

Conflicts of Interest—The Basics

By John W. Allen

John W. Allen, chairperson of the State Bar of Michigan's Standing Committee on Professional and Judicial Ethics, has prepared a four-part series on the important topic of conflicts of interest. Parts One and Two were published in the January 1999 edition of the Michigan Bar Journal. This publication covers Parts Three and Four.

Part Three—Conflict with Former Client

The gist of MRPC 1.9 is that, even after a lawyer's representation of a client ceases, the lawyer may not represent a prospective client (Client A on Decision Tree No. 3) in the same or a substantially related matter in which the prospective client's interests are materially adverse to those of the former client without the consent of the former client (Client B on Decision Tree No. 3.) The aim is to prevent use of protected information about a client to that client's detriment.¹

Later adverse representation of a former client is regulated, but not flatly prohibited, as is direct representation adverse to a present client under MRPC 1.7.² It is permissible if the prospective representation is not sub-

stantially related and if no protected information will be used or revealed. But, even if the matters are neither the same nor substantially related, nevertheless the lawyer may still not represent another person in a matter in which the prospective client's (A) interest are materially adverse to those of the former client (B), if information protected by MRPC 1.6 (e.g., "confidences or secrets" of the former client) would be revealed, or used to the disadvantage of the former client. Even if otherwise prohibited, such a conflict may be waived, if the former client consents after consultation.

As with a present client, this analysis does *not* turn upon any likelihood of an "appearance of impropriety," which was the test applied by the former Code of Professional Responsibility (CPR), and which is specifically rejected by both the American Bar Association's Model Rules of Professional Conduct, as well as the Michigan Rules of Professional Conduct (MRPC), because it is too vague a standard for discipline.³ Unlike the CPR, the MRPC contains a specific provision (MRPC 1.9), which directly addresses former-client conflicts, with specific fact-based tests.

Who is the Client?

The first step is to *identify the client*. Lawyers represent clients, not property, or issues, or positions, or work product. The fact that the former representation concerned the same property or issue, is *not* controlling. If there had never been any attorney-client relationship between the

lawyer and the person claiming to be the former client (B), then the analysis under MRPC 1.9 would end with that conclusion. There is no conflict, and the prospective representation is permitted, even if, in the past, the lawyer had represented one or more others in relation to the same property or issue.⁴

There is no clear indication of when a client becomes a former client. Since the principal aim of MRPC 1.9 is to preserve protected information, the currency or usefulness of such information, in light of its age, is one logical ground of inquiry.⁵

Some decent interval is usually required, and the "hot potato" client may not be dropped, attempting to turn the present client conflict prohibition under MRPC 1.7, into a former client conflict under the more lenient standard of MRPC 1.9.⁶

Exception—Required Conditions

- Will representation be materially limited?

Generally, the representation of prospective client (A) will be prohibited, if the former client (B) could have a limiting effect, such as foreclosing alternative courses of action. This analysis is objective.⁷

- Does the prospective representation concern the same or a substantially related matter?

This "substantial relationship" test was first fashioned by courts, and then codified into ABA Model Rule 1.9(a), from which MRPC 1.9 was adopted. In deciding whether a "substantial relationship" exists, the scope and subject matter of the

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**EXHIBIT A
CONFLICT WAIVER/CONSENT**

Re: Waiver of Conflict and Consent to Representation.

Dear [A] and [B]:

We represent both [Client A] and [Client B]. [Client A] has asked us to represent it involving [Describe Engagement].

We believe that the representation of [A] and our relationship with [B] will not be adversely affected; nevertheless, the Rules of Professional Conduct prohibit us from representing either [A] or [B] in this matter, without the knowing and voluntary waiver of the conflict by both clients, and that you be informed, and consider, the implications, advantages, and risks of doing so.

Our representation of [A] in this matter could yield **advantages** to both parties. We routinely handle matters of this nature and the benefit of our experience may assist both parties in resolving these issues in the most efficient way, and successfully concluding this transaction as both [A] and [B] desire. [Add other fact-specific advantages.]

There are also **risks**. Because we have represented both parties, the possibility exists that protected information could be transferred during the representation. While the possibility exists, we believe the probability of this occurring to be remote and we do not anticipate the exchange of any such information. We shall admonish all lawyers and staff on this matter to avoid it. In addition, an irreconcilable actual conflict in the future could mean that we could not represent either of you in this matter. [Add other fact-specific risks.]

Because of our conflict, both of you may wish to seek independent counsel to advise each of you regarding this waiver. If, after full review and consultation, you decide to waive the conflict and allow us to represent [A] (or [A and B]) in this matter, please sign your copy of this letter and return it to us. If you have any questions, or if we can provide any other information, please call us.

