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THE FUNDAMENTALS OF LOSS PREVENTION FOR LAWYERS

Identifying, Managing, and Avoiding Conflicts of Interest

Contents

Avoiding and Mitigating Conflicts of Interest

Many lawyers find the rules governing conflicts to be confusing and difficult to apply in real-life situations. Yet the consequences of acting in a conflict can be severe. Conflicts have long been among the leading causes of legal malpractice claims and disciplinary actions. Conflicted lawyers face possible disqualification. Fees earned in connection with conflicted engagements may be disgorged. And lawyers acting in more serious conflicts could even face criminal charges.

This chapter is intended to aid Illinois practitioners in identifying when a potential conflict of interest exists, in implementing appropriate conflict check procedures, and in using conflict waivers to avoid the potentially harsh consequences presented by conflicts of interest.

Types of Conflicts

In Illinois, the Illinois Rules of Professional Conduct of 2010 (the "Rules" or a "Rule) set forth the general standards for determining when a conflict of interest exists and, if so, the circumstances under which the conflict can be waived, if at all. Generally, these standards are set forth in Rules 1.7 through 1.12:

- Conflicts in connection with the representation of current clients, including so-called "direct adversity" conflicts and "material limitation" conflicts, as well as other specific conflict scenarios (Rules 1.7 and 1.8);
- Conflicts arising from duties to former clients (Rule 1.9);
- Imputed conflicts (Rule 1.10);
- Conflicts relating to work as a current or former government officer or employee (Rule 1.11); and
- Conflicts relating to employment as a third-party neutral, such as a judge, mediator or arbitrator (Rule 1.12).

In addition to the foregoing, duties to prospective clients (Rule 1.18) should be considered when evaluating whether a lawyer will be disqualified from a contemplated engagement.

This Section provides an overview of each of the more common types of conflicts discussed in Rules 1.7-1.10 and Rule 1.18, including guidance for identifying each type of conflict and a discussion of the requirements for obtaining waivers under each scenario.

Practitioners should be aware that conflicts of interest are determined not by the effect of the conflict (i.e., whether the conflict harmed the client), but rather on the quality of the representation (i.e., whether the representation itself was harmed by the conflict). This distinction is important, as a conflict of interest may occur—and conflicts often do—even where the client suffered no actual adverse effect.

Concurrent Conflicts of Interest (Rule 1.7)

There are two types of concurrent conflicts of interest, (1) those that are based on direct adversity between current clients ("direct adversity" conflicts) and (2) those where a lawyer's

representation of a client is likely to be materially limited by the lawyer's duties to different current or former client or the lawyer's own personal interests ("material limitation" conflicts). As discussed below, if properly identified, many concurrent conflicts can be waived.

Identifying "Direct Adversity" Conflicts

Pursuant to Rule 1.7(a)(1), a conflict of interest exists if "the representation of one client will be directly adverse to another client." Such conflicts are often referred to as "direct adversity" conflicts and, despite the relatively simple, straightforward language of Rule 1.7, many lawyers consider them to be among the most difficult types of conflicts to identify.

A direct adversity conflict arises where clients are directly adverse to one another in litigation or a transaction. This could occur where the lawyer represents both clients in a single matter in which the clients are adverse. More frequently, such conflicts occur where the lawyer represents the affected clients in different matters. For example, Client A asks Lawyer to pursue a claim against Client B, whom Lawyer represents in an unrelated matter. Lawyer would have to decline the engagement relative to Client A, absent an appropriate conflict waiver.

Rule 1.7(a)(1) becomes more difficult to apply when one considers that "direct adversity" does not necessarily mean that one client has asserted a claim against the other. Direct adversity could occur in the litigation context where clients have competing interests but neither has asserted a claim against the other. This could occur where Lawyer represents Clients A and B jointly as co-defendants in litigation, and Client A has an interest in minimizing liability at the potential expense of Client B's defense.

Direct adversity can occur in the transactional context, as well. For instance, if Lawyer represents Client A in estate-planning matters and is asked by Client B to represent her in purchasing Client A's home, a conflict would exist. In order to proceed with the representation of Client B, Lawyer would have to obtain conflict waivers from both affected parties. Conflict waivers for concurrent conflicts are discussed below.

Direct adversity can occur under other circumstances, as well. For instance, direct adversity could occur where Lawyer, in representing Client A, is tasked with taking the deposition of Client B, whom the lawyer represents in an unrelated matter. If Client B is likely to testify in a manner unfavorable to Client A, Lawyer should seek to impeach Client B's credibility, but doing so would be directly adverse to Client B.

Another common example is where Lawyer represents the driver (Client A) and passenger (Client B) of an automobile in personal injury claims arising from an accident with another vehicle. In vigorously representing the passenger, Client B, the lawyer may be obligated to pursue a claim against Client A, the driver, thereby presenting a direct adversity conflict. In this scenario, a direct adversity conflict exists whether or not Lawyer actually asserts Client B's claim against Client A.

Direct adversity could even occur where the lawyer represents two clients with competing economic interests, though such potential conflicts are more typically analyzed under the "material limitation" standards discussed below.

Lawyers are sometimes mistakenly concerned that they will be conflicted via the representation of clients who are directly adverse to one another in a matter in which the lawyer plays no role. Under Rule 1.7(a)(1), a direct adversity conflict does not arise where two of the lawyer's current clients are directly adverse to one another in a matter in which the lawyer does not represent

either. For instance, if Lawyer represents Client A in connection with the sale of a home, and Lawyer represents Client B in connection with the preparation of a will, the fact that Client A is suing Client B for injuries sustained in an automobile accident would not create a direct adversity conflict where Lawyer has no involvement in the personal injury lawsuit. As discussed below, though there is no direct adversity conflict, such a scenario could present a risk that the lawyer's duties to one client will be limited by his representation of the other, thereby creating a material limitation conflict.

Identifying "Material Limitation" Conflicts

Even if two (or more) current clients are not directly adverse, a conflict may nonetheless arise where there is a significant risk that the lawyer's ability to represent one client will be materially limited by the lawyer's obligations to another current client. A lawyer's representation of a current client could also be materially limited due to the lawyer's obligations to a former client or the lawyer's own personal interests. Although the latter types of conflicts do not relate to the current representation of multiple clients, they are nonetheless referred to as "concurrent" conflicts. Pursuant to Rule 1.7(a)(2), a concurrent conflict of interest exists 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."

Even if the representation of a client *may* be materially limited by an obligation to a current or former client or the lawyer herself, a conflict will only exist under Rule 1.7(a)(2) if there is a *substantial risk* that such a material limitation will occur. The mere possibility of harm will not be sufficient to create a conflict.

In assessing a "material limitation" conflict, the practitioner should consider whether the lawyer has an incentive to act without appropriate diligence and zealousness due to some other interest or whether the lawyer's independent professional judgment would otherwise be compromised by such interest.

Almost any direct adversity conflict will also be a material limitation conflict, but material limitation conflicts often exist absent direct adversity. In fact, material limitation conflicts often occur during the representation of multiple clients with generally aligned interests. A common example is where Lawyer is asked to represent Client A and Client B in forming a joint venture. Lawyer may be limited in her ability to recommend or advocate for all possible positions on behalf of Client A due to her loyalties to Client B.

It can be especially difficult to identify when a lawyer's personal interests create a significant risk of material limitation. One example is where Lawyer owns stock in a corporation that Client has asked Lawyer to sue. Another example is where Client's interests require Lawyer to take a position that Lawyer considers morally objectionable. A third example is where Lawyer represents Client in litigation and the opponent files a motion for sanctions against both Lawyer and Client based on an allegation that a pleading was filed in bad faith. Under such a scenario, Lawyer and Client each arguably have an interest in blaming the other for the alleged pleading issue, thereby creating a possible conflict.

"Positional" Conflicts

Positional conflicts arise when a lawyer takes a position on behalf of a client in one matter, usually an appeal, which could have a negative impact upon a matter being handled for a different client. But such a scenario does not necessarily create a conflict of interest. Comment [24] to Rule 1.7 provides that "[t]he mere fact that advocating a legal position on behalf of one

client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest." Such a scenario presents a conflict only if there is a *significant risk* that advocating for one client's position will create precedent adverse to another client. Positional conflicts should be assessed under the standards for material limitation conflicts, and potential waivers should be addressed accordingly.

Waivers of Concurrent Conflicts

Concurrent conflicts—those based on direct adversity or a material limitation, including positional conflicts—can often be waived under appropriate circumstances. Rule 1.7(b) identifies the circumstances under which a waiver may be obtained:

> (b) *Notwithstanding the existence of a concurrent conflict of interest under paragraph (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.*

There are situations in which a concurrent conflict cannot be waived. A lawyer may not represent a client in the face of a concurrent conflict of interest unless the lawyer reasonably believes that he can provide competent and diligent representation despite the conflict. If the lawyer does not reasonably believe that he can provide such representation, the conflict cannot be waived. A lawyer's reasonable belief will be judged based on an objective standard: What would an objectively reasonable lawyer believe under the circumstances?

