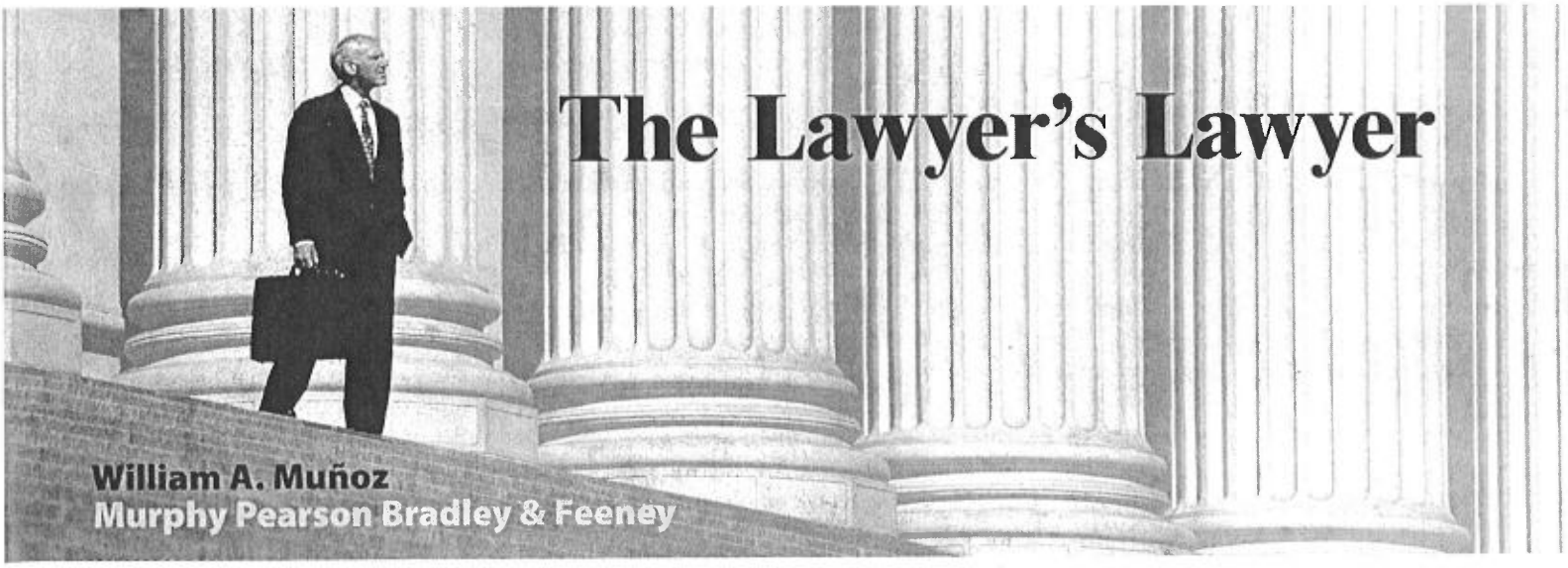

The Lawyer's Lawyer

William A. Muñoz
Murphy Pearson Bradley & Feeney

Conflict Waivers – Why Do We Need Them?

This is the fourth in a series of articles by The Lawyer's Lawyer providing key insights into potential ethical issues that arise in your daily practice and ways to avoid malpractice claims. Previous articles talked about the initial client contact and whether to accept the client, the importance of memorializing the representation once you agree to accept the client's case, and billing practices. Let's now shift gears to the topic that we as lawyers (except for me and those who practice in the area of legal malpractice) do not want to deal with and often overlook or ignore – the dreaded conflict waiver. We are going to talk about why you need them and what should be included in the conflict waiver for it to be enforceable in the event of a challenge.

So let's start with the "why." Why do we need conflict waivers? The answer is straightforward and twofold. First, the California Rules of Professional Conduct require them in certain circumstances. Those circumstances are set forth in Rules of Professional Conduct, rules 3-300 and 3-310. Rule 3-300 requires informed written consent when the attorney has a pecuniary interest in a matter being handled on behalf of the client. The most common example of a Rule 3-300 situation requiring a conflict waiver and informed written consent is when the attorney secures his fees with a charging lien under an hourly fee agreement with a client. (*See Fletcher v. Davis* (2004) 33 Cal.4th 61, 71-72; *but see Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 49-50 (Rule 3-300 not implicated for lien created to secure contingency fee agreement.)

Rule 3-310 is implicated in a number of different ways. However, the most common scenario implicating Rule 3-310 is joint representation – where you as the lawyer are representing multiple plaintiffs or defendants in the same matter. (*See* Rules Prof. Cond., rule 3-310(c)(1).) For example, you are retained to represent the offending lawyer and his or her law firm in a legal malpractice action. Or, you are retained to represent an employer and the alleged harassing employee in a sexual harassment case. While your clients in these types of cases are generally aligned in terms of defending against the claims asserted, you cannot simply agree to represent them and be on your merry way.

Secondly, the reason you need conflict waivers is inherent in the first reason. If you do not comply with the Rules of Professional Conduct, you may be subject to disciplinary action. Furthermore, failing to provide a conflict waiver will set you up for a breach of fiduciary duty claim should the relationship go south at some point in time and you end up in a dispute with your former clients. Lastly, failure to obtain a conflict waiver could result in your disqualification in pending litigation.