Very truly yours,

[Lawyer]

After full review and consultation, the undersigned waive the conflict and consent to [Your Firm]'s representation of [Prospective Client A and Client B].

Signed:
[Prospective Client A]

Signed:
[Client B]

former client is likely to be revealed or used adversely in the prospective representation, then the prospective representation will be prohibited, absent a waiver by the former client.

• Is there an effective waiver of the conflict by the Former Client?

The disqualification and the prohibition on use of information imposed by MRPC

1.9 are safeguards for the benefit of the former client, and thus may be waived; the former client may give consent to an otherwise improper representation, provided that the consent is given "after consultation," which requires specific disclosure to the client of the implications, advantages and risks of the waiver.¹⁹

Part Four—Waivers, Consents and Screening Devices

Conflicts are not absolute. Consistent with the principle that clients retain ultimate control over matters handled by their lawyer, the Michigan Rules of Professional Conduct (MRPC) provide for client waiver and consent, permitting engagements which otherwise would be prohibited. In certain limited instances regarding lawyer's changing public or private employment, screening devices may be used to cure a conflict, without the consent of the client.

Waivers and Consents

Although MRPC 1.7 and 1.9 generally prohibit a lawyer from undertaking representation which results in a conflict of interest, each of these rules also provides for the possibility of client consent to overcome what otherwise would be a prohibitive conflict. Conflicting client interests may be represented if two general conditions are met: the lawyer must reasonably believe that the client will not be adversely affected; and the client must consent after consultation.²⁰

Lawyer Must Reasonably Believe That Client Will Not Be Adversely Affected

The comment to MRPC sets forth the standards for determining whether it is proper for a lawyer to obtain a client's consent to otherwise impermissible representations. When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. These are conflicts without cure, and the client's waiver and consent should not be sought.²¹

The seeking of consent also presumes that the client is competent to do so; consent should not be sought from a client who is incompetent, ill-advised, or disadvantaged in the bargaining process such that the integrity of the waiver and consent would be compromised.²²

Consultation

The second condition necessary for curing an otherwise impermissible conflict is that the client must consent after consultation. "Consultation" is defined in the Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."²³

The consultation requirement is intended to assure that the client is reasonably informed. Thus, the lawyer must disclose that multiple representation is sought and the implications of the prospective representation, including its risks and advantages.²⁴

Writing Preferred, But Not Required

The MRPC does not require waivers and consents to be in writing. Although verbal



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explanations may frequently be sufficient, written confirmation is preferred. Likewise, although signature of a waiver and consent is not required, a writing signed by the client may often be useful as proof in the event of a dispute. (See Exhibit A on the previous page for an example of a Waiver and Consent.)

Prospective Waivers

A prospective waiver, or a waiver and consent to a *future* conflict, is permissible. In a formal opinion, the ABA has said that a lawyer may obtain advance waiver from a client allowing the lawyer to represent even unidentified future clients with interests potentially adverse to the existing client's interest. However, the client must be given enough information to make an intelligent decision regarding the waiver and consent, and (as with all waivers and consents) the lawyer must reasonably believe that the future representation will not adversely affect the original client's *representation* in the case of *indirect* conflict), or the *relationship* with the original client (in the case of a *direct* conflict).²⁵ (See Exhibit B, for an example of an Advance Conflict Waiver.)

Waiver Without Consent: Screening Devices

The prohibition of a conflicted engagement may be avoided, without the client's consent, in the limited circumstances of a lawyer's changing government or private employment. In regards to the screened lawyer, the client of the former employer becomes a "former client," under MRPC 1.9, which presumes that the lawyer gained or had access to protected information about the client during the former employment.

In Michigan, this presumption is rebuttable. Law firms faced with actual or potential disqualification due to a new hire or merger, may screen the affected lawyer from involvement, as specifically permitted by MRPC 1.10(b) and Michigan Formal Ethics Opinion R-5.²⁶ The screen rebuts the presumption that confidential information should be attributed from the screened lawyer's former employment and former client. If implemented promptly (*e.g.*, at the inception of new employment, or as soon as the potential conflict becomes known), the lawyer's present employer may continue to represent the former client's opponent, even as a direct adversary.

EXHIBIT B ADVANCE CONFLICT WAIVER

As part of our engagement for services, you have agreed to waive and consent to our representation, now or in the future, of *[Other Client]*, even though adverse to you, regarding *[Describe Scope of Engagements Waived]*. We have concluded that neither our representation of you nor our relationship with our other client or clients would be adversely affected. We have also concluded that no such conflict presently exists. You agree. In order to obtain such a waiver and consent, especially in advance of any actual conflict, the Rules of Professional Conduct require that you be informed, and consider, the implications, advantages and risks of doing so.