The practitioner should also pay careful attention to subsections (b)(1) and (b)(3). A direct adversity conflict cannot be waived, under any circumstances, if one client has asserted a claim against the other client in the same litigation or other proceeding before a tribunal. Under such circumstances, the lawyer would be precluded from representing one client or, possibly, both clients. And, if such a conflict arose during the representation, the lawyer would be required to withdraw.

Assuming that the requirements of subsections (1)-(3) are met, a conflict waiver will only be effective where the lawyer also obtains the informed consent of each affected client. In a direct adversity situation, both of the directly adverse clients must consent. In a material limitation situation involving two current clients, both current clients must consent. In a material limitation situation involving a current client and a former client, *both* the current client *and* the former client must consent.

It is not enough to obtain the client or former client's consent; the affected party's consent must be *informed*. Informed consent is discussed further in the section entitled *Obtaining Conflict Waivers: Informed Consent*, below.

Notably, conflict waivers relative to concurrent conflicts of interest do not need to be confirmed in writing, much less in a writing signed by the client. However, as discussed in greater depth later in this Guide, it is strongly recommended that every conflict waiver be in writing and signed by the affected party or parties. Doing so serves multiple purposes, including providing evidence

of informed consent in the event that a dispute arises. For lawyers in multi-jurisdictional practice, obtaining written confirmation can be especially important as most states require waivers of concurrent conflicts to be memorialized in writing. Some states require the writing to be signed. By always obtaining signed, written consent, lawyers can avoid engaging in a potentially complex analysis as to which set of rules will apply to a particular scenario. In some circumstances, the ethics rules of more than one jurisdiction may apply.

Conflicts Relating to Former Clients (Rule 1.9)

As discussed above, a "material limitation" conflict may result based on the lawyer's obligations to former clients. Conflicts relating to the representation of former clients may exist for other reasons, as well. Under Rule 1.9, lawyers owe continuing duties of loyalty and confidentiality to former clients.

Rule 1.9(a) prohibits a lawyer who represented a former client in a matter from representing another client in the "same or a substantially related matter" where the current client's interests are "materially adverse" to those of the former client, unless informed consent is given. Matters are considered to be substantially related if they involve the same transaction or legal dispute or if there is a substantial risk that confidential factual information obtained in connection with the representation of the former client would materially advance the current client's interests in the current matter.

Rule 1.9(b) applies where a lawyer has changed firms and is presented with the opportunity to represent a client in a matter that is the same or substantially similar to one handled by the lawyer for a client while with the prior firm. Such new engagements are prohibited absent informed consent if both (1) the current client's interests are "materially adverse" to those of a former client and (2) the lawyer obtained information relating to the prior representation that is material to the current matter.

Rule 1.9(c) prohibits a lawyer who obtained information during the representation of a former client from using that information to the disadvantage of the former client or otherwise revealing that information, with some limited exceptions. One exception is that the lawyer may use information relating to the representation of a former client if that information has become "generally known." Practitioners are cautioned that information can be made public without being "generally known."

Rule 1.9 is implicated in a number of different scenarios. For instance, if Lawyer previously represented Client in her business dealings with others, Lawyer may be prohibited from representing Client's spouse in seeking a divorce. Lawyer who previously represented Client A in a merger may be precluded from representing Client B in seeking to collect on a judgment against Client A. In both cases, the lawyer may have been privy to confidential client information relative to the former client that could be used to the current client's benefit. Although either such engagement could likely proceed with the former client's informed consent, the former client may not offer consent after being informed of all pertinent circumstances.

Conflicts under Rule 1.9 may only be waived via the informed consent of the *former* client. The current client's rights are not implicated, so consent is not required of the current client. The former client's informed consent does not need to be confirmed in writing but, as discussed throughout this Guide, a prudent lawyer will always obtain written confirmation of the affected party's informed consent.

Specific Conflicts Rules (Rule 1.8)

Rule 1.8 sets forth a number of conflicts scenarios that do not fit neatly within the previously discussed categories or for which different rules apply. Below is a brief discussion of each such conflict and options for obtaining waivers thereof. As is the case with any potential conflict, a lawyer faced with a potential conflict under Rule 1.8 should consult the Rules and the Comments thereto.

For further guidance on these issues and other conflicts questions, lawyers can research ISBA Professional Conduct Ethics Opinions. Although ethics opinions do not carry the weight of law—they are not precedential in connection with ethics grievances or other civil proceedings—they can be invaluable in analyzing specific conflicts scenarios.

Business Transactions with Clients (Rule 1.8(a))

Lawyers are generally prohibited from engaging in business transactions with clients, including loan arrangements and property transactions, unless: (1) the terms are fair and reasonable to the client; (2) the terms are communicated in writing to the client in a way that is understandable to that client; (3) the client is informed in writing that client may obtain advice of an independent attorney and is given a reasonable opportunity to do so; and (4) the client gives informed consent in a signed writing to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction. In Illinois, although most conflict waivers do not have to be in writing, much less signed by the client, a waiver of a Rule 1.8(a) conflict must be in writing *and* signed by the client. As with any conflict waiver, in order to obtain a client's consent to a Rule 1.8(a) conflict, the client must be adequately informed of the circumstances. The requirements for obtaining informed consent are discussed further in the section entitled *Obtaining Conflict Waivers: Informed Consent*, below.

Use of Information Relating to a Client (Rule 1.8(b))

Rule 1.8(b) provides that "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." Rule 1.8(b) must be read in conjunction with Rule 1.6, entitled *Confidentiality of Information*, which defines as confidential all "information related to the representation of a client," and identifies circumstances in which it may be appropriate to reveal such information.

Under Rule 1.8(b), a conflict may exist where the attorney has an interest in using confidential information to a client's detriment. Such conflicts may be resolved with the affected client's informed consent. As with most conflict waivers in Illinois, the waiver is not required to be signed by the client or even in writing. Though written confirmation is not necessary, it is prudent to obtain a signed document authorizing the disclosure of any confidential information, certainly if it is anticipated that the disclosure will or may be disadvantageous to the client. In order to obtain *informed* consent, which is discussed further below, the lawyer will likely have to inform the affected client how the information will be used and how such use will be disadvantageous to the affected client.

Gifts from Clients (Rule 1.8(c))

Rule 1.8(c) forbids lawyers from soliciting "substantial" gifts from clients and from preparing instruments, including wills and trusts, through which the lawyer or a person related to the lawyer will receive such a gift. The only exception is where the recipient of the gift (either the lawyer or a relation) is related to the person giving the gift. Rule 1.8(c) defines who will constitute a "relation."

Conflicts based on Rule 1.8(c) cannot be waived under any circumstances and engaging in a conflict of the sort described therein is likely to result in professional discipline and could result in criminal prosecution.

Literary or Media Rights (Rule 1.8(d))
Rule 1.8(d) provides that, "prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation." Rule 1.8(d), like Rule 1.8(b) (use of information relating to the client) is based in great part upon the notions that all information relating to the representation is confidential (Rule 1.6) and that business transactions with current clients are inherently problematic from a conflicts perspective (Rule 1.8(b)).

The prohibition in Rule 1.8(d) is absolute—it cannot be waived—but applies only during the representation of a client. Upon termination of the engagement, such an agreement is permissible, though a prudent lawyer will consider the impact of Rules 1.6 and 1.8(b) and will ensure that appropriate steps have been taken to ensure that the engagement has, in fact, concluded. See discussion below relative to avoiding conflicts via the use of disengagement letters.

Financial Assistance to Clients (Rule 1.8(e))
Rule 1.8(e) prohibits lawyers from providing financial assistance to clients in connection with pending or contemplated litigation, except under certain enumerated circumstances. Rule 1.8(e) conflicts only explicitly apply in the case of litigation, but a "material limitation" and/or "business transaction" conflict may exist if a lawyer provides financial assistance to a client in connection with a non-litigation engagement. Rule 1.8(e) conflicts cannot be waived.

Rule 1.8(f))
Rule 1.8(f) addresses situations in which a non-client pays for a lawyer to represent a client. This scenario is especially common among family members. For instance, Mom pays Lawyer to represent Son in defending against a DUI charge following an automobile accident. Though lawyer may accept compensation from non-clients, three requirements must be met in every such instance:

First, the client must give informed consent to the arrangement. Informed consent does not need to be given in writing, but it is highly recommended that consent be memorialized in a writing explaining the risks and alternative courses of action, and that the writing be signed by the client.

Second, the lawyer may only accept an engagement under such an arrangement if the payment of fees by the non-client will not interfere with the lawyer's exercise of independent professional judgment or the attorney-client relationship. Under the scenario above, if there is evidence to suggest that Mom was actually driving the vehicle, not Son, Mom's payment of Lawyer's fees could make it difficult for Lawyer to exercise independent judgment. This is especially likely to be the case if Mom has been Lawyer's regular client, or if Lawyer has concerns that he will not be paid unless he acts in Mom's interests.

Third, the lawyer must protect information relating to the representation of the client in accord with Rule 1.6. The non-client payor is not entitled to confidential information obtained via the engagement, and this fact should be made clear to both the client and the non-client payor at

the outset of the engagement. Information may be shared with the non-client payor, but only to the extent approved by the client or otherwise permissible under Rule 1.6.

In addition to the foregoing, whenever a lawyer accepts compensation from a non-client, it is strongly recommended that the lawyer memorialize in a writing directed to the payor at the outset of the engagement that (1) there exists no attorney-client relationship between the lawyer and payor, (2) the payor is neither entitled to direct the terms of the engagement or work performed by the lawyer (unless directed to do so by the client, in which case that direction should be memorialized in the written informed consent), and (3) the payor is not entitled to confidential client information. The lawyer has to be willing to accept the consequences of such a disclosure, including the payor withdrawing the agreement to pay fees.

A lawyer asked to accept compensation from a non-client should also consider whether the arrangement violates Rule 1.7(a)(2). If such an arrangement creates a significant risk that the representation of the client will be materially limited, and if the lawyer does not believe that she can offer competent and diligent representation as a result, the conflict cannot be waived even under the circumstances discussed above.

Aggregate Settlements (Rule 1.8(g))
Rule 1.8(g) prohibits lawyers representing multiple clients from making aggregate settlements in civil claims or from making aggregate guilty or *nolo contendere* pleas in criminal matters absent informed consent of all affected clients. In the civil context, Rule 1.8(g) is not limited to the representation of plaintiffs – negotiating an aggregate settlement on behalf of two or more defendants also implicates Rule 1.8(g). Here, the conflict waiver must be in writing, and it must be signed by each of the affected clients. Moreover, Rule 1.8(g) provides that the lawyer must make certain disclosures, including an identification of the claims or pleas involved and the participation of each client in the settlement. This means that, for instance, if Lawyer is settling a claim brought against two defendant-Clients for an aggregate of $100,000, with Client A to pay $95,000 and Client B to pay $5,000, both Clients must be informed of the breakdown before the settlement is reached and must consent thereto in writing.

Limitation on Malpractice Liability (Rule 1.8(h))
Rule 1.8(h) provides that a conflict may exist when a lawyer seeks to limit malpractice liability to a client or former client.

Pursuant to Rule 1.8(h)(1), a lawyer may prospectively limit malpractice liability to a client only if the client is independently represented in connection with the agreement. If the client is not independently represented, no degree of informed consent will cure or avoid the conflict. Under such circumstances, the attempt to limit liability will almost certain be given no effect, and the conflicted representation could give rise to disciplinary charges and/or civil liability.

Pursuant to Rule 1.8(h)(2), a lawyer may settle a malpractice claim with an unrepresented client or former client only if the client or former client is both (1) advised of the desirability of seeking independent counsel in connection with the agreement and (2) given a reasonable opportunity to obtain such independent legal counsel. Although not required by the Rule, if the client or former client is represented by counsel in connection with the settlement of a malpractice claim against a lawyer, it is good practice for the lawyer to memorialize this in writing, such as in the written settlement agreement itself.

Any time a lawyer seeks to negotiate a settlement or other limitation on liability with a client or former client, the best practice is for the lawyer to obtain separate legal counsel to engage in the negotiations and finalize the agreement on the lawyer's behalf.

Proprietary Interests in Subject Matter (Rule 1.8(i))
Rule 1.8(i) provides that other than attorney liens and contingency-fee arrangements, a lawyer may not obtain a proprietary interest in the subject matter of a claim pursued on behalf of a client. This conflict cannot be waived. As with conflicts relating to gifts from clients, engaging in a conflict under Rule 1.8(i) is likely to result in disciplinary charges and could subject the lawyer to criminal liability.

Sexual Relations with Client (Rule 1.8(j))
Pursuant to Rule 1.8(j), a lawyer may not have sexual relations with a client unless the consensual sexual relationship existed prior to the attorney-client relationship. Such conflicts cannot be waived. As is the case with many conflicts, identification of the client is key to determining whether such a conflict exists.

Other Types of Conflicts (Rules 1.11 and 1.12)
Rules 1.11 and 1.12 address conflicts relating to government officers and employees (Rule 1.11) and former judges, arbitrators, mediators and third-party neutrals (Rule 1.12). Lawyers who have personally served in such roles, or whose firms employ lawyers who have served in such roles, should closely consult the Rules.

Imputation of Conflicts and Ethical Walls

Lawyers frequently have difficulty applying concepts relating to the imputation of conflicts. From a high-level perspective, practitioners should understand that the vast majority of conflicts are imputed to all other attorneys with a lawyer's firm. In other words, if a lawyer is prohibited from representing a potential client due to a conflict, the lawyer's colleagues are also prohibited from representing the potential client. Or, if a lawyer must obtain a waiver in order to proceed with an engagement, the lawyer's colleagues must likewise obtain a waiver. With limited exceptions, if a lawyer has a conflict, the law firm has a conflict.

Rule 1.10(a) provides that conflicts under Rules 1.7 (concurrent conflicts) and 1.9 (conflicts relating to former clients) are imputed to all lawyers associated in a firm, with the exception of personal interest conflicts. If one lawyer has a personal interest conflict that would prohibit the representation of a client, other members of the firm may represent the client as long as the representation does not present a significant risk that the representation will be materially limited. Such a material limitation could result from a lawyer's loyalties or obligations to a colleague, such that they have an interest in protecting the colleague's personal interests, potentially at the expense of the client.

Likewise, Rule 1.8(k) provides that the conflicts identified in Rule 1.8—those discussed in the *Conflicts Exceptions and Specific Rules* section, above—are imputed to a lawyer's colleagues. A prohibition that applies to one lawyer applies to all lawyers in the firm. There is one exception to the imputation under Rule 1.8, permitting a lawyer to represent a client that is engaged in a sexual relationship with that lawyer's colleague.

Conflicts may be imputed even under circumstances where the affected lawyer has left the firm. Under Rule 1.10(b), if a lawyer has left a firm, other lawyers in the firm *may* represent a client

with interests materially adverse to those of a client of the now-departed lawyer, as long as (1) no lawyer remaining in the firm possesses confidential information material to the matter, and (2) the matter is not the same or substantially related to the matter handled by the now-departed lawyer. Practitioners should pay careful attention to the first caveat. The representation is prohibited if *any* remaining lawyer-member of the firm possesses confidential information relating to the representation of the former client. This includes associates who obtained confidential information while assisting a now-departed partner.

Conflicts are imputed among members of a firm even if the basis for the conflict—a lawyer's representation of a former client, for instance—occurred before the lawyer joined the current law firm. In other words, conflicts follow the lawyer.

An ethical wall—a procedural mechanism designed to isolate the disqualified attorney—can be effectively used to avoid imputation of a conflict that follows a lawyer upon affiliation with a new law firm. But ethical walls can only be utilized in this circumstance – shielding a law firm from imputed conflicts brought to the firm via a newly-affiliated lawyer. Rule 1.10(e) provides that "[w]hen a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom."

Ethical walls can be an important tool in avoiding an otherwise-prohibited engagement, but an effective conflict-check system must be utilized to identify the conflict promptly and an effective screen must be put in place immediately. An ethical wall cannot be used to avoid imputation of a conflict within a law firm except for those conflicts relating to newly hired lawyers.

Obtaining Conflict Waivers: Informed Consent

Once a conflict has been identified, and the nature thereof ascertained, the lawyer should consult the appropriate Rule to determine whether the conflict can be waived. If so, the lawyer should identify the particular requirements for the waiver, such as whether it must be confirmed in writing or signed by the client and whether the client must be represented by independent counsel or advised that obtaining independent representation is recommended. From a risk management perspective, it is good practice to memorialize every conflict waiver in writing and to have that writing signed by the client. A conscientious lawyer will not ask whether a signed writing is required, but rather why a signed writing should not be obtained in any given case.

Every valid conflict waiver, whether memorialized in writing or not, is founded upon the notion that the affected client or former client has waived rights with *informed consent*. Though informed consent is the backbone of any conflict waiver, lawyers are often lax in assuring that the affected party has been fully informed. Rule 1.0(e) defines informed consent as follows:

> *"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.*

In order to obtain a client or former client's informed consent, the lawyer must disclose all of the following to the affected party:

1. The circumstances giving rise to the conflict or potential conflict;

2. An assessment of the material risks created by the conflict; and
3. A discussion of reasonably available alternatives to the proposed conflicted representation.

The first requirement—disclosing the circumstances—entails disclosing all material information that forms a basis for the potential conflict. For instance, in the case of a personal interest conflict, the lawyer must explain the nature of his personal interest and how that personal interest is connected to the potential engagement.

The following sample language and documents can be a starting point for disclosing conflicts can be found in the Sample Letters and Forms portion of this guide.

- Sample Letter to Disclose Conflict and Seeking to Consent to Continue Representation
- Sample Engagement Waiver Clause
- Sample Waiver for Joint Representation

In the case of a material limitation conflict, the disclosure can present confidentiality concerns, as the lawyer may have to disclose confidential information relating to another client or former client. Practitioners should take particular care to avoid an improper disclosure. If the relevant circumstances cannot be disclosed due to confidentiality concerns, it may not be possible to obtain informed consent and, thereby, a conflict waiver.

Lawyers frequently seek to avoid full disclosure, fearing that the client will be dissuaded from waiving the conflict. Lawyers who do this do so at their own peril, as full disclosure is the essence of any valid conflict waiver. Anything less than full disclosure is insufficient and will likely result in an ineffective waiver. Often, the circumstances that the lawyer is disinclined to disclose are the very circumstances that must be disclosed in order to obtain informed consent.

A strong conflict waiver will often include not only a discussion of the factual circumstances, but also reference to the implicated Rule and a general explanation as to why the particular circumstances give rise to a conflict under the Rules.

The second requirement—risk assessment—is likewise essential to obtaining a valid conflict waiver. Ethics commentators often suggest that this requirement includes the disclosure of both the risks of the proposed course of conduct—conflicted representation—as well as the potential benefits thereof to the affected party. The lawyer should often consider whether the conflict will limit the lawyer's ability to act zealously on behalf of the affected party, and whether there is a risk of disclosure or improper use of confidential information.

The third requirement—alternatives—requires the lawyer to specifically identify other courses of action available to the affected party. In most cases, one alternative would be for the lawyer to decline the engagement or withdraw from the representation that would give rise to the conflict. The failure to disclose this alternative could invalidate a waiver.

Take care not to disclose confidential information relating to one client (or former client) when seeking the informed consent of another. If confidential information must be disclosed to communicate to the affected party an explanation of the circumstances as well as the risks and alternatives, it may not be possible to obtain a conflict waiver.

In addition to the three requirements addressed above, in multiple representation cases an effective conflict waiver should identify how confidential information will be maintained, including whether such information may be shared among the joint clients, and what action may be taken in the event that one client withdraws consent.

Whenever informed consent is memorialized in writing, whether required by Rule or obtained as a good practice, the writing should include a thorough discussion of each of the foregoing topics. Doing so accomplishes three purposes: (1) it provides the client with ample opportunity to consider and understand the disclosure; (2) it serves as evidence that an appropriate disclosure was made, in the event that the affected party later disputes the validity or effectiveness of the waiver; and (3) it forces the lawyer seeking consent to conduct a full evaluation of the situation.

The process of obtaining a conflict waiver almost always begins with a discussion between the lawyer and client (or other affected party). Although a written memorialization of the client's informed consent will ultimately be made, a thorough discussion of the circumstances surrounding the potential conflict and the requested waiver will provide the affected party with the opportunity to ask the lawyer questions and will afford the lawyer with the opportunity to explain, often more clearly than can be effectively done in writing, why the affected party may want to agree to the proposed waiver. The discussion may also provide the lawyer with additional information that should be included in the written memorialization.

Advance Conflict Waivers

Many commentators question whether advance conflict waivers can ever be appropriately obtained. Advance conflict waivers follow the same rules as any other conflict waiver, and thereby require the informed consent of the affected party or parties. It is questionable whether a client can be sufficiently "informed" when the circumstances giving rise to the conflict have not yet been identified. Practitioners seeking advance conflict waivers should tread carefully, as such waivers are frequently deemed invalid and unenforceable.

One key to obtaining a potentially enforceable advance conflict waiver is the ability to predict what conflicts may arise, and to provide the affected client with sufficient information about the potential conflicts such that the client's consent can be deemed truly "informed." An advance conflict waiver is also more likely to be upheld if the affected client is sophisticated and/or entered into the waiver with the benefit of independent legal representation.

The risks of attempting to obtain advance waivers are significant, and often outweigh the potential benefit. Among the risks are disqualification from continued representation of the affected client or clients and a not-insignificant chance that the lawyer could be ordered to disgorge fees already earned. Another risk of obtaining an advance conflict waiver is that the presence of an advance conflict waiver often lulls lawyers into complacency, and informed consent is not later obtained when an unanticipated conflict arises.

Conflict Check Procedures

The process of identifying conflicts and, if possible, obtaining conflict waivers begins with an effective conflict check system. As discussed below, an effective conflict check system will be tailored to the lawyer's practice and will often rely upon input from multiple members of the law firm in order to ensure that appropriate information is captured, that conflict checks are run at appropriate junctures, and that, when identified, conflicts are handled appropriately.

Choosing a Conflict-Check System

There are a number of products available to automate portions of the conflict check process. Computerized conflict-check systems are generally preferable to manual systems because they tend to be quicker and more reliable and have the capacity to analyze large sets of data. Computers can search through thousands of names in a matter of seconds. Computerized options include traditional software programs that can be installed on a desktop computer with access to an internal network. There are a number of mass-marketed software options, some of which, such as Clio and AbacusLaw, provide other file-management services, like billing, time-entry, invoicing, docketing and file-management. Some law firms have developed proprietary software tailored specifically to the law firm's needs. Still other firms utilize cloud-based conflict-check and practice-management systems, which are similar to traditional software systems, but the firm data is maintained on the cloud, rather than on a local server. Cloud-based systems can be preferable for lawyers and law firms that want to check for conflicts when away from the office. Still other lawyers continue to use manual systems, such as paper systems consisting of notecards containing handwritten information. Although manual file card systems can be effective in a smaller office setting if used consistently and properly, computerized systems are generally favored.

When choosing a conflict-check system, the following should be considered:

1. Ease of data-entry;
2. Ability to merge data from spreadsheets and other systems when laterals are hired;
3. Speed and the ability to run multiple checks concurrently;
4. Ability to obtain customized reports; and
5. Cost.

Although cost is necessarily a factor, practitioners should consider the potentially significant cost of failing to identify a conflict due to the utilization of an insufficient conflict-check system.

Memory Check

In addition to maintaining a manual or computerized system, every law firm should distribute new client/matter intake sheets to each lawyer in the office at least once a week. A lawyer may recognize a conflict on the distribution list that was not discovered by the manual or computer search.

Capturing the Proper Information

Your conflict check system is only as accurate as the information you put into it. If you misspell a name or neglect to add the maiden name of a client, for example, you may miss a conflict in the future. The following information should be recorded and maintained in your conflict database for future reference:

Information relating to past and present client-engagements:

- Name and address of the client. If the client is an individual, include all former or maiden names and aliases, and identify suffixes, like Jr., Sr., or III. If the client is a corporation, include the corporate name, state of incorporation and any d/b/a or trade names. Also include any known subsidiaries, parent corporations and affiliates. Whether an individual or an entity, if the client's name is misspelled in a pleading, contract or other document relating to the engagement, include the misspelled name, as well.
- Names of all adverse parties and "friendly" parties, including aliases, other spellings, and known related entities, as discussed above.

- Names of other involved parties, possibly including: spouses, parents and other family members; non-party witnesses; guardians *ad litem;* child representatives; trustees; beneficiaries; executors and administrators; lienholders; lenders; principals; significant shareholders; directors; officers; subsidiaries, parent corporations and affiliates; expert witnesses and consultants; settlors, grantors and testators; victims; and creditors and debtors.
- Names of adverse and co-parties' counsel, including the individual attorneys and firms.
- If an insurer is involved, whether your client's insurer or not, include the name of the insurer.
- File name and number.
- Date the file was opened and, if applicable, the date the file was closed.
- Nature of the legal work to be performed (e.g., divorce, will, contract, tax, personal injury case).
- Name of the lawyer within the firm who is primarily responsible for the case or matter.
- Name(s) of any other lawyers within the firm who assisted in the engagement.

Information on members of the firm:

- Names of all lawyers and their spouses.
- Names of all employees and their spouses.
- For all lawyers and employees, names of any entity for which the individual has served as a director, officer, partner or employee within the last 5 years, and names of any entity in which the individual has held a significant ownership interest during that time.
- Names of trusts of which a lawyer or employee serves as trustee or has served as trustee within the 5 years.
- Any public office held by any member of the firm within the 5 years.

Information on persons/entities whom the firm has declined to represent:

- Name of the person/entity declined; and
- Names of any adverse or co-parties in the declined matter, if known.

A Common Party Search Checklist can be found in the Sample Letters and Forms part of this Guide.

Input Procedures

It is vital that everyone in the office follow the same procedures when inputting data. You may find it preferable to have one person in charge of inputting all data and checking for conflicts to ensure that the integrity of the system is maintained. (If you do rely on one individual, however, at least one other individual should be cross trained to fill in at vacation time or if otherwise necessary.)

Data should be inputted into the conflict-check system throughout the engagement and upon closure of the file. If data is inputted only at the commencement of the engagement, critical information relating to the engagement will likely be omitted from the system and a future conflict may be missed.

The firm should institute a policy as to who is responsible for updating the database. If multiple lawyers are assigned to a matter, all such lawyers should be responsible for ensuring that the database is updated, and new conflict checks are run. If the task of ensuring that data is inputted as necessary is left to the responsible partner, information learned by the subordinate

lawyer but not communicated to the responsible partner will necessarily be omitted from the database.

A Sample Conflict of Interest Search Form can be found in the Sample Letters and Forms part of this Guide.

When to Check for Conflicts

Lawyers are accustomed to running a conflict check before opening a new file, but conflict checks will often have to be performed on multiple occasions. There are four critical points at which conflict checks should be performed:

- **Before the initial consultation with a potential client.** Never receive or review confidential information from a prospective client before a conflict search is completed. Checking for conflicts before the first consultation will aid in weeding out known-conflict situations.
- **When opening a new client file upon engagement.** The person responsible for establishing new files should be instructed that a new file number cannot be assigned until a conflict check is completed and initialed.
- **Entry of a new party or new attorney** to the case/matter.
- **When hiring new lawyers, paralegals and "of counsel"** require each new lawyer and paralegal to disclose the names of their previous clients. This process is particularly important when lateral partners are brought into the firm.

Depending on the nature and circumstances of the engagement, conflicts may need to be checked at other junctures. For instance, it may be prudent to run a conflict check upon the identification of a new witness. This could be necessary if there is a close relationship between the witness and the lawyer's client, such as a family relationship or an employer-employee (or former employee) relationship.

How to Check for Conflicts

The lawyer primarily responsible of the new matter should fill out a conflict check request form and submit it to the person responsible for checking for conflicts. Although the task of preparing the request form may be delegated to a responsible staff member, the lawyer should review the form before submission.

All the names on the conflict check request form should be checked against the names in the

database (or on file cards, if a manual system is maintained) by the person responsible for checking conflicts. The results of the search should then be recorded and provided to the requesting lawyer.

If a potential conflict is found, the firm should review the Rules, determine whether a conflict actually exists, and if so, whether it can be waived with the informed consent of the affected parties. As discussed below, the firm's conflicts expert should be responsible for determining whether a conflicted engagement should go forward and, if so, on what terms.

If no conflict was uncovered, the completed request form and conflict check results should be kept in the client file. Legal assistants should be instructed not to open a file and give a matter a new file number until a completed request form and conflict check results have been received.

If a new party is added to the matter, the lawyer primarily responsible for the matter should submit an addendum to the request form listing the new party's name. This new name should be checked for conflicts and entered into the system. The completed form and updated conflict check results should then be returned to the primary lawyer for inclusion in the client file. This process should be followed not only for new parties, but for any newly learned information discussed in the *Capturing the Proper Information* section, above.

Appoint a Conflict Expert Within the Firm

If you practice with other lawyers, designate one lawyer in the office as the conflict "expert." All questionable conflicts should be discussed with and approved by this lawyer. If a potential conflict arises on a matter for which the designated "expert" is responsible, the firm should have a designated backup "expert" who can be consulted. Larger firms should consider forming conflicts committees to evaluate difficult conflicts issues. Solo practitioners can seek assistance from a trusted colleague or sources such as the ARDC, Illinois State Bar Association, a local law school or through an ISBA Mutual Risk Management Consultation.

Tips and Common Conflicts Traps

Document the Relationship

Most lawyers are aware that the consistent use of engagement letters/agreements, non-engagement letters and disengagement letters goes a long way in preventing legal malpractice claims and minimizing exposure therein, as well as in avoiding ethical discipline. Following good documentation procedures can also serve as a client relations tool, as clients (and even declined clients) will appreciate your attention to detail and your efforts to ensure that you and they have a consistent understanding of the status of your relationship. Many lawyers do not appreciate the role that engagement, disengagement and non-engagement letters can have in relation to conflicts. As discussed below, such documentation is necessary to appropriately conduct conflict checks and to avoid some less common conflicts issues. Documenting a lawyer's relationship vis-à-vis an unrepresented party or witness can likewise minimize the risk that a conflict is later found.

- **Engagement letters and agreements** serve multiple conflict-related purposes. First, the act of preparing the letter or agreement will require the lawyer to closely evaluate (1) the exact identify of the client and (2) the role that the client contact and other client representatives will play going forward. For instance, in a corporate engagement, will the person who communicated with the lawyer during the retention process be the only authorized client contact? Is the lawyer authorized to take direction from others?

  Clearly identifying the client is essential to avoiding conflicts. For instance, in the representation of a start-up business, is the client one of the founders, more than one of the founders, the business entity itself, or some combination thereof? By identifying the client(s) clearly at the outset of the engagement, the lawyer will have clearly defined key parameters of the attorney-client relationship, including who is *not* the client. In the scenario above, if the lawyer is representing the business entity only, the engagement agreement should clearly state that fact and the fact that the lawyer does not represent

any of the founders. On the other hand, if the lawyer is being asked to represent both of the founders, the lawyer will recognize that a potentially problematic multiple-representation situation exists and will act accordingly. In either event, if a dispute arises later on, the lawyer's loyalties will be clearly defined.

Clearly identifying the client in an engagement agreement can be especially important in the representation of an entity, as the lawyer will invariably be communicating with the entity via an authorized representative. By defining the client in the engagement agreement, the representative will understand that he or she, personally, is not a client of the lawyer.

A strong engagement agreement will also identify other authorized representatives, if any, and will define with whom confidential client information may be shared.

Implementing a firm policy requiring clear identification of the client in an engagement agreement can also aid the firm in its conflict check procedures. By clearly identifying the client from the outset, the firm avoids data-entry problems that could result in a missed conflict.

- **Disengagement letters** are another key tool in avoiding conflicts. The distinction between a "current client" and a "former client" can mean the difference between a conflicted representation and an unconflicted engagement. By clearly memorializing the end of an engagement, the prudent lawyer will avoid subsequent confusion as to whether a client believed to be a "former client" could be considered a "current client" for conflicts purposes.

- **Non-engagement letters** can be just as valuable as engagement letters in protecting against conflicts. Non-engagement letters should be a ubiquitous part of any firm's intake process and should be sent out any time that a prospective engagement is declined by the lawyer or if a potential client decides not to retain the lawyer. A process should be implemented whereby within a certain period of time (seven days, for instance) after an initial consultation, an engagement letter or non-engagement letter must be sent. By documenting every non-engagement, lawyers protect themselves against misunderstandings as to whether an attorney-client relationship was created.

  By documenting non-engagements, the lawyer can also memorialize that no confidential information was shared during the consultation, thereby avoiding a conflict under Rule 1.18. Rule 1.18 defines a lawyer's duties to prospective clients and provides that a lawyer who learns information from a prospective client that could be "significantly harmful" to that individual may be disqualified from representing another client in "the same or a substantially related matter." These issues arise frequently in family-law, criminal defense, and estate-planning practices.

- **"Not-your-lawyer" letters** provide yet another safeguard against potential conflict issues. Pursuant to Rule 4.3, a lawyer has certain obligations when dealing with an unrepresented person. Among those duties are a responsibility to take reasonable efforts to ensure that the unrepresented person understands the lawyer's role in the matter, including the fact that the lawyer does not represent that individual. Rule 4.3 further provides that "[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know

that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Whenever dealing with unrepresented persons on behalf of clients, lawyers should deliver to the unrepresented person a clearly written letter detailing that the lawyer does not represent the non-client and, under appropriate circumstances, recommending that the non-client obtain counsel in connection with the matter. Compliance with Rule 4.3, and written memorialization thereof, can go a long way in avoiding conflicts claims not only by the non-client, but by the client, as well. These issues arise most frequently in business formation, real estate transactions, and business transactions, but they can also occur in other situations, such as when a lawyer is involved in the deposition of a client's employee or former employee who may believe that the lawyer represents her for the deposition.

Be cautious when presenting a non-client for deposition

Litigators frequently "present" non-clients for depositions. As noted above, this often occurs when the employee or former employee of a client is asked to give a deposition, or it may be the case that the client's spouse or child is asked to sit for a deposition. Under any such circumstances, the lawyer should carefully consider whether the deponent is a client or not, and the lawyer should behave accordingly.

If the lawyer does take the deponent as a client, the lawyer should prepare an engagement letter and run a conflict check. The lawyer must consider whether the original client and the deponent have differing interests, such as may be the case relative to a former employee. Both the original client and the new client/deponent may have to provide informed consent to the arrangement, including consent to a procedure for sharing—or not sharing—confidential information. If the lawyer takes the deponent as a client, the lawyer should consider whether payment for the lawyer's services by a non-client presents Rule 1.8(f) issues relative to accepting compensation from someone other than the client. The lawyer should also clearly define the scope and duration of the engagement, such as defining that the engagement will relate only to deposition testimony and will terminate upon the conclusion of the deposition.

If the lawyer does not take the deponent as a client, a non-engagement letter should be provided, especially under those circumstances where the lawyer purports to prepare the non-client for the deposition or assists in negotiating the terms of the deposition. The lawyer should also be careful to act in accord with the non-engagement. For instance, an objection to a question regarding communications between the deponent and the lawyer on the basis of the attorney-client privilege may blur the lines between an ostensible non-engagement and an attorney-client relationship.

