New Hampshire Bar Association Ethics Committee Advisory Opinion #2017-18/2

Conflicts Arising from *DeBenedetto* Disclosures

RULE REFERENCES:
NHRPC 1.7(a)(1)
NHRPC 1.7(a)(2)
NHRPC 1.7(b)

SUBJECTS:
Concurrent Conflicts of Interest
Waivability of Conflicts of Interest

ANNOTATIONS:

A defendant in a civil action and a potential DeBenedetto party in that action are directly adverse to one another, so that the representation of both these parties by one lawyer gives rise to a concurrent conflict of interest.

The representation of a defendant in a civil action and a potential DeBenedetto party in that action by the same lawyer creates a significant risk that the lawyer's responsibilities to one client will materially limit the lawyer's representation of the other client, giving rise to a concurrent conflict of interest.

Because the pursuit of a DeBenedetto apportionment defense against a current client creates a concurrent conflict of interest, the informed written consent of both clients is necessary before the dual representation may proceed.

Where a lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client affected by a concurrent conflict of interest, the lawyer may not seek a written waiver of the conflict.

A lawyer's subjective belief that he or she can provide competent, diligent representation to both clients is a necessary, but not sufficient, condition of seeking written waiver of a concurrent conflict of interest; rather, the test for waivability is one of objective reasonableness.

Even if a lawyer can form the objectively reasonable belief that he or she can provide competent, diligent representation to both clients affected by a concurrent conflict of interest, the lawyer must ensure that the other requirements for a waiver of the conflict are present before proceeding with the dual representation.

What is necessary for a client to provide informed consent to the waiver of a concurrent conflict of interest is a fact-specific, case-by-case inquiry that hinges on a number of factors, including but not limited to the breadth and specificity of the waiver, the quality of the conflicts discussion between the lawyer and the client, the nature of the conflict, the sophistication of the client, and the interests of justice.

BACKGROUND

In 1989, New Hampshire passed a law adopting several liabilities for those parties "less than 50 percent at fault." *See* RSA 507:7-e, I(b). In 2006, the New Hampshire Supreme Court held that a defendant may request that the jury apportion fault for the plaintiff's injuries to a person or entity not before the court. *DeBenedetto v. C.L.D. Consulting Engineers, Inc*., 153 N.H. 793 (2006).

A defendant who intends to request such apportionