and imputation of those conflicts, as currently set forth in the ABA Model Rules of Professional Conduct, arose when a large law firm might be dozens of lawyers instead of hundreds. But under those Rules, if any one of the law firm’s lawyers undertakes a representation of a client without an “advance” waiver, the entire law firm will be conflicted out of any representation “directly adverse” to that client, absent the client’s consent, no matter how unrelated that other matter might be to what the lawyer is doing for the client. Superimpose on that situation a set of “Outside Counsel Guidelines” that expands the definition of “the client” to every possible entity within the actual client’s corporate family structure and one can see the difficulty in the law firm agreeing to such a representation. One can also see the dangers of the lawyer taking it upon him/herself to commence the representation without fully appreciating the possible ramifications of his/her doing so.
Sophisticated lawyers and sophisticated clients should be able to come to a reasonable understanding of the respective commitments that each is making to the other. If they cannot come to such a mutual understanding, then it becomes a business decision for the lawyer and his/her law firm as to whether the lawyer and the law firm are willing to undertake the representation given the client’s unwillingness to agree to any type of “advance” waiver of conflicts or the client’s insistence on the representation being governed by the client’s own “Outside Counsel Guidelines.”
Panelist Bios

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Miriah Holden is associate counsel at American Savings Bank, F.S.B. in Honolulu, Hawaii. Before joining the legal department, Ms. Holden was in the Bank Regulatory Compliance department, focusing on lending compliance and regulatory issues. Prior to joining American Savings Bank, Ms. Holden was in private practice for 8 years with a general litigation practice which included foreclosures, collections, bankruptcy, and commercial litigation. Miriah is new to the Business Law Section as a Business Law Fellow. She is also very involved in the Young Lawyers Division.

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Mr. Singleton is licensed to practice law in the Commonwealth of Kentucky and the State of Georgia. He is Vice Chair of the ABA Business Law Section’s Professional Responsibility Committee and a member of the Lexington-Fayette Urban County Government’s Ethics Commission.