Beware of multiple-client representations

Multiple-client representations are fraught with risk, as the clients' respective interests may not be aligned from the outset, or they may diverge over time. Any multiple-client engagement necessitates a constant reevaluation of conflicts issues and, if a conflict or potential conflict becomes known, the process of obtaining informed consent must be undertaken.

Common multiple-representation situations that can create conflicts for lawyers include the following:

- buyers and sellers (in a real estate deal)

- husband and wife in estate planning matters
- multiple beneficiaries
- the testator or settlor and beneficiaries of a will or trust
- guardian and ward
- majority and minority stockholders
- a corporation and its directors or officers
- the partners in a newly formed partnership
- a general partner and the limited partners
- multiple criminal or civil defendants
- multiple civil plaintiffs

Though some of the aforementioned scenarios present obvious conflict risks, other situations can be less obvious, such as situations discussed above involving aggregate settlement issues, use of confidential information obtained by one client, or the representation of a client in forming a new business entity.

Any time a lawyer represents multiple clients in an engagement, it is especially important that the terms of the engagement are clearly laid out in an engagement agreement signed by all clients, and that the engagement agreement expressly provides for whether and, if so, how confidential client information will be shared among the clients. As a general rule, there is no confidentiality between joint clients unless agreed to in advance. If conflicts can be identified, they should be discussed in the engagement agreement such that informed consent can be provided at the outset of the engagement. Consider recommending to each client that they should obtain independent representation in connection with the engagement agreement.

Lawyers should take particular care when engaging in multiple-client representations involving family members. Even the most cautious lawyers sometimes fail to identify the conflicts between clients who are members of the same family. Because family members are less likely to themselves recognize the conflicting interests that may exist, obtaining informed consent via thorough disclosure can be especially critical in such situations.

Avoid other common conflicts traps

In addition to the multiple-client representations discussed above, the following are examples of other situations fraught with danger from a conflicts perspective:

- **Acting as a director, officer or shareholder in a corporation while acting as counsel thereto.** Although *de minimis* stock ownership in a corporate entity will not necessarily implicate a conflict, but any purchase of an interest in a current client, or any representation of an entity in which a lawyer owns stock, should be carefully considered.

- **Acting as both counsel and an officer or director of a corporate client.** Officers and directors owe fiduciary duties to the corporate entity that may be inconsistent with those duties owed by corporate counsel. A lawyer serving as both corporate counsel and an officer or director may obtain confidential information in connection with his role as counsel that should not be shared with officers or directors. Or a lawyer's personal interests relating to her role as officer or director could impact her ability to exercise independent legal judgment.

- **Failing to identify imputed conflicts resulting from the failure to appropriately screen new hires**, including not only attorneys, but paralegals, secretaries, legal

assistants, and clerks. All new hires should fill out a screening questionnaire before commencing their employment, and preferably before being hired. The questionnaire should be carefully tailored – and the hire or prospective hire should be carefully instructed – to avoid the disclosure of confidential information. The form should identify all clients that the individuals represented (or, for non-attorney staff, that they were involved in the representation of) while in prior employment. If a potential conflict with a current firm client is identified at this pre-employment stage, an appropriate conflicts screen/wall can be constructed to avoid the effect of an imputed conflict. If the disclosure is not made until after the new employee's start date, it is unlikely that an ethical wall can be appropriately constructed.

- **Failing to identify "common pool" conflicts.** Common pool conflicts, otherwise known as "finite pie" conflicts, arise when a lawyer separately represents two or more clients in seeking recovery from a limited pool of resources. The most common scenario arises when Lawyer represents Client A in suing Defendant and Lawyer separately represents Client B in suing Defendant. Defendant may have limited resources, including insurance coverage, to potentially satisfy judgments or settlements in favor of Clients A and B. Lawyers presented with such scenarios should carefully consider whether a direct adversity or material limitation conflict exists and, if so, take appropriate action to disclose the conflict and obtain waivers.

- **Failing to obtain *effective* conflict waivers.** Informed consent is the foundation of any effective conflict waiver. The client or prospective client must be advised of the material risks that the conflicted representation will or may present, and must also be advised of reasonable alternatives, likely including retaining another lawyer. Absent such a disclosure, a conflict waiver will almost never be effective.

  As discussed throughout this Guide, there are varying requirements for conflict waivers, depending upon the type of conflict presented. For instance, some conflicts can be waived only if the client has independent counsel; in other cases, conflicts cannot be waived unless the lawyer recommends that the client obtain independent counsel and provides the client with enough time to act on the recommendation; and still other conflicts require specific information to be disclosed to the client in writing. Some conflict waivers will not be effective unless the informed consent is confirmed in writing, and in some such cases the writing must be signed by the client.

- **Failing to carefully consider that another state's conflicts laws may apply**. This Guide addresses conflicts under Illinois law, including the Illinois Rules. Illinois law will generally apply to the work of an Illinois lawyer, but it is possible that the ethical rules and/or the substantive law of another jurisdiction may apply instead of, or in addition to, Illinois law.

  As of 2018, the ABA Model Rules of Professional Conduct ("ABA Model Rules") serve as the basis for the ethics rules in all fifty states and the District of Columbia, but no jurisdiction has adopted the ABA Model Rules wholesale. Under the ABA Model Rules, a client's informed consent to waive a concurrent conflict of interest must always be confirmed in writing and almost every state has adopted this requirement. Some states, like Wisconsin, go further and require the client confirmation to be signed by the client. Contrary to the majority rule, Illinois Rule 1.7 does not require a written confirmation.

It is highly recommended that every conflict waiver should be confirmed in a writing signed by the client, both as a rule of good practice and in the event that the ethics rules of another state could be applied in analyzing the waiver.

- **Failing to protect confidential information in obtaining a conflict waiver**. Lawyers must be careful that, when obtaining a conflict waiver, confidential information relating to one client or former client is not divulged to another client or former client. A conflict can be created during the process of obtaining a conflict waiver.

- **Failing to consider the impact of a joint defense agreement.** Joint defense agreements are premised on the "common interest doctrine" and are designed to protect confidential information when shared between "friendly" co-parties and their respective lawyers. Although often termed joint *defense* agreements, such agreements can be reached between co-plaintiffs, as well. Some courts have held that a lawyer's receipt of confidential information from a co-party in accord with such an agreement subjects the lawyer to a duty of confidentiality to the co-party akin to that owed to a client, former client, or potential client. In other words, the receipt of confidential information from a co-defendant or co-plaintiff could disqualify that lawyer or law firm from a future engagement. For this reason, the potential impact of a joint defense agreement should be carefully considered, and co-parties to joint defense agreements must be identified in conflict check systems in a manner that highlights that a "confidentiality" conflict may exist if the co-party is flagged during a subsequent conflict check.

- **Failing to act promptly.** Too often, conflicts are identified but not acted upon until too late. If a conflict is identified, the responsible lawyer should act promptly and obtain informed consent from all affected parties before proceeding with the engagement. There is no legal basis for obtaining a waiver of conflicts after the fact.

Conflicts of Interest Do's and Don'ts

Do…

- ✓ Establish a Conflict-of-Interest system.
- ✓ Send a letter to the unrepresented party stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that they should seek legal counsel immediately.
- ✓ Watch what you communicate to the unrepresented individual. Exchanging pleasantries about the weather is okay. Anything else is suspect.
- ✓ Call the ISBA Mutual Risk Consultative Services at 312-379-2000 if you are in doubt.

Don't…

- ☹ Take any matter without conducting a conflicts check.
- ☹ Make any lateral hires without conducting a conflicts check.
- ☹ Overlook of counsel, independent contractors and temporary lawyers in your conflict checks.
- ☹ Proceed with conflicted representation without reviewing the Illinois Rules of Professional Conduct to determine whether it is consentable and/or waivable.

To download our entire guide, ***The Fundamentals of Loss Prevention for Lawyers*** or to access Sample Letters & Forms, visit our website www.isbamutual.com.

Addenda: Sample Letters and Forms

NOTE: This material is intended as only an example, which you may use in developing your own letters and forms. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Client Screening: New Client Intake Form

Date File Opened: _____

File Number: _____ Matter Type: _____

File Name: _____

Client Name: _____

Contact Name and Title (if different): _____

_____

Client Address: _____

_____

Client Telephone Numbers: Work _____ Home _____ Cell _____

Client Fax Number: _____ Email Address: _____

Responsible Lawyer: _____

Billing/Fee Information

- □ Retainer: $_____
- □ Hourly $_____
- □ Contingent $_____
- □ Fixed Fee $_____

Billing Cycle:

- □ Monthly
- □ Other (explain) _____
- □ N/A

Calendaring Information

File Review Dates:

- □ Every 30 days
- □ Every 60 days

Statute of Limitations Date:(Reminders 180, 90-, 60-, 30- and 15-days prior)

Verified by: _____ (Lawyer Initials)

Other Critical Dates to Calendar: _____

_____

Calendaring Information

- □ Added to Calendaring System
- □ Conflict Search Completed
- □ Engagement Letter sent or Contingent Fee Agreement signed

File Opened By: _____ Date: _____

Conflicts: Common Party Search Checklist – Internal Document

When checking the names of a new client for potential conflict of interest, it is necessary to take your search beyond the names of your current and former clients. The list below suggests other parties that should be included in your search.

