



CONFLICTS OF INTEREST

RISK MANAGEMENT PRACTICE GUIDE
OF LAWYERS MUTUAL

ABOUT THE AUTHOR:



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DISCLAIMER: *This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

Conflict of Interest

Risk Management Practice Guide of Lawyers Mutual

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CONFLICTS

Conflicts. The one word answer for why the firm made the headlines in the newspaper today. Yes, the most severe legal malpractice settlements and verdicts all come from conflict claims. Visualize the sting of seeing “Breach of Fiduciary Duty” and “Punitive Damage” when reading the demand letter or pleadings.

A conflict of interest is a compromising influence that is likely to negatively affect the advice which a lawyer would otherwise give to a client. A conflict of interest can adversely affect a lawyer’s judgment, loyalty, and ability to safeguard the interest of a client or prospective client.

When a conflict exists and is not or cannot be waived by the relevant parties, lawyers may face many difficult consequences, including disqualification motions and orders; disciplinary actions; reversal of proceedings; forfeiture of fees and time invested in the case; and malpractice claims and ethics grievances.

Conflict of interest malpractice claims and related ethics complaints are among the most rapidly increasing types of allegations lodged against lawyers today. Legal consumers are no longer hesitant to cry foul when made aware of their lawyer’s alleged conflicts.

While it’s true that conflicts are a complicated matter particularly in larger firms with thousands of clients, this guide serves as a referral primer when a thought or concern arises. Be proactive and implement a system for conflict checks at different stages of an attorney-client relationship.

It is a proven fact that attorneys who correspond with their clients regularly and make sure their services and fees are reduced to writing have fewer complaints filed against them, fewer problems with their clients, and provide better legal services. Letters set the stage for the relationship and responsibilities between the parties. They protect both the lawyer and the client by providing a clear written description of the client's relationship with counsel. An engagement letter is also an excellent opportunity to address potential conflicts with the client and obtain advance consent where permitted. Many legal malpractice claims are successfully defended because the lawyer can produce a letter which establishes that he or she did not have responsibilities to the client. As such, it is wise to delineate these relationships in writing.



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TOP TEN PROBLEM AREAS

Here is a list to refer to of the top ten problem areas and why, which came from real legal malpractice suits and claims.

1. The continued representation after a conflict develops. This is number one because it is a sleeper issue. Conflicts are checked at the beginning of the representation but should be checked again when facts unfold by way of witness or documents and/or when parties are added or subtracted. Does your firm have a procedure in place to catch subsequent activity?
2. Prejudging the matter based upon a concern of not getting paid. Word to the wise, always place payment concerns in a separate letter that starts with the sentence: "Just a follow up on our conversation . . ."
3. Changing the terms of your service (fee) agreement. This creates the perception that the attorney has an advantage and that the dealings are unfairly weighted in your favor.
4. Doing business with your clients. Again, the perception is that the client is at a disadvantage and you the attorney took advantage to line your pockets.
5. Insured vs. Insurer. You really do need the three legs to balance the stool of the tripartite relationship.
6. Representing all the parties in a transaction. The "I was only the scrivener" defense rarely works and both sides may sue you for malpractice.
7. Agreeing to a matter that is adverse to a former client or a current client. Both run the risk of alleged misuse of information acquired in confidence.
8. Representing multiple defendants. Who is the client? Is the client the board, president, shareholders, general partner or limited partner, etc.? Picture a minefield. Address this in your engagement letter.
9. Representing Multiple Plaintiffs. One is one. Two or more is never one. Strive to follow the one client one lawyer rule. We are all granted the same rights not the same results.
10. Agreeing to represent a client despite inexperience and lack of knowledge in the appropriate area of law.

FIVE TIPS FOR AVOIDING A CONFLICT OF INTEREST

1. Even if there is no conflict at the start of a case, keep your radar on as the matter proceeds – and even after it ends. Some conflicts appear over time. Others may arise after the matter is concluded.
2. Have a system to check for conflicts of interest. Lawyers Mutual has risk management practice guides that can help you set up a system to suit your practice needs.
3. Take action at the slightest hint of a conflict. Talk to your client. Discuss the situation with a senior partner. Don't just keep silent and look the other way.
4. Full disclosure and client consent can often defuse a sticky situation and prevent a costly malpractice claim.
5. Review N.C. State Bar Rules of Professional Conduct 1.7 through 1.18 at your next staff meeting.

IMPORTANT RULINGS ON CONFLICTS OF INTEREST

There are ten primary North Carolina Rules of Professional Conduct that govern most conflict situations with which lawyers should be familiar. These rules should be reviewed every time a conflict disclosure or waiver is prepared. Such time should be accounted for and may or may not be billed. Imagine how easy it would be to pinpoint the amount of time spent conducting a conflict check and using real facts to defend yourself against a spurious claim.

Although evidence sufficient to establish a violation of the Rules does not establish a cause of action for legal malpractice, courts look to the Rules of Professional Conduct with increasing frequency for guidance in considering issues of conflict of interest in disqualification cases.

- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality
- Rule 1.7 – Current Clients
- Rule 1.8 – Current Clients/Specific Rules
- Rule 1.9 – Former Clients
- Rule 1.10 – Imputation of Conflicts
- Rule 1.11 – Conflicts Rules for Current & Former Government Employees
- Rule 1.12 – Former Judges, Arbitrators, Mediators
- Rule 1.13 – Representing an Organization
- Rule 1.18 – Prospective Clients

Here are ten NC ethics opinions issued over the past ten years regarding conflicts of interest:

- **2015 Formal Ethics Opinion 4.** Opinion analyzes a lawyer's professional responsibilities when she discovers that she made an error that may adversely impact the client's case.
- **2016 Formal Ethics Opinion 3.** A lawyer working for a private law firm may not negotiate for employment with another firm if the firm represents a party adverse to the lawyer's client unless both clients give informed consent.
- **2014 Formal Ethics Opinion 6.** A lawyer who provides free brief consultations to members of a nonprofit organization must still screen for conflicts prior to conducting a consultation.
- **2009 Formal Ethics Opinion 9.** Opinion describes reasonable procedures for a computer-based conflicts checking system.
- **2013 Formal Ethics Opinion 14.** Common representation in a commercial real estate loan closing is, in most instances, a "nonconsentable" conflict meaning that a lawyer may not ask the borrower and the lender to consent to common representation.
- **2015 Formal Ethics Opinion 8.** Opinion rules that a lawyer who previously represented a husband and wife in several matters may not represent one spouse in a subsequent domestic action against the other spouse without the consent of the other spouse unless, after thoughtful and thorough analysis of a number of factors relevant to the prior representations, the lawyer determines that there is no substantial relationship between the prior representations and the domestic matter.
- **2010 Formal Ethics Opinion 3.** Opinion provides guidance on the cross-examination of current and former clients.
- **2011 Formal Ethics Opinion 2.** Opinion sets forth the factors to be taken into consideration when determining whether a former client's delay in objecting to a conflict constitutes a waiver.
- **2012 Formal Ethics Opinion 4.** Opinion rules that a lawyer who represented an organization while employed with another firm must be screened from participation in any matter, or any matter substantially related thereto, in which she previously represented the organization, and from any matter against the organization if she acquired confidential information of the organization that is relevant to the matter and which has not become generally known.
- **2013 Formal Ethics Opinion 8.** Opinion analyzes the responsibilities of the partners and supervisory lawyers in a firm when another firm lawyer has a mental impairment.

PRACTICE TIP

These rules should be reviewed every time a conflict disclosure or waiver is prepared. Such time should be accounted for and may or may not be billed.

IMPORTANCE OF A GOOD CONFLICT SYSTEM

Conflicts of interest can lead to serious malpractice and ethical problems. To detect conflicts, a good conflicts checking system is essential. No lawyer can remember every person connected with every case. Eventually a new client will appear with interests opposed to a present or past client. If undetected, such a conflict will cause much wasted effort if you are eventually forced to resign from the case and can result in malpractice claims and disciplinary proceedings.

A good conflict checking system will detect possible conflicts of interest before representation. Nevertheless, some conflicts may arise during representation. Every lawyer should develop policies for handling conflict situations as they arise. A poor conflict system is as bad as having no conflict system at all. There are different approaches to setting up conflict systems, depending on the size and type of office. All effective systems have certain things in common. A good conflict system has these characteristics:

FEATURES OF A GOOD CONFLICT SYSTEM

- The system is integrated with other systems; i.e., time and billing and case management;
- Provides easy access to conflict data for everyone in the office;
- Checks are conducted at the three key stages of the representation: before face-to-face consultations, before a new file is opened and when a new party enters the case;
- Checks are conducted when new attorney and staff members join the firm and their list of past clients;
- Searches check for varying spelling of names and all prior names;
- Conflict entries show the party's relationship with the client;
- All parties connected with a case are entered into the system;
- Conflict searches are documented in the file; and
- A new client list is circulated weekly to all lawyers and staff in the office and is reviewed for possible conflicts.



***Conflicts of interest can lead to serious malpractice and ethical problems.
To detect conflicts, a good conflicts checking system is essential.***

TYPES OF NAMES TO BE ADDED TO CONFLICT LIST

(This is not a complete list.)

LITIGATION Insured Insurer Plaintiff(s) Defendant(s) Guardian ad Litem Spouse or Partner Expert Witness(es) Lay Witness(es)	CORPORATE/BUSINESS/REAL ESTATE Owner (Spouse/Partner) Subsidiaries/Affiliates Buyer(s) Seller(s) Partner(s) Officer(s) Shareholder(s) Director(s) Key Employees Property Address Taxlot ID Number Any opposing party in a transaction
PROBATE Deceased Personal Representative Spouse or Partner/Children/Heirs/Devises Trustee/Guardian/Conservator	ESTATE PLANNING Testator Personal Representative Spouse or Partner/Children/Heirs/Devises Trustee/Guardian
DOMESTIC RELATIONS Client Spouse or Partner Children Grandparents	CRIMINAL Client Co-Defendant(s) Witness(es) Victim(s)
WORKERS' COMPENSATION Injured Worker Insurer Employer	BANKRUPTCY Client Spouse or Partner Creditors
YOUR FIRM All Lawyers Employees Spouse or Partners Parents/Siblings/ In-laws/Children	OTHER Declined clients and adverse parties, if known Prospective clients Agencies or individuals for whom you provide investigation work, such as OSB Professional Responsibility Board

Include all clients in your conflict system, including pro bono clients and individuals advised through volunteer work at pro bono agencies.

When listing an individual, be sure to include all known names (i.e., former or maiden names). When listing lawyers and employees of the firm, consider including contract attorneys, temporary workers and free-lancers. Key vendors or service providers of the firm may also be included in the conflict system.

CONFLICT OF INTEREST SEARCH TERMS

(Organized by Area of Practice)

The following chart is a list of suggested search terms to use in your screening for conflict of interest. The list is not all-inclusive and your list that you use in your firm may depend on a number of other factors such as business set-up, locality, and specialty areas of practice.

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)
- ☐ Guardian ad litem
- ☐ Related Parties

LITIGATION

- ☐ Client
- ☐ Insured
- ☐ Plaintiffs
- ☐ Defendants
- ☐ Insurance carriers
- ☐ Guardian ad litem
- ☐ Spouse
- ☐ Witnesses (if any)
- ☐ Expert Witnesses
- ☐ Co-Counsel
- ☐ Co-plaintiffs/Co-Defendants
- ☐ Opposing counsel

IMMIGRATION LAW

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

RESIDENTIAL REAL ESTATE

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

WORKERS COMPENSATION

- ☐ Client
- ☐ Employer
- ☐ Insurer
- ☐ Expert Witnesses
- ☐ Witnesses (if any)
- ☐ Adverse family members
- ☐ Guardian ad litem

REQUEST FOR CONFLICT SEARCH AND SYSTEM ENTRY

FILE NAME _____

CLIENT/COMPANY NAME _____

CLIENT MATTER _____

RESPONSIBLE ATTORNEY _____

RELATED PARTIES (Name/Relationship): _____

Requested by _____ Request Date _____

☐ NEW MATTER (to open new file)

☐ SEARCH ONLY (do not add information)

☐ ADDITIONAL INFORMATION (to update file)

☐ NO CONFLICTS FOUND

☐ NAMES FOUND AS FOLLOWS: _____

Searched by _____ Search Date _____

CONFLICT BULLETIN

To: All Attorneys and Staff

Date: _____

If anyone knows of a CONFLICT that would arise if we represented or were adverse to the following parties, kindly contact _____ immediately.

CLIENT: _____

() New () Existing

ADVERSE PARTIES: _____

OPPOSING COUNSEL: _____

BRIEF DESCRIPTION OF MATTER: _____

* * * * *

Please check the appropriate box below and return to

() I know of no conflict.

() Yes, there is a conflict. Please notify the responsible attorney.

(initials)

(date)

CONFLICTS OF INTEREST AUDIT

	YES	NO
1. Do you know the meaning of “undivided loyalty”?	<input type="checkbox"/>	<input type="checkbox"/>
2. Do you have a reliable system for screening new clients and cases for potential conflicts of interest?	<input type="checkbox"/>	<input type="checkbox"/>
3. Do you have routine procedures to obtain basic conflict of interest information before opening a file?	<input type="checkbox"/>	<input type="checkbox"/>
4. Are your conflicts procedures provided in writing so that all staff are familiar with them?	<input type="checkbox"/>	<input type="checkbox"/>
5. Do you check for subject matter conflicts as well as client conflicts?	<input type="checkbox"/>	<input type="checkbox"/>
6. Do you screen for conflicts before receiving confidential information and fees from new clients?	<input type="checkbox"/>	<input type="checkbox"/>
7. Do you maintain a master index; either as a notebook, card system, or computerized list?	<input type="checkbox"/>	<input type="checkbox"/>
8. Does your master index include all of the following: <ul style="list-style-type: none"> • Client name • Affiliates or partners of client • “Also known as” name • Directors or officers of client • Adverse parties • Co-plaintiffs or co-defendants • Known relative of client and other parties • Common law spouses of client and others • Lawyers for any names in the index 	<input type="checkbox"/>	<input type="checkbox"/>
9. Is one person assigned responsibility for maintaining the master index?	<input type="checkbox"/>	<input type="checkbox"/>
10. Do you routinely circulate new case summaries to all attorneys and support staff, and do the summaries contain a space for indicating any potential conflict?	<input type="checkbox"/>	<input type="checkbox"/>
11. If a potential conflict is found, does your firm have one or more attorneys designated to determine if an actual conflict exists?	<input type="checkbox"/>	<input type="checkbox"/>

CONFLICTS OF INTEREST

12. If a potential conflict is found, do you either decline to take the case or notify the client of the potential conflict in writing?	<input type="checkbox"/>	<input type="checkbox"/>
13. Do you have a standard letter for conflict disclosure?	<input type="checkbox"/>	<input type="checkbox"/>
14. Do you decline cases where there is actual conflict regarding the client, the subject matter, or some other aspect of the case?	<input type="checkbox"/>	<input type="checkbox"/>
15. Have you discussed the conflicts rules in the NC State Bar’s Rules of Professional Conduct and adopted RPC and FEO opinions within your firm?	<input type="checkbox"/>	<input type="checkbox"/>
16. Do you screen new associates and staff when they come into the firm for potential conflicts arising from their prior employment?	<input type="checkbox"/>	<input type="checkbox"/>
17. Do red flags go up when you are asked to: <ul style="list-style-type: none">• Serve as an officer or director of a client corporation• Engage in business with a client or acquire a financial interest in a client matter• Acquire a financial interest in your client’s business• Represent adverse parties in “friendly” suits where there seems to be no opposing interests• Represent multiple parties with different interests• Represent more than one party seeking recovery from a fixed pool of money	<input type="checkbox"/>	<input type="checkbox"/>
18. Do you avoid acting for two or more clients in the same matter without their written informed consent?	<input type="checkbox"/>	<input type="checkbox"/>
19. Do you avoid acting for a client in a matter in which you, your relative, friend or partner has a financial interest which would reasonably be expected to affect your professional judgment?	<input type="checkbox"/>	<input type="checkbox"/>

TIP: An ideal conflicts database might include: clients, persons declined as clients, adverse parties, maiden names, parent and subsidiary corporations, individual directors and officers of corporations, trade names, alter egos, co-plaintiffs and co-defendants, known allies of clients or adverse parties, firm attorneys and staff, business interests of attorneys and staff, subject matter of representation.

NO. OF YES ANSWERS

SAMPLE LETTERS

NON-ENGAGEMENT LETTER: Conflict of Interest

[Date]

[Client Name]

[Client Address]

[Client Address]

Re: Confirmation of Non-Representation

File ID:

Dear [Client's Name]:

Thank you for your visit yesterday regarding _____. It was a pleasure to speak with you. Regrettably, however, [Law Firm] will not be able to assist you in this matter.

