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How to handle full disclosure

The type and content of a disclosure required for client's effective consent varies in each case

By J. Randolph Evans and Shari L. Klevens, Special to the Daily Report

With the help of computers, attorneys and law firms are getting better at identifying potential conflicts of interest. But, like the dog that catches the bus, many attorneys face the equally important question of "What now?"

Identifying potential conflicts of interest is only one-half of the battle. The other half requires attorneys to seek and obtain the client's consent to the representation after "full disclosure." After all, a potential conflict of interest that has not been resolved in accordance with the applicable ethical rules is still a conflict.

What is "full disclosure" for purposes of resolving potential conflicts?

The purpose of the full disclosure requirement is to enable a client to make an informed decision regarding whether to agree or object to a representation. For a former client, this decision involves accepting the risk that their former attorney may use confidential information against them on behalf of a new client. For current clients who will share an attorney, it involves waiving the right to insist that the attorney only protect their interests as opposed to their collective interests with other clients.

As a result, in order for the disclosure to be effective, it must enable a former or existing client to fully appreciate the risks of granting consent. It is not sufficient for an attorney to simply advise a client that there is a potential conflict of interest, and ask for consent without providing additional information.

A simple waiver isn't enough

Similarly, it is not sufficient to simply confirm a client's waiver of the conflict or consent to the representation. Instead, an effective disclosure requires more. Rule 1.7(b) of the Georgia Rules of Professional Conduct requires that "reasonable and adequate information about the material risks of the representation" be provided to the client before consent.

In general terms, this means that an attorney should disclose whatever information a reasonable person would expect and need to consider before waiving an important right. In specific terms, there are topics that every attorney should include when seeking a client's consent or waiver.

There is no template that attorneys can use as a form for full disclosure when seeking a client's consent to a representation. Instead, the type and content of a disclosure required for effective consent varies depending on the facts and circumstances of each representation. For example, the scope and content of full disclosure will often depend on the sophistication of the client, the nature of the

representation, prior representations, and the length of the relationship.

Common topics

There are some topics that are common to representations requiring consent.

First, identify the proposed representation and then state what consent the attorney seeks. Importantly, general waivers involve a different kind of disclosure than a limited waiver for a specific representation. Hence, tailoring the full disclosure necessarily involves making clear exactly which kind of waiver the attorney seeks.

In the multiple representation context, this means advising the client that the attorney is requesting permission to jointly represent the client along with others. In the successive representations context, this means advising a former client that the attorney is requesting permission to represent a new client in a matter involving the former client.

Second, identify the risks. There should be no mincing of words when disclosing the potential risks to a client. Subtlety, implication and suggestion do little when an attorney is attempting later to prove that a client consented to a representation after full disclosure. To be effective, the disclosure should clearly and plainly articulate the risks so that a court can later determine that a client understood and accepted the risks by providing consent to the representation.

In the multiple representation context, this means identifying the kinds of things that an attorney cannot and will not do because the representation involves more than one client. For example, the attorney will not explore or pursue claims by one client against another client. In addition, information communicated by one client may be disclosed to the other clients. There may be others. The important point is to ensure that the consenting clients understand the limitations that arise from a joint representation as opposed to the representation of a single client.

In the successive representation context, this means explaining the risk that the attorney may have learned confidential information that may be used on behalf of a new client. Importantly, the standard is not whether an attorney actually did learn confidential information in the prior representation that can be used against a former client. Instead, to trigger an attorney's obligation to obtain a former client's consent, all that is required is that the new representation be "substantially related" to the former representation. The existence of confidential information is presumed.

Third, advise the clients of the right to independent counsel in deciding whether to agree to the multiple or successive representation. The safer course is to, in fact, encourage independent counsel on all issues arising out of the potential conflict of interest.

Importantly, an attorney seeking a client's consent should not advise a client on whether to give consent. Instead, the attorney's role should be limited to fully disclosing the risks without advice to the client about whether to give consent.

Fourth, confirm what will happen if an actual conflict develops that precludes the continued representation. Clients may agree, for example, that the attorney may continue to represent one of the clients if an actual conflict develops. Or the clients may insist that an attorney simply withdraw from the entire representation if an actual conflict develops. The most important thing is that the clients agree before the representation begins.

Both the multiple and successive representation rules require a consultation with the attorney for the client to consent. In most cases, the consultation will be in person. Unfortunately, while important to answer any questions that a client may have, the consultation actually does little to protect an attorney from a later allegation challenging the client's consent to the representation.

In addition to the consultation, there must be a written component. In fact, the most important document for effective consent is a writing, typically a letter. The letter should be jointly addressed to all of the clients (for a multiple representation), or to the former client (for successive representations), and should include a discussion of all the material risks of the representation.

Must consent be in writing?

Does the client's consent have to be in writing? As a legal matter, the answer is "no." Rule 1.7 allows the representation "if each affected or former client consents, preferably in writing, to the representation." As a practical matter, the answer is an emphatic "yes."

Invariably, once problems arise, clients have different recollections about the extent of the disclosure, their understanding of the risks, and whether they, in fact, consented to the representation. To avoid this problem, the safest course is to require that all clients consent in writing to a multiple or successive representation.

The easiest course is to simply include a signature line on the full disclosure letter and have the client return an executed copy. This simple step serves to protect both the client (by making sure that they, in fact, receive full disclosure in writing), and the attorney.

J. Randolph Evans and Shari L. Klevens are co-authors of "Georgia Legal Malpractice Law," published by Daily Report Books.

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