ANCILLARY BUSINESSES

- ☐ Name of any business in which a firm member has an equity interest or director/officer role

BANKRUPTCY

- ☐ Client
- ☐ Spouse
- ☐ Client's partners
- ☐ Client's other businesses
- ☐ Client's family members
- ☐ Creditors

COMMERCIAL REAL ESTATE BUSINESS/CORPORATE

- ☐ Client
- ☐ Owner/Spouse
- ☐ Key employees
- ☐ Buyer
- ☐ Seller
- ☐ Partners/Shareholders
- ☐ Directors/Officers
- ☐ Brokers
- ☐ Lenders
- ☐ Any opposing party in a transaction
- ☐ Parcel number/location/address
- ☐ Title insurer

CRIMINAL

- ☐ Client
- ☐ Victim
- ☐ Witnesses
- ☐ Expert witnesses
- ☐ Co-Defendants
- ☐ Potential Co-Defendants

DECLINED CLIENTS

- ☐ Person declined
- ☐ Adverse parties, if known
- ☐ Spouse, if known

ESTATE PLANNING

- ☐ Testator/Testatrix
- ☐ Spouse
- ☐ Children/Heirs
- ☐ Devisees/Beneficiaries
- ☐ Personal representative(s)
- ☐ Trustees

FAMILY LAW — DISSOLUTION

- ☐ Client
- ☐ Spouse (former & current)
- ☐ Children
- ☐ Expert witnesses
- ☐ Witnesses (if any)
- ☐ Adverse family members
- ☐ Guardian ad litem
- ☐ Related parties
- ☐ Witnesses
- ☐ Experts

LITIGATION

- ☐ Client
- ☐ Insured
- ☐ Plaintiffs
- ☐ Defendants

IMMIGRATION LAW

- ☐ Insurance carriers
- ☐ Client
- ☐ Guardian ad litem
- ☐ Spouse (former & current)
- ☐ Children
- ☐ Witnesses (if any)
- ☐ Expert witnesses
- ☐ Co-Counsel
- ☐ Adverse family members
- ☐ Co-Plaintiffs/Co-Defendants
- ☐ Opposing counsel
- ☐ Employers
- ☐ Persons residing with client

PATENT

- ☐ Client (by name and type of products)

Patent Prosecution:

- ☐ Subject matter of patent/trademark
- ☐ Inventors
- ☐ Research & Development personnel (within reason)
- ☐ Assignees of patent/trademark
- ☐ Affiliates, subsidiaries, parent & holding companies
- ☐ Graduate student assistants
- ☐ Foreign patent agents

Patent Litigation:

- ☐ Client affiliates, subsidiaries, parent & holding companies
- ☐ Opposing parties & affiliates (to the extent identifiable)
- ☐ Opposing counsel

RESIDENTIAL REAL ESTATE

- ☐ Client
- ☐ Owner/Spouse
- ☐ Buyer
- ☐ Seller
- ☐ Brokers
- ☐ Lender/Mortgage company
- ☐ Any opposing party in a transaction
- ☐ Parcel number/locations/address
- ☐ Title insurer

WORKERS COMPENSATION

- ☐ Client
- ☐ Employer
- ☐ Insurer

NOTE: This material is intended as only an example, which you may use in developing your own form. It is not considered legal advice and as always, you will need to do your own research to make your own conclusions with regard to the laws and ethical opinions of your jurisdiction. In no event will ISBA Mutual Insurance Company be liable for any direct, indirect, or consequential damages resulting from the use of this material.

Conflicts: Conflict of Interest Search Form – Internal Document

To: File Room

Requesting Attorney: _____

Date: _____

Prospective Client Information

Name: _____

Address: _____

_____

Phone: (Work) _____

(Home) _____

Principals: _____

_____

_____

Related Entities: _____

_____

_____

Prior Representation of Client, Principals or Related Entities: _____

_____

_____

File Name: _____

Adverse Party Information

Name: _____

_____

_____

Address: _____

_____

_____

Principals: _____

_____

_____

Related Entities: _____

_____

_____

Check Completed By: _____

Date: _____

Conflicts: Letter to Disclose Conflict and Seeking Consent to Continue Representation

[Date]

[Name and Address of Client]

Re: Consent to continued representation

Dear [Client's Name]:

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

I believe that I can represent you in the [identify claim] claim against [adverse party]. The fact that you may have a claim against me for not filing the [identify claims] claims within the statutory time period will not, in my opinion, materially limit my loyalty to you as my client.

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

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

Sincerely yours,

[Name of Firm]

By _____ _____

[Name of Attorney]

Accepted On _____ By _____

[Date] [Client]

Conflicts: Engagement Waiver Clause – Waiver of Potential Conflicts of Interest Forms

Whenever the interests of a current client might affect, or be affected by, the personal, business, financial, or professional interests of a lawyer, a professional or business associate or relative of the lawyer, another current client, or a former client, there is always a possibility for the existence of such multiple interests to interfere with the lawyer's ability to serve one set of interests without adversely affecting other interests. Whenever such interests become conflicting, it is necessary for the lawyer to withdraw from all attorney-client relationships affected by such conflict, and it is then necessary for each person to hire a new lawyer.

With respect to [describe representation and subject matter], there exists the possibility for the following interests of the following persons to become conflicting: [describe all reasonably foreseeable interests that each client and former client might, in the course of after-the-fact dissatisfaction, claim to have adversely affected the lawyer's judgment or performance, and describe the potential adverse effects on each client].

Despite possibilities for such interests to conflict, you believe one lawyer can adequately represent, advance, or protect each such interest without harming any other such interests. Therefore, you agree that you want me to represent each of you in this matter, and you each refuse to exercise your right to hire a different lawyer and hereby waive the conflicts described.

Conflicts: Waiver Joint Representation

VIA REGULAR MAIL AND VIA ELECTRONIC MAIL

[Client A]

[Client B]

RE: _____
Matter No.: _____
File No.: _____

Dear ***[Client A and Client B]***:

We have been asked to represent both of you, Client A ("A") and Client B ("B"), with respect to ***[identify nature and scope of the proposed joint engagement]*** (the "Joint Engagement").

Although we reasonably believe that the representation of both of you in the Joint Engagement will not adversely affect our representation of either of you, the purpose of this letter is to discuss with each of you the actual and potential risks and consequences of such simultaneous representation, to identify any potential alternative courses of action, and to explain the circumstances under which we would be willing to represent both parties simultaneously if, after full consideration of the consequences, both of you wish us to do so.

Simultaneous representation of parties with potentially adverse interests by the same attorneys involves a number of departures from professional norms and should not be undertaken by any such party without careful consideration. In particular, we want you to be aware of the following.

1. Under applicable rules of professional conduct, a law firm owes each of its clients a duty of loyalty, which would normally preclude any attorney within the firm from undertaking a representation adverse to any client of the firm without the affected client's informed consent. Other rules generally prohibit a firm from undertaking any representation involving an actual or potential conflict of interest without the informed consent of all affected parties. Such a situation may exist when a firm represents two clients simultaneously in a situation in which their interests are actually or potentially adverse.

2. The conflict of interest and the need for informed consent exist no matter how cordial the ***[business/family/etc.]*** relationship between the two parties currently is or is anticipated to be, and no matter how non-controversial the subject of the engagement is anticipated to be.

3. We recommend that each of you seek the advice of independent counsel of your own choice regarding this written consent. If, however, it is the wish of both clients that we undertake the simultaneous representation of both parties with respect to the ***[subject of***

the proposed Joint Engagement], we will undertake to do so under the terms described herein.

4. ***[Explain how the Joint Engagement will mean that (1) the clients' interests will be adverse or (2) there is a significant risk that the lawyer's representation of one client will be materially limited by the lawyer's responsibility to the other. For instance, the Joint Engagement will require that information learned from B shall be kept confidential as between the lawyer and B and may not be shared with A. Identify the Rule(s) of Professional Conduct that are implicated and either quote or summarize the applicable Rule(s).]***

5. ***[Explain the risks of the foregoing to each of A and B.]***

6. ***[Explain alternatives to the foregoing, such as the clients' ability to retain other counsel.]***

7. In light of the foregoing, it may not be possible for a single law firm to represent both of you in the same aggressive manner as would two separate and independent law firms. By giving the consent requested in this letter, you are, in effect, waiving that kind of zealous representation of your individual and conflicting interests with respect to the subject matter of the proposed Joint Engagement. It is possible that each or both of you might be advised by independent counsel to demand or offer different or more favorable terms and conditions with respect to the subject matter of the proposed Joint Engagement than we can or will demand or offer.

