

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 58

Question Presented

The Committee has been asked to address prospective conflict waivers, also known as “advance conflict waivers” or “future conflict waivers” pursuant to Nevada Rule of Professional Conduct 1.7, and to issue an opinion on the following:

1. Does Nevada accept the general principle in Comment 22 to ABA Model Rule 1.7 and allow prospective conflict waivers?
2. If so, what must a prospective conflict waiver contain to be effective and avoid running afoul of the Nevada Rules of Professional Conduct?

Answer to Questions 1 and 2

Prospective conflict waivers may be permitted under Nevada Rule of Professional Conduct 1.7 if the prospective waiver meets all the requirements for waiving a present conflict of interest, including whether the conflict can be consented to and whether the client has given truly informed consent. Because no one client is the same, however, this Committee cannot give an opinion on what a prospective conflict waiver “must contain to be effective.” Rather, an attorney should undertake an independent assessment of each client and each situation consistent with the attorney’s ethical obligations in order to ensure the client fully appreciates the significance of the waiver being sought.

Rule

Nevada Rule of Professional Conduct 1.7:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) The representation of one client will be directly adverse to another client; or
- (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under 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, confirmed in writing.

Discussion

A. NRPC 1.7 does not prohibit prospective client waivers.

Prospective conflict waivers arise when an attorney asks a current client to waive a future conflict under Rule 1.7 and permit the attorney to represent a future client whose interests may be adverse to the current client. The use of prospective conflicts waivers was first recognized by the American Bar Association in 1993 with its issuance of ABA Formal Ethics Op. 93-372, which recognized the practicalities of law firms who engaged in specialized practice areas with large corporate clients who were sophisticated users of legal services. The 1993 opinion recognized that such law firms should not be precluded from negotiating agreements with current clients for possible future conflicts on work wholly unrelated to the law firm's work for that current client.

Prospective conflict waivers can benefit both the client and the attorney, particularly in long-standing relationships between the client and his or her counsel. As the Restatement explains,

...particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement (Third) of the Law Governing Lawyers § 122, *comment d* (2000).

In 2002, the Model Rules were amended, and comment 22 to RPC 1.7 was adopted, which further defined the parameters of prospective conflict waivers. Comment 22, "Consent to Future Conflicts," provides, in full, as follows:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b) [of RPC 1.7]. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will

be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b) [of RPC 1.7].

Model Rule 1.7, Comment 22 (ellipses added).

After Comment 22 was added to Model Rule 1.7, the 1993 ABA opinion was withdrawn and replaced by ABA Formal Opinion 05-436 in 2005. The 2005 opinion recognizes that, “a lawyer in appropriate circumstances may obtain the effective informed consent of a client to future conflicts of interest,” and also provides that under the 2002 amendments to the Model Rules, a lawyer can obtain effective informed consent under a wider range of future conflicts than would have been possible under the Model Rules prior to their amendment.” *See* ABA Formal Ethics Op. 05-436. This expansion, however, does not in any way reduce or alter a lawyer’s ethical responsibility to ensure that the future conflict is one that is consentable and that the client truly appreciates the material risks involved. *Id.*

As Comment 22 notes, it is likely that a broad and open-ended waiver will ordinarily be ineffective to obtain client consent to a future conflict. Instead, in order to be effective, an advanced waiver should meet the test of Rule 1.7(b). “The key factor to determine if an advance waiver is effective is whether the lawyer can properly explain to the client all of the material risks associated with the future conflict.” Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics, The Lawyer’s Deskbook on Professional Responsibility*, p. 407 (ABA 2018).

Rule 1.0A of the Nevada Rules of Professional Conduct provides that comments to the ABA Model Rules may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conflict, unless there is a conflict between Nevada’s Rules and the Model Rules. The Committee does not find a conflict between NRPC 1.7 and Comment 22 of the Model Rules. The Committee finds the foregoing commentary and opinions persuasive, and so finds that prospective client waivers can be consistent with Nevada Rule of Professional Responsibility 1.7, subject to the factors set forth below.

B. Whether a prospective client waiver is consistent with NRPC 1.7 is a fact-specific inquiry.

Because the nature of representation is unique for each client, there is no single talismanic phrase that a lawyer can include in a prospective conflict waiver to cover all situations. Rather, “there are a number of factors that are important in determining the effectiveness of any advanced consent.” *Legal Ethics*, *supra*, p. 407. These factors may include:

- (1) the comprehensiveness of the information provided to the client,

- (2) the sophistication and experience of the client with respect to such conflicts, and
- (3) the extent to which the actual conflict that arises in the future matches the information provided to the client and agreed upon in the advance consent.

Id. (citing factors).

These factors are in line with Nevada’s definition of “informed consent,” which is defined as “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.” Nev. R. Prof. Cond. 1.0(e). In other words, the attorney should convey to the client the information in such a way that the client can fully understand and appreciate the materiality of the waiver, depending on that client’s sophistication and experience. *See also*, Comment 18 to Model Rule 1.7 (“Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of that client. The information required depends on the nature of the conflict and the nature of the risks involved.”).

Moreover, the validity of such waivers may also depend on whether the client was represented by independent legal counsel in determining whether to give consent and whether the consent is “limited to future conflicts unrelated to the subject of the representation.” *See* Model Rule 1.7, Comment 22. ABA Formal Ethics Opinion 05-436 has interpreted “unrelated” in this context by looking to comment 3 of Model Rule 1.9, which explains that matters are “substantially related” if they “involve the same transaction or legal dispute or if there is otherwise a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” In sum, if a lawyer seeks a client’s consent to conflicting representation, then the representation should not “involve the same transaction or legal dispute that is the subject of the lawyer’s present representation of the consenting client.” *Id.* Further, the representation should not be “of such a nature that the disclosure or use by the lawyer of information relating to the representation of the consenting client would materially advance the position of future clients.” *Id.* The reasoning behind this is to protect the confidentiality of client information. While a client may decide to waive a conflict based on loyalty, a client may not normally waive a future conflict based on confidentiality because a client generally cannot know in advance the significance of those confidences. *See Legal Ethics*, p. 408 (“the focus of the conflicts rules is to protect client confidential information.”).

Finally, “if the scope of the original representation changes in a material way, the advance consent may be invalid” unless the attorney revisits the consent with the client and obtains a new informed consent agreement. *See Legal Ethics*, p. 410; *see also Restatement (Third) §122, comment d* (“if a material change occurs in the reasonable expectations that formed the basis of a client’s informed consent, the new conditions must be brought to the attention of the client and new informed consent must be obtained.”) *and comment f* (“A material change in the factual basis

on which the client originally gave informed consent can justify a client in withdrawing consent.”¹

These principles are borne out by courts who have examined the validity of prospective conflict waivers. For example, in *Cedar Rapids Bank & Tr. Co. v. Mako One Corp.*, 919 F.3d 529, 536 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 848, 205 L. Ed. 2d 468 (2020), the Eighth Circuit examined whether a firm’s future conflict waiver was valid where the law firm represented a mortgagee in an action to foreclose on a mortgagor’s tax credit bonds that the law firm had previously prepared for the mortgagor. The court found the law firm’s consent waiver letter was inadequate under the applicable rules of professional conduct because it made “no attempt to explain to [the mortgagor] the advantages, disadvantages, risks, or benefits that [the mortgagor] would confront by allowing [the law firm] to represent [the mortgagee].” *Id.* at 536. Indeed, the letter only stated that the interests of the mortgagee and the mortgagor “are or may be adverse,” with no additional explanation. *Id.* Because there was no informed consent and because the firm represented the mortgagee against the very same work it conducted for the mortgagor, there was no valid waiver.

By contrast, in *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1105 (N.D. Cal. 2003), the Northern District of California upheld a prospective conflict waiver between Visa and First Data even though the law firm’s representation ripened into an actual conflict because the law firm fully explained to First Data the nature of future prospective conflicts that could arise. Acknowledging the “fact-specific” inquiry of prospective conflict waivers, the court set out the following factors to analyze whether full disclosure was made for purposes of whether the client made an informed waiver:

...the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.

Visa U.S.A., Inc., 241 F. Supp. 2d at 1106 (citations omitted). In affirming the prospective conflict waiver, the court found the law firm satisfied these factors by meeting with First Data, explaining

¹ Although beyond the scope of the initial inquiry, this Committee notes that attorneys should be aware of the client’s ability to withdraw consent should a conflict arise. The attorney must analyze whether he or she can still remain counsel for the other client in light of the conflict. If an attorney must withdraw from one client, that client becomes a “former client” for purposes of whether the attorney can continue to represent the other client. *See Nev. R. Prof. Cond.* 1.9. Without informed consent from the former client, the rules generally prohibit a lawyer from continuing to represent the other client. *See Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice*, §§ 17:39, 17:44 (2015); *and Rotunda, Legal Ethics*, p. 410 (“Absent special circumstances, if the parties do not consent to the conflict, the law firm must withdraw from representing both parties in the two cases.”). In determining whether to enter into a prospective conflict waiver, the Committee observes that an attorney should carefully consider the potential impact of one client withdrawing its consent and how that will affect the attorney’s relationship with and professional obligations to not only to the withdrawing client but the remaining client as well. *See Mallen*, § 17:52 (noting that allegations of conflicts of interest “almost routinely appear in actions for legal malpractice.”).