So now that you understand why you need conflict waivers, you need to know what must be contained in the conflict waiver for it to be enforceable. Preliminarily, when you are required to have a conflict waiver, do not include it in your legal services agreement. The conflict waiver should be a standalone document so there is no question that the client understands what it is, as opposed to trying to bury it within the legal services agreement where the likelihood of the client reading it is very low. Moreover, if you include the conflict waiver in the legal services agreement and the waiver is ultimately determined to be unenforceable, you run the risk of the entire fee agreement being found unenforceable. Granted, if the conflict waiver is unenforceable, whether your legal services agreement is enforceable may be a moot point as a breach of fiduciary duty claim may be grounds to disgorge any fees earned from inception of the conflict. (*See Clark v. Milsap* (1926) 197 Cal. 765, 785.)

Additionally, do not be complacent and simply use the firm's template conflict waiver to meet your fiduciary obligation. Each case is different and may present different consequences that need to be disclosed. Thus, your conflict waivers should be tailored to address the facts of your case.

As for the content of the conflict waiver, there are four essential elements. First, the attorney should identify the facts of the given case and reason for requesting a conflict waiver citing to the particular Rules of Professional Conduct that are applicable under the facts of the case. For example, the attorney has been asked to

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represent multiple defendants in a litigation matter. In the conflict waiver, the attorney should state that he has been asked to represent Defendants A, B and C in the *Smith v. Jones* litigation and that Rule of Professional Conduct, Rule 3-310(C)(1) requires that the attorney obtain informed written consent of each prospective client before representation can begin.

Second, the attorney should advise the prospective clients what informed written consent means. This is expressly set forth in Rule 3-310(A)(1)-(3) and typically should be cited verbatim so there is no misunderstanding. Generally speaking, this requires the attorney to provide the prospective clients with all reasonably foreseeable consequences (i.e., potential conflicts) that could arise in the litigation. It is worth noting that this is not a one-time disclosure. The duty to disclose potential or actual conflicts is an ongoing obligation of the attorney. Should circumstances develop that an unforeseen potential conflict arises during the representation, another conflict waiver is necessary.

By way of example in the joint representation context, the clients should be advised regarding the implications of Evidence Code section 962. Under Evidence Code section 962, while the attorney-client privilege would protect communications between the defendants and counsel in the subject litigation, it would not protect the communications between any one of the defendants and counsel in the event of a future dispute between the defendants. Thus, the potential conflict is that if such a dispute arose, the attorney would have a conflict and could not represent one of the defendants against the other.

As another example, the jointly represented defendants may not agree on litigation or settlement strategy. Some may want to fight the claims because they are frivolous while others understand the business side, recognizing that the claims may be frivolous, but it is not worth the headache of litigation to prove it; and thus, resolution is the more preferred route. This should be disclosed to each of the prospective clients.

Lastly, another example is if intentional conduct is alleged giving rise to potential punitive damages. Depending on the nature of the relationship between the respective clients (i.e., employer-employee, attorney-law firm), the potential conflict that could arise in this context is respondeat superior liability. In the employer-employee context, if the alleged harasser employee is non-management, then the only way the employer is liable for punitive damages for the conduct of the employee is if the employer knew of the conduct and ratified it. Thus, the potential conflict is the fact that the employer will disclaim any knowledge in order to protect itself from punitive damage exposure. This must be disclosed to each client, but in reality, the best practices in this scenario would be to have separate counsel for employer and employee.

The list can go on and on, but you should have the gist of what reasonably foreseeable consequences should be disclosed. So once you have set forth the facts of the particular case at issue and applicable Rules of Professional Conduct, as well as the potential consequences of the representation set forth in your conflict waiver, you should be ready to go, right? Unfortunately, no.

There are two additional and very essential items needed in the conflict waiver. After providing the facts and potential adverse consequences that could arise in the representation, you must advise the clients that they have the opportunity to seek the advice of independent counsel to review the waiver to determine whether they should sign it. Include at the end of this particular paragraph a line for the client to initial indicating that the client has had the opportunity to seek the advice of independent counsel and has waived his or her right to do so. Make sure the client understands this and signs it!

Secondly, you need the actual waiver for the client to execute. The waiver is straightforward and should contain words to the effect:

> I have read Law Firm's January 1, 2018 letter regarding the potential conflicts of interests that may arise from the joint representation of A, B and C in the matter entitled *Smith v. A, et al.*, Sacramento County Superior Court, Case Number 12-CV-34567.
>
> I understand the disclosures set out in Law Firm's January 1, 2018 letter. I acknowledge having been advised to seek and obtain legal advice from independent counsel of my choosing, and have had the opportunity to do so. Having been so advised, I hereby agree to waive any potential conflict of interest and further agree to Law Firm's continued and future representation of A, B and C.

Do not have the client execute the conflict waiver in your office. Send it to the client and give the client an opportunity to review it and seek the advice of independent counsel, asking that the client return the executed waiver within a reasonable period of time. If you have not received the executed waiver within two weeks, follow up with the status and continue to do so until your client either provides you with the executed waiver or tells you that they will not execute it. If the latter situation arises, immediately terminate the relationship in writing citing the lack of executed waiver because you cannot continue to represent that client under Rule 3-310.

While most attorneys find them inconvenient and unnecessary because the clients will never sue them if things do not work out (wishful thinking!), conflict waivers are a necessary evil in the practice of law. The Rules of Professional Conduct require them and the small amount of time spent actually preparing them is well worth it down the road. Good luck!

William A. Muñoz

Bill Muñoz is a shareholder at Murphy Pearson Bradley & Feeney in Sacramento, where he specializes in legal malpractice and other business matters. He received his Bachelor's degree from University of California, Davis, and his J.D. from Hamline University School of Law.