As we discussed yesterday, [Law Firm] would not be able to formally offer our services until we had the opportunity to investigate whether any of our current or former clients would be adversely affected by our participation in your matter. After we spoke, this formal search was performed and I learned that a conflict of interest does exist. Unfortunately, this situation cannot be resolved in a way that would permit [Law Firm] to represent you in this matter.

Please understand that [Law Firm] expresses no opinions on the merits of your claim. Any comments made were offered based solely on memory of the law and without the benefits of research, a complete understanding of the facts or time to reflect on the issue. Because of this, any such comment was not intended to serve as definitive legal advice. We strongly urge you to seek other counsel in this matter and remind you that you must not delay because of the legal time limits that can bar you from raising your claim once lapsed. If you do not have another attorney in mind, we recommend that you immediately contact the North Carolina Bar Association's Lawyer Referral Service at (800) 662-7660.

Thank you again for your consideration, but we must decline representation. Please do not hesitate to contact us with any questions regarding this letter.

Sincerely,

[Attorney's Name]

[Law Firm]

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

ENGAGEMENT LETTER: Simple

[Date]

[Client Name]

[Client Address]

[Client Address]

Re: Engagement For Legal Services

File ID:

Dear [Client's Name]:

We are pleased that you have asked the firm to serve as your counsel. At the outset of any engagement, we believe it is appropriate to confirm in writing the nature of the engagement and the terms of our representation, and that is the purpose of this letter. If you have any questions about this letter or any of its provisions, do not hesitate to call. Otherwise, this letter and the attached Policy will represent the terms of our engagement. Again, we are pleased to have the opportunity to serve you.

Scope of Representation

We have been engaged to represent [Client's Name] for the purpose of _____
_____, hereinafter referred to as the "matter" or "engagement."

However, engagement does not include _____
_____.

Billing and Fee Policy

Our fees will be based primarily on the hourly rate for each attorney and legal assistant devoting time to this matter. Our standard hourly rates for attorneys likely to be involved currently range from _____ to _____ per hour. Time devoted by legal assistants is charged at hourly rates ranging from _____ to _____ per hour. These rates are subject to periodic changes by our firm. In addition to the number of hours involved, we take into consideration other factors in determining our fees, including the urgency of the matter, the responsibility assumed, the novelty and difficulty of the legal problem involved, particular experience or knowledge provided, time limitations imposed by the client or matter, the results obtained, the benefit resulting to the client, and any unforeseen circumstances arising in the course of our representation.

We bill for out-of-pocket expenses, and also bill an administrative expense charge per billable hour in lieu of charging for long distance charges, routine copy costs, postage, and similar office expenses. Please refer to our attached Billing and Fee Policy, which is incorporated herein and made a part of the terms of our engagement for further details regarding our agreement regarding payment or reimbursement of fees and expenses.

General Waiver of Conflicts

As we have discussed, you are aware that the firm represents many other companies and individuals. You agree that we may continue to represent or may undertake in the future to represent existing or new clients in any matter that is not

substantially related to our work for you, even if the interests of such clients in those other matters may be directly or indirectly adverse to you. We agree, however, that the prospective consent to conflicting representation contained in the preceding sentence shall not apply in any instance where, as a result of our representation of you, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to your material disadvantage. You should know that, in similar engagement letters with many of our other clients, we have asked for similar agreements to preserve our ability to represent you.

Sending Funds via Electronic Transfer

Before sending any wire, call our office at (***) ***-**** to verify the instructions. We will not change wiring instructions. If you receive wiring instructions for a different bank, branch location, account name or account number, they should be presumed fraudulent. Do not send any funds and contact our office immediately. Failure to follow this procedure endangers your funds.

Once again, we are pleased to have this opportunity to work with you. Please call me if you have any questions or comments during the course of our representation.

Very truly yours,

[Attorney Name]

[Law Firm Name]

[Date]

Enclosure:

The foregoing letter accurately states the terms of our engagement of [Law Firm] to represent us in connection with the matter and under the circumstances described above, including our waiver of any existing conflicts and our waiver of future conflicts.