its relationship with Visa, and disclosing as fully as possible the nature of any potential future conflict between Visa and First Data. Although the law did not require a waiver to “specifically state the exact nature of the future conflict,” the prospective conflict waiver was upheld in this case because future potential adverse parties were identified, First Data gave knowing, informed consent, and First Data was a sophisticated user of legal services. *Id.* at 1105-1108. The *Visa U.S.A. Inc.* case is instructive to attorneys in that they cannot pay lip service to obtaining informed consent in writing if they wish to use prospective conflict waivers.

C. Other authorities rely on these factors to judge the validity of a prospective waiver.

In indicating the permissibility for the use of prospective conflict waivers, other jurisdictions and state bar associations who have addressed this issue affirm the need for the attorney to appropriately explain the nature of potential future conflicts so that the client’s consent is meaningful.

For example, Colorado Formal Ethics Opinion 135 (2018) states, “the lawyer should carefully evaluate whether the conflict that has arisen was of the type fairly within the advisement to, and contemplation of, the clients at the time they gave their advance consent to future conflicts.” *Id.*, p. 18. “The client’s reasonable understanding of the material risk that the waiver entails generally determines the effectiveness of the waiver.” *Id.* (citations omitted).

Opinion 724 from the New York County Lawyers Association observes that while there is no actual conflict for a lawyer to examine when requesting a future conflict waiver, “this does not prevent the lawyer from examining the type of representation anticipated for the prospective client and its adversity to the interests of the current client, and from making a reasonable analysis of the probabilities of whether or not this type of representation is likely to give rise to a conflict that is non-consentable.” *Id.*, p. 2. The opinion similarly notes that, “the adequacy of disclosure and consent will depend, as it does in a contemporaneous conflict situation, upon the circumstances of each individual case.” *Id.* p. 3 *citing* Wolfram, *Modern Legal Ethics* § 7.2.4 at 343 (1986); *see also*, New York State Bar Ass’n Op. 903 (2012) (discussing how advance agreement can avoid many uncertainties surrounding a client’s revocation of consent to a multiple representation); *and see* District of Columbia Bar Association Ethics Op. 309 (2001) (citing the “modern view” that advance waivers of conflicts of interest are permissible, within certain limits and subject to certain client protections).

The Committee joins the reasoning of these jurisdictions and finds that if an attorney elects to enter into a prospective conflict waiver with a client, the nature of the waiver should be communicated in a way that ensures the client is fully and appropriately apprised such that their consent is meaningful. *See* Nev. R. Prof. Cond. 1.0(e). The factors discussed in this opinion may be instructive to whether a client’s consent is informed and valid.

Conclusion

The Committee finds that prospective conflict waivers may be permitted under Nevada Rule of Professional Conduct 1.7 if the prospective waiver meets all the requirements for waiving a present conflict of interest under Nevada Rule of Professional Conduct 1.7(b). This includes an attorney undertaking an analysis of whether the conflict can be consented to and whether the client has given truly informed consent, as defined by Nevada Rule of Profession Conduct 1.0. Because no one client is the same, this Committee declines to opine on what a prospective waiver “must contain to be effective.” Rather, an attorney should undertake an independent assessment of each client and each situation in order to ensure the client fully appreciates the significance of the waiver being sought, in line with the attorney’s professional obligations.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

Authorities

Nevada Rule of Professional Conduct 1.7
Nevada Rule of Professional Conduct 1.0(e)
Model Rule of Professional Conduct 1.7 and related comments
Model Rule of Professional Conduct 1.9 and related comments
ABA Formal Ethics Op. 93-372
ABA Formal Ethics Op. 05-436
Colorado Formal Ethics Opinion 135 (2018)
New York County Lawyers Association Ethics Opinion 724 (1998)
New York State Bar Association Ethics Opinion 903 (2012)
District of Columbia Bar Association Ethics Opinion 309 (2001)
Restatement (Third) of the Law Governing Lawyers § 122
Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics, The Lawyer’s Deskbook on Professional Responsibility* (ABA 2018)
Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* (2015)
Charles W. Wolfram, *Modern Legal Ethics* § 7.2.4 (1986)
Cedar Rapids Bank & Tr. Co. v. Mako One Corp., 919 F.3d 529, 536 (8th Cir. 2019), *cert. denied*, 140 S. Ct. 848, 205 L. Ed. 2d 468 (2020)
Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1105 (N.D. Cal. 2003)