

# Some Conflicts Are Without a Cure

By Melody Nashan

Many lawyers believe that all conflicts of interest are waivable. There are, however, both consentable and nonconsentable conflicts of interest. “[S]ome conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”<sup>1</sup>

The comments to Rule 4-1.7 provide the steps a lawyer must take to address a conflict of interest problem:

- (1) clearly identify the client or clients;
- (2) determine whether a conflict of interest exists;
- (3) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable; and
- (4) if so, consult with the clients affected under Rule 4-1.7(a) and obtain their informed consent, confirmed in writing. The clients affected under Rule 4-1.7(a) include both of the clients referred to in Rule 4-1.7(a)(1) and the one or more clients whose representation might be materially limited under Rule 4-1.7(a)(2).<sup>2</sup>

Step three is critical, yet often skipped by many practitioners.

Conflicts of interest arising from a lawyer’s *former* representation of a client are consentable if that consent is informed and confirmed in writing.<sup>3</sup> But, not all conflicts of interest arising

from the representation of *current* clients are consentable. The operative Rule of Professional Conduct is 4-1.7. It provides:

(a) Except as provided in Rule 4-1.7(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 Rule 4-1.7(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.

Conflicts that are not consentable, therefore, are (1) conflicts in which the lawyer cannot reasonably believe he can provide competent and diligent representation to each affected client, (2) conflicts in which the representation is prohibited by law, and (3) conflicts in which the representation involves assertion of a claim by one client against another client in the same litigation or other proceeding.<sup>4</sup> If any one of the three is present, the issue of consent is not reached, *i.e.*, that conflict cannot be waived by the clients.

Client loyalty, of course, is the basis for prohibiting conflicts of interest. “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>5</sup> The Supreme Court of Missouri has emphasized “that ‘the nature of a lawyer’s profession necessitates the utmost good faith toward his client and the highest loyalty and devotion to his client’s interests.’”<sup>6</sup> Recently, the Missouri Court of Appeals wrote: “The lawyer-client relationship is grounded in the fundamental understanding that a lawyer will give his or her complete and undivided loyalty to the client, fully applying the lawyer’s professional training, ability, and judgment.”<sup>7</sup>

Whether a conflict is prohibited by applicable law is a simple concept.<sup>8</sup> Also, it is easy to understand why lawyers may not represent opposing

parties in the same litigation, regardless of the clients' consent.<sup>9</sup> "Representation of clients whose interests are directly adverse in the same litigation constitutes the 'most egregious conflict of interest.'"<sup>10</sup> Other nonconsentable conflicts, however, may not be so obvious. In *State ex rel. Horn v. Ray*,<sup>11</sup> the Missouri Court of Appeals recently analyzed whether a conflict was consentable where the lawyer sought to represent both the defendant and the alleged victim in the State's prosecution of that defendant for second-degree domestic assault. The alleged victim was the defendant's wife. The lawyer obtained affidavits executed by the clients purporting to waive "any conflict of interest" and asserting that neither client would testify at the trial.<sup>12</sup> The county prosecutor moved to disqualify the lawyer. When the trial court denied the motion to disqualify, the prosecutor petitioned the court of appeals for a writ of prohibition.<sup>13</sup>

The court of appeals found that the lawyer could not reasonably believe that he would be able to provide competent and diligent representation to both the defendant and alleged victim in the criminal prosecution.

Counsel's duty of loyalty to the defendant ... prevents counsel from fairly presenting to the victim all possible courses of action because some of those options – most notably testifying against the defendant – would be detrimental to the defendant. Counsel's duty of loyalty to the defendant thus plainly forecloses alternatives that otherwise might be recommended to the victim. ... Likewise, counsel's duty of loyalty to the victim prevents

counsel from fairly presenting to the defendant all possible courses of action because some of those options – such as testifying that the victim lied about events leading to the instant charges or claiming self defense – would be detrimental to the victim. Thus, counsel's duty of loyalty to the victim forecloses alternatives that would otherwise be available to the defendant....<sup>14</sup>

"In our circumstances, counsel's duty of loyalty to one client naturally compromises his duty of loyalty to the other."<sup>15</sup>

Rule 4-1.7(b)(1) specifies an objective test as to whether the lawyer "reasonably believes" he can provide competent and diligent representation to both clients. Rule 4-1.0(h) provides: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." One commentator succinctly explained: "Unless each client has the same opportunity to achieve a good result with the 'conflicted' lawyer as she would with an independent lawyer, the lawyer cannot represent both clients."<sup>16</sup>

The court of appeals also found that counsel in *State ex rel. Horn v. Ray* could not meet subsection (b)(3) of Rule 4-1.7. Remember, all requirements of 4-1.7(b) must be met. Rule 4-1.7(b)(3) prohibits representation by a lawyer of two clients in the same litigation, or other proceeding before a tribunal, where one client is asserting a claim against the other. The lawyer argued that because the alleged victim had chosen not to testify, the clients' interests were the same. The court of appeals was not persuaded.