5. Moreover, regardless of the terms upon which the matters between the two clients are concluded, the fact that one law firm has been involved in the representation of both parties may give rise to a perception on the part of ***[shareholders/investors/third parties/etc.]*** that different terms might have been arrived at had each of the joint clients had separate representation by independent law firms.

6. Notwithstanding the foregoing, we believe that we will be able to provide competent and diligent representation to each affected client.

7. If a dispute should arise in the future between the two of you concerning the ***[subject of the proposed Joint Engagement]*** or any other aspect of your dealings with each other, we believe we may have to withdraw, or would be disqualified, from representing either of you with regard to that dispute or any other relationship you might then have with each other. You would then each have to retain separate counsel, resulting in additional expense and inconvenience that you might not have incurred had you been separately represented from the outset.

We will be pleased to answer any questions you may have concerning this representation or this requested consent. If you do wish to consent, please sign the enclosed extra copy of this letter and return it to us in the enclosed envelope.

Very truly yours,

[Attorney Name]

Acknowledgement and Consent

Despite any actual or potential conflict of interest which exists now or may in the future, as discussed above, we hereby consent to ***[the firm's]*** simultaneous representation of both ***[Client A and Client B]*** with respect to the subject matter of the Joint Engagement as described above. We further agree that ***[the firm]*** may withdraw its representation of either client or both clients without prejudice should it determine that continued representation will or might violate applicable rules of professional conduct.

[Client A} ***[Client B]***

By: _____ By: _____

Engagement Letter: Estate Planner Representing Both Spouses

For use when representing both spouses

Dear ***[Name of Client(s)]***:

I am writing to confirm our agreement to represent both of you jointly regarding your estate plan. Spouses can sometimes have conflicting interests regarding their estate plan. For example, they may have different views as to how much power the surviving spouse should have over the property of a deceased spouse, how assets should be distributed upon the death of one or both of them, and how family assets should be divided between them during their lifetimes. Also, in order to take advantage of available tax benefits, lawyers frequently recommend that family assets be divided between a husband and wife to increase one estate or decrease the other by dividing jointly owned assets or by recommending gifts from one to the other. These are just some examples of potential conflicts that sometimes arise during the estate planning process.

If each of you had your own separate lawyer, you would each have an “advocate” for your position and would each receive totally independent and confidential advice from your own lawyer. Under such an arrangement the information given to your respective lawyers would be confidential and could not be disclosed to your spouse without your consent. This is not the case when one firm advises both of you jointly.

Although we will encourage the resolution of any differences of opinion or conflicting interests, we cannot be an advocate for one of you against the other if we represent both of you. When your individual interests differ, we will attempt to explain to both of you the interests of each of you and the effect on each of you of a particular course of action. Similarly, anything that either of you tells us relating to your estate plan cannot be kept confidential from the other.

In the interests of efficiency, you may choose to communicate with us primarily through one of you, in which event we will provide any necessary explanation of the issues to that individual. Of course, either of you may put questions to us at any time.

By signing this letter, each of you confirm that you have requested and consented to our joint representation of both of you in connection with the preparation of your estate plan and that you each agree that communication and information received from each of you relating to your estate plan will not be kept confidential from the other. Of course, either of you may retain separate counsel at any time. In that event, we will be free to continue to represent the other one of you only with the consent of the one who retained separate counsel.

In very unusual circumstances, a law firm representing both the husband and wife regarding their estate plan confronts a conflict of interest between them that is so serious that the firm can no longer continue to represent either of them. Although such a situation seems highly unlikely in your case, were it to occur, we would promptly notify both of you that we could no longer continue to represent either of you. In some cases, it may not be possible to disclose to both of you precisely why we have concluded that we should discontinue our representation.

Our fee will be based upon the prevailing hourly rates in effect for our law firm. Currently, these rates range from $___ to $___ per hour, depending upon the experience and position of the individual lawyer. Paralegal services, if reasonably required, will be billed at a rate of $____ per hour. During the period of our representation, it is possible that individual hourly rates in the firm may be increased ***[by some modest amount]***. You will be informed of any changes immediately.

You will be billed for all of the time spent handling your matter, including but not limited to time spent on telephone conferences, research and drafting. In addition to our fee for services, you will also be billed for out-of-pocket costs incurred on your behalf such as postage, photocopying, long distance charges, facsimile charges, costs of using computerized legal research facilities, filing fees and messenger fees.

We will bill you monthly for the amount of work that was performed on your file during the preceding month. At this time, it is impossible to estimate the amount of time and expense that will be necessary to adequately represent you in this matter.

During the representation, we will supply you with copies of all substantive correspondence ***[as well as a complete set of your estate plan documents upon completion of the matter]***. We suggest that you keep a copy of all of the documents regarding your matter in the file folder we have provided to you. After the matter is closed, you may obtain copies of your file by paying our standard photocopying charges and a minimum fee to compensate us for the time necessary to duplicate the file. ***[Due to storage constraints, the file will be destroyed after ____ years.]***

We understand that we are being retained solely to prepare your estate plan and related documents, that our representation will cease when the documents are signed, and that thereafter you prefer that we not advise you of changes in the law or provide additional or ongoing services, except at your specific request. Because estate taxes and other relevant laws change from time to time and your estate planning goals may also change, we would be pleased to review your estate plan in the future upon your request. We urge that you consider such a review at least once every five years.

Your primary contact for this matter will be _____. If you have any questions regarding this matter, please feel free to contact _____directly at ***(###) ###-####***.

If you disagree with any of the terms and conditions set forth above, please contact me immediately. We will not commence any work on your behalf until we have received a copy of

this letter with both of your signatures acknowledging agreement. We look forward to representing you in the preparation of your estate plan.

Sincerely,

Agreed to:

Signature	Print Name	Date
Signature	Print Name	Date

Non-Engagement Letter: Conflict of Interest

[Date]

[Name and Address of Client]

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

Return Receipt Requested

Dear [Client]:

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

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

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

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

[Name of Firm]

By_____

[Name of Attorney]

Non-Engagement Letter: Conflict of Interest

VIA REGULAR MAIL, CERTIFIED MAIL[1] RETURN RECEIPT REQUESTED,AND VIA ELECTRONIC MAIL

[Name]
[Address]

RE: Declination of Representation

Dear ***[Name]***:

You contacted our firm ***[last week]***[2] and requested that we represent you in the ***[describe case/matter]***. Although we did not discuss the particulars of your legal matters, our review has revealed that we have a possible conflict of interest. We appreciate the confidence you have expressed in our firm; however, because it does not appear that the ethical rules will permit an engagement under these circumstances, we must decline to represent you. ***[Enclosed herewith are the documents that you provided to us for review. We have not kept any copies thereof.]***[3]

In declining to accept your matter, the firm is not expressing an opinion as to the merits ***[or value]*** of such matter. You should be aware that any advice provided during our consultation were based on a preliminary understanding of the pertinent facts and were not based on a thorough legal analysis.

[It appears that your legal matter is time-sensitive. This means that the failure to take prompt legal action may result in your legal matter being barred by a time limit.[4] In order to preserve your rights, I strongly recommend that you contact another lawyer regarding this matter immediately.] [Although your legal matter may not be time-sensitive, I recommend that you contact another lawyer promptly should you wish to pursue the matter.]

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[1] If the firm is returning documents to the individual or entity seeking representation, or if the statute of limitations is fast approaching, it is recommended that the firm send the letter by certified mail. Because the certified letter may not be accepted by the intended recipient, it should be sent via regular mail, as well. If the individual or entity seeking representation has an email address, the declination letter should be sent via email as well as via regular mail and, under the aforementioned circumstances, via certified mail.

[2] The nonengagement letter should be sent within a reasonable time after the engagement is first sought, especially if the legal matter for which representation is sought involves time-sensitive matters, such as a statute of limitations.

[3] Preferably, the proposed client will not have provided any documentation to the lawyer, as documentation should be obtained only after a conflict-check has been run and a determination that no conflict exists has been made.

[4] As a general rule, lawyers should not specify the exact date on which they believe a statute of limitations period will expire or even the length of the statute of limitations (i.e., one year, two years). This is because lawyers who are declining a case may not have all of the information necessary to establish either the correct date or the statute of limitations that applies to the matter. Case law suggests that a lawyer who states an incorrect limitations period or date in his nonengagement letter may be held liable for providing negligent advice if the nonclient relies on that advice to her detriment.

Disclaimer

This booklet includes loss prevention techniques designed to reduce the likelihood of being sued for legal malpractice. It is not the intent of these materials to suggest or establish practice standards or standards of care applicable to a lawyer's performance in any given situation. Rather, the sole purpose of these materials is to assist lawyers insured by ISBA Mutual in avoiding legal malpractice claims, including meritless and frivolous claims. To that end, the intention is to advise lawyers insured by ISBA Mutual to conduct their practice in a manner that is well above the accepted norm and standards of care established by substantive legal malpractice law. The recommendations contained in these materials are not necessarily appropriate for every lawyer or law firm and do not represent a complete analysis of each topic.

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