The **implication** is that future circumstances could arise in which *Other Client*, represented by our lawyers, would be adverse to you in another matter. In your various commercial enterprises, you are involved in *[Describe activities]*. We are active in the representation of others who often find themselves in relationships in competition with and adverse to the owners and operators of such businesses. There is no doubt that a conflict situation could arise in the future.

The **advantage** of the consent and waiver is that it would allow our firm to continue representation of you in a variety of matters, even as you increase your business activities. This preserves your choice of counsel, in this matter, which both you and we deem to be important.

The principal risk in a future conflict is that, in this or other previous representations of you, we may have obtained confidential or protected information, which could be of use to an adversary. Of course, under no circumstances, would we actually disclose or use such confidential information against you; nor do we interpret your waiver and consent as an agreement to waive any rights of confidentiality of the attorney-client privilege.

You have told us that you have no objection to our representation of other such clients adverse to you, now or in the future, regarding the above types of matters, and that you still wish that we enter into an engagement for legal services with you. You also understand that we have recommended that you have the right to [and in fact did] seek independent legal counsel about this matter.

By signing this letter, you affirm that understanding, and waive the conflict of interest, or potential conflict of interest, which might exist now or in the future, and consent to our representation. Your waiver and consent is a requirement of the Rules of Professional Conduct, and we are relying upon it as a condition to accepting and continuing this engagement.

Rule 1.9 Conflict of Interest: Former Client.

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
- (b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client:
 - (1) whose interests are materially adverse to that person, and
 - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
 - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Typical elements of an effective screening device include:

- Separation from any participation in the representation;
- Segregation of file materials;
- Instructions to other staff regarding screening restrictions;
- Notice to the relevant clients; and (if the screened lawyer has actual knowledge

of material protected information of the former client)

- Segregation of fees derived from the representation.²⁷

If the screened lawyer does not have actual knowledge of material protected information of the former client, or if the compensation benefit is only indirect, then segregation of fees derived from the rep-

resentation is not necessary. A screening device is equally useful and necessary to avoid imputed disqualification upon the transfer of staff or nonlawyer employees.²⁸ If the representation includes an appearance in a tribunal, then notice to the tribunal is also necessary.²⁹ (See Exhibit C for an example of a Screening Device and Notice to the Tribunal). ■

EXHIBIT C

SCREENING DEVICE MEMORANDUM

TO: ALL ATTORNEYS AND STAFF
 DATE: ___/___/___
 RE: [Client A—Name]; SCREENING DEVICE AND IMPLEMENTATION PROCEDURES FOR LATERAL LAWYERS.

1. The "Screened Lawyer" are [Lawyers #1 and #2], who previously worked at [Former Firm] and joined This Firm on ___/___/___.
2. Before that date, [Screened Lawyer #1] and the [Former Firm] represented [Former Client B] against [Client A]. It is believed that the [Screened Lawyer #1] may have acquired privileged or confidential information material to [Former Client B].
3. Before joining This Firm, [Screened Lawyer #2] did not personally represent [Former Client B], and did not acquire privileged or confidential information material to [Former Client B].
4. In order to avoid any conflict of interest, imputed or otherwise, this memorandum is intended to operate as the implementation of a Screening Device by This Firm in relation to the Screened Lawyers, as concerns all matters related to [Former Client B].
5. The Screening Device consists of the following elements:
 - A. **Prohibitions Against Screened Lawyers.** By this memo, the Screened Lawyers are prohibited from:
 - (1) Participating in any way in the preparation or conduct of any matter related to [Former Client B].
 - (2) Discussing any aspect of any [Former Client B] matter with anyone at This Firm.
 - B. **Restrictions Upon Remuneration.**
 - (1) Because of acquisition of protected information, [Screened Lawyer #1] is prohibited from receiving, directly or indirectly, any remuneration derived from This Firm's representation adverse to [Former Client B].
 - (2) Because he/she has not acquired protected information regarding [Former Client B], [Screened Lawyer #2] is not prohibited from receiving remuneration directly or indirectly regarding This Firm's representation adverse to [Former Client B].
 - C. **File Management.** In addition, by this memo, This Firm takes the following action:
 - (1) The Screened Lawyers are excluded from any participation in any matter adverse to [Former Client B].
 - (2) All other attorneys and staff in This Firm are instructed not to discuss such matters in the presence of the Screened Lawyers, not to allow the Screened Lawyers to review any documents or any other materials relating to, and not to receive any information from the Screened Lawyers concerning any such matter.