[Client's Name]

Date: _____

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

ENGAGEMENT LETTER: Hourly, Potential Conflict of Interest

[Date]

[Client Name]

[Client Address]

[Client Address]

Re: Engagement For Legal Services

File ID:

Dear [Client's Name]:

I enjoyed meeting with you on _____ to discuss your representation by this firm. This letter will confirm our agreement and if after reviewing it, you have no further questions about the terms of your representation, please sign the extra copy enclosed and return it to my office in the postage-paid envelope enclosed for your convenience. Our work will begin when we receive the signed copy of this letter [and required deposit].

I will undertake the following work on your behalf: [set forth the scope of the representation]. [My work will not include {set forth specific matters excluded from the representation if appropriate}].

You will receive an itemized monthly statement of fees and expenses associated with our services. [Payment is due upon receipt.] [The fees and expenses will be deducted from your deposit, and we will advise you from time to time if an additional amount is needed to maintain a sufficient deposit to cover anticipated fees and expenses.] My rate per hour for work is \$____. Often, from time-to-time, other members of the firm as well as our staff may engage in work on this matter, and their rates are as follows: partners, \$____ per hour; associate attorneys, \$____ per hour; legal assistants, \$____ per hour.

Previously, we discussed orally the potential for a conflict of interest in my [firm's] representation of you [client]. As I explained, a conflict may arise 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. When there are such multiple interests, there is always a possibility for the existence 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.

In addition to the fees set forth above, you will be responsible for expenses incurred in connection with this matter. Such expenses may include, among others, copying, delivery, and telephone charges, fees for professional services, and travel expenses. If the firm makes payment for you, you will need to reimburse us promptly.

[If we have to bring suit against you to collect any balance owed, you agree to pay us an additional amount of % of the balance owed as attorney fees. To secure any balance you owe us, you grant us a security interest in any property that may come into our possession in the course of our representation and any claim or cause of action on which we are representing you.]

To achieve the best possible representation of you will need to cooperate with us fully and provide us all the information we need to assist you. I encourage you to keep detailed notes of questions that may arise and of any new information, witnesses, or other important matters that come to your attention. Please call me if something is truly urgent, but otherwise it is best to schedule an appointment to discuss your accumulated questions and concerns. So that we may maintain continuous contact with you throughout the representation, please notify us immediately if there is any change in your address or telephone number.

If at any time you become dissatisfied with our handling of this matter, you should not hesitate to tell me immediately so we can discuss and resolve the problem. It is essential to your representation that we maintain a good relationship throughout. You may terminate our representation at any time. In the event of termination, you will be responsible for payment of any fees earned or expenses incurred. We may terminate this representation only as permitted or required by laws and regulations. Failure to pay [fees or] expenses or make deposits when due will be cause for such termination.

[Optional] In this joint representation, I must and will treat you [both] equally in all regards, including all communications. I will communicate all matters to both of you and will share all communications from each of you with the other.

While the agreement is intended to prevent any confusion of the terms of my representation, should a fee dispute arise you are agreeing pursuant to this paragraph to submit any fee dispute between us to arbitration with [your bar's program name]. You understand that you have the right to use other court forums to address fee disputes but we are both agreeable to compromising those rights to submit to binding arbitration. Any decision made by the arbitration panel whether for you or me will be final and non-appealable. It has the same effect and enforceability as if rendered by a court of law. The arbitration panel would hear us in [locality] and would be composed of those individuals, two attorneys and one layman. The [local bar organization] selects the panel from among a list of volunteers who have agreed to hear fee disputes. There are no costs associated with the panelists. You can seek additional independent legal counsel on this issue before signing this agreement, if you wish.

We will use our best efforts in representing you in this matter, but you acknowledge that we can give no assurances as to the final outcome.

CONFLICTS OF INTEREST

If the above terms are acceptable, please sign and return one of the enclosed copies of this letter. I look forward to working with you.

Very truly yours,

[Attorney Name]

[Law Firm Name]

[Date]

Enclosure:

The foregoing letter accurately states the terms of our engagement of [Law Firm] to represent us in connection with the matter and under the circumstances described above, including our waiver of any existing conflicts and our waiver of future conflicts.

[Client's Name]

Date: _____

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

ENGAGEMENT WAIVER CLAUSE: Waiver of Potential Conflict of Interest Form

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.