Looking to the plain language of the rule, the court found that Rule 4-1.7(b)(3) applied to "clients" in the same litigation or proceeding, not only to opposing parties.<sup>17</sup> The court found that the alleged victim in *State ex rel. Horn v. Ray*, at least initially, had asserted a claim when she reported allegations against the defendant to the police and sought the State's protection.<sup>18</sup> The court held that the defendant and alleged victim could not, therefore, consent to the conflict of interest.<sup>19</sup>

Also, sometimes conflicts are not consentable because "informed consent" cannot, in a practical sense, be obtained. Rule 4-1.0(e) defines informed consent:

"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.

Informed consent, therefore, requires the lawyer to disclose to the affected clients the pros and cons of consenting to the representation despite the conflict of interest. "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."<sup>20</sup> Any consent obtained must be "knowing, intelligent, and voluntary."<sup>21</sup>

The client must be capable of giving consent. In *In re Schaefer*, Client A was so obsessed with Client B that

the Supreme Court of Missouri found that the lawyer reasonably should have known that Client A's judgment was impaired and that he could not give knowing consent to any transaction involving Client B.<sup>22</sup> "The client must be of sufficiently sound mind to assent to the conflict, to understand the consequences of consent, and to exercise judgment in the matter."<sup>23</sup> The client must not be unduly influenced by another person.<sup>24</sup> "Consent purportedly given by a client whom the lawyer should reasonably know lacks capacity to give consent is ineffective."<sup>25</sup>

There also may be situations where the lawyer simply cannot obtain informed consent because, for example, he cannot disclose information to one client because it is confidential information the lawyer has obtained from another client. Rule 4-1.6(a) prohibits lawyers from disclosing confidential information of a client unless the client gives informed consent, the disclosure is impliedly authorized, or it is permitted by Rule 4-1.6(b). If the lawyer must disclose confidential information from Client A to Client B in order for Client B to have adequate information to decide whether to consent to the conflict, the lawyer will have to obtain Client A's informed consent to disclose that confidential information, per Rule 4-1.6(a). Again, the lawyer would have to fully disclose to Client A all the material risks of and reasonable alternatives to that disclosure by Client A of confidential information to Client B.

Finally, if a lawyer does jump all the hurdles and obtain informed consent to a conflict of interest, that informed consent must be confirmed in writing. "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."<sup>26</sup>

While it might seem easier to skip over the more involved steps and go straight to seeking informed consent to a conflict of interest, the analysis cannot start there. Attorneys must first analyze the facts of the case and the nature of the representation to determine, objectively, whether they will be able to give impartial and candid advice to both clients, and to advance the interests of both clients. If the conflict is consentable, that prior thorough analysis of the requirements in Rule 4-1.7(b) will better equip attorneys to make the disclosures necessary to obtain truly informed consent.

Many tools are available to help lawyers analyze potential conflicts. Rule 4-1.7 and its comments provide helpful and rather extensive guidance. Some concerned lawyers analyze potential conflicts by brainstorming about all the things that could go wrong in a joint representation. Others take it a step further and try to consider all the arguments a plaintiff's malpractice attorney reasonably could make in a case against them. Others seek advice from their insurance carrier's risk managers and/or from the Legal Ethics Counsel. Whatever tools attorneys use, they should not assume that consent cures all ills.

## Endnotes

- 1 Rule 1.7 cmt. [14].
- 2 Rule 4-1.7 cmt. [2].
- 3 Rule 4-1.9.
- 4 Rule 4-1.7(b)(1) – (3).
- 5 Rule 4-1.7 cmt. [1].

6 *In re Oliver*, 285 S.W.2d 648, 655 (Mo. banc 1956), quoting *In re Thomasson's Estate*, 144 S.W.2d 79, 83 (Mo. 1940).

7 *State ex rel. Horn v. Ray*, 325 S.W.3d 500, 507 (Mo. App. 2010).

8 "For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest." Rule 4-1.7 cmt. [16].

9 Rule 4-1.7(b)(3); Rule 4-1.7 cmt. [23].

10 *State ex rel. Horn v. Ray*, 325 S.W.2d at 509, quoting *Nunez v. Lovell*, Civil No. 2005-7, 2008 WL 4525835, \*3 (D.V.I., Oct. 3, 2008).

11 325 S.W.3d 500 (Mo. App. 2010).

12 No evidence was presented as to what information, other than the right not to testify, was explained to the clients about the conflict of interest posed by the joint representation, or how the conflict might affect the lawyer's representation of each client. *Id.* at 503-04.

13 *Id.* at 504.

14 *Id.* at 508.

15 *Id.*

16 W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES & EXPLANATIONS 296 (2d ed. 2007).

17 Rule 4-1.7(b)(3).

18 *State ex rel. Horn v. Ray*, 325 S.W.3d at 509.

19 *Id.*

20 Rule 4-1.0 cmt. [6].

21 *In re Schaeffer*, 824 S.W.2d 1, 3 (Mo. banc 1992); *State ex rel. Union Planters Bank, N.S. v. Kendrick*, 142 S.W.3d 729, 739 (Mo. banc 2004).

22 *Schaeffer*, 824 S.W.2d at 4.

23 *Id.* at 3.

24 *Id.*

25 *Id.*

26 Rule 4-1.0(b).

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