- (3) The files relating to such matters shall be moved to a physically segregated place, and marked, indicating that the files contain screened material. Any attorney or staff person reviewing the marked file, shall also review and consult this Screening Memorandum, which shall be prominently placed in the file.
 - (4) By appropriate accounting measures, the remuneration attributable to this representation shall be segregated, so as to assure that the [Screened Lawyer #1] will not receive any portion of it, directly or indirectly.
- D. **Special Instruction to Staff in Charge of File.** The staff person in charge of this file shall do the following:
- (1) Prepare a label and place it on the outside of the file stating, "THIS FILE CONTAINS SCREENED MATERIAL," or words to that effect.
 - (2) Place a copy of this Screening Memorandum prominently in the file, by establishing a separate file folder so labeled, or by separately attaching it to the principal file folder.
 - (3) Arrange for the distribution of this memorandum to all lawyers and staff members at all offices of This Firm.
- E. **Notice to Tribunal.** The attached Notice shall be filed with the Court and served upon all counsel of record and all unrepresented parties.
6. **Violations.** Any violations of these procedures should be reported immediately to the supervisory lawyer, Firm Ethics Committee, or Managing Partners.

NOTICE OF SCREENING DEVICE

[Court and Case Caption]
 Notice of Screening Device

TO: The Court, All Parties, and their Attorneys
 PLEASE TAKE NOTICE THAT on _____, 19____, [Your Firm] implemented a screening device in relation to [Screened Lawyers #1 and #2], previously employed by [Former Firm], which represents or represented one or more other parties or other related entities in the above matter.

This Notice is given pursuant to the requirements of Formal Opinion R-4 issued by the State Bar of Michigan Committee on Professional and Judicial Ethics.

Dated: _____, 19____. Respectfully submitted,

[Your Firm]

By: _____

Footnotes

1. See Footnote 1, MRPC 1.8(b).
2. See Part One—Present Client, *Direct Conflict*, *supra*.
3. See Footnote 5 and 6, *supra*, and Accompanying Text.
4. See Footnotes 6, 7 and 8, *supra*, and Accompanying Text.
5. *Annotated Model Rules of Professional Conduct* (3d Edition), ABA Center for Professional Responsibility (1996), pp 148-149.
6. Michigan Informal Ethics Opinion RI-139 (1992).
7. See Footnotes 13 and 20, *supra*, and Accompanying Text.
8. See, for example, *Analytical, Inc v NDP Research, Inc*, 708 F2d 1263 (CA 7, 1983). See also Michigan Informal Ethics Opinion RI-46 and RI-53 (1990).
9. See, for example, *Lawyer Disciplinary Board v Printz* (West Virginia, 1995), 11 BNA/ABA Lawyers Manual, Release No: 2 (2/22/95).
10. Michigan Informal Ethics Opinion RI-248 (1995).
11. *Annotated Model Rules of Professional Conduct* (3d Edition), ABA Center for Professional Responsibility (1996), *supra*, p 151.
12. See Footnotes 13, 20-21, *supra*, and Accompanying Text.
13. *Murphy v Riggs*, 238 Mich 151, 156; 213 NW 110 (1927).
14. *E.g.*, As with a large joint defense arrangement among insurers. *Anno. MRPC* (3d Edition) *supra*, pp 157-158.
15. See MRPC 1.9(c)(1).
16. See MRPC 1.8(b).
17. *Annotated Model Rules of Professional Conduct* (3d Edition), ABA Center for Professional Responsibility (1996), *supra*, pp 157-159.
18. Michigan Formal Ethics Opinion, R-4. See Part Four of this Series: "Waivers, Consents, and Screening Devices."
19. MRPC 1.9(a) and (b)(2). See Footnotes 15-17, *supra*, and Accompanying Text. See also Part Four of this Series: "Waivers, Consents and Screening Devices."
20. ABA, *Annotated Model Rules of Professional Conduct* (3d Edition), p 114-115.
21. ABA, *Annotated Model Rules of Professional Conduct* (3d Edition), p 115; *Burger v Kemp*, 474 US 806 (1987) (Blackmun, J, concurring).
22. Charles W. Wolfram, *Modern Legal Ethics*, §§ 7.1.7 and 7.2 (1986).
23. MRPC, *Terminology*.
24. MRPC 1.7(b)(2).
25. ABA Formal Opinion 93-372 (1993).
26. The term "screening device" is preferable to the more archaic "Chinese Wall," which is ethnically insensitive, and should be avoided. Regarding successive government and private employment, see MRPC 1.11.
27. Michigan Formal Ethics Opinion, R-4 (September 22, 1989). Not all jurisdictions permit screening to cure lateral hire conflicts without consent of the adverse party in private employment; if the lateral is a government lawyer, screening is generally permitted.
28. ABA Informal Ethics Opinion, 88-1526 (June 22, 1988).
29. MRPC 1.10(b)(2).