Letter to Disclose Conflict and Seeking Consent to Continue Representation

[Date]

[Client Name]

[Client Address]

[Client Address]

Re: Consent to continued representation

File ID:

Dear [Client's Name]:

I have been representing you in your claims against _____ for _____ 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 North Carolina Rules of Professional Conduct 1.7(b) and North Carolina State Bar 2015 Formal Ethics Opinion 4 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. If you and my insurance carrier cannot resolve that matter short of litigation, however, we will have to reassess this issue.

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.

Very truly yours,

[Attorney Name]

[Law Firm Name]

[Date]

[Client's Name]

Accepted on: _____

[Date]

Note: This is a sample form only and is written for the general purposes of facilitating clear expectations and avoiding misunderstandings between an attorney and client. It is not intended as legal advice or opinion and will not provide absolute protection against a malpractice action.

TAKE OUR CONFLICT OF INTEREST TEST

How knowledgeable are you on conflicts of interest? Take this test on Rule 1.8 and find out. Answer each question true or false (correct answers below):

1. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest directly adverse to a client unless the client is (a) advised in writing of the desirability of seeking the advice of independent legal counsel and (b) given a reasonable opportunity to do so.
2. A lawyer shall not enter into a business transaction as described above unless the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in it.
3. It's okay to offer a prospective client a computer tablet in a direct mail solicitation letter as long as you keep records of the solicitation letters you send.
4. While representation of a client is ongoing, a lawyer is allowed to 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.
5. A lawyer shall not accept a fee from anyone other than the client unless: (a) the client consents, (b) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (c) information relating to representation of a client is kept confidential under Rule 1.6.
6. A lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of the claims or pleas involved and the participation of each person in the settlement.
7. It's okay to foreclose on a client's deed of trust while you are representing the client.
8. A lawyer shall not make an agreement prospectively limiting malpractice liability unless the client is independently represented in making the agreement, or settle a malpractice claim with an unrepresented client or former client unless that person is advised in writing of the desirability of independent legal counsel.
9. You can recommend that your client purchase a financial product, but you can receive no more than a 10 percent commission on the sale.

ANSWERS

- | | |
|---|--|
| 1. True. See Rule 1.8 (a) | 6. True. See Rule 1.8 |
| 2. True. See Rule 1.8 (a) 3. | 7. False. See 2008 Formal Ethics Opinion 12 |
| 3. False. See 2015 Formal Ethics Opinion 3 | 8. True. See Rule 1.8(h) |
| 4. False. See Rule 1.8(d) | 9. False. See 2001 Formal Ethics Opinion 9 |
| 5. True. See Rule 1.8(f) | |

So how did you do? Should your malpractice insurer be notified?

ADDITIONAL RESOURCES

“ATTORNEY-CLIENT AGREEMENTS TOOLKIT.” Downloadable PDF Published by Lawyers Mutual. Available at <https://nmcdn.io/e186d21f8c7946a19faed23c3da2f0da/556712d9bf0f4cb2a916cc810687d52b/files/risk-management-resources/risk-management-handouts/attorney-client-agreements-toolkit/Agreements.pdf>

“ETHICS: NOT ALL RELATIVE.” Downloadable PDF Published by The American Bar Association. Available at www.abanet.org or by phone at 800.285.2221; product code: 51105671701PDFA03. Price is \$19.95 regular and 14.95 for members of the ABA.

FREIVOGEL ON CONFLICTS. Available at: www.freivogelonconflicts.com

“THE INTERSECTION OF CONFLICTS OF INTEREST AND IMPUTATION OF KNOWLEDGE.” Downloadable PDF Published by The American Bar Association. Available at www.abanet.org or by phone at 800.285.2221; product code: 54302002206PDFA06. Price is \$19.95 regular; \$14.95 for members of the ABA; and \$9.95 for members of the Government and Public Sector Division and Law Student Division.

“MANAGING CONFLICT OF INTEREST SITUATIONS.” Published by PracticePro. Available at: <http://www.practicepro.ca/practice/conflicts.asp>

“CONFLICTS.” By Carter L. Hampton. Published in the Professional Liability Newsletter. Available at: https://www.iadclaw.org/securedocument.aspx?file=1/19/Professional_Liability_June__2009.pdf

Keep up to date with new changes affecting attorneys by visiting Lawyers Mutual’s Byte of Prevention Blog at <http://www.lawyersmutualinc.com/blog>.

Read more about Risk Management at www.lawyersmutualinc.com/risk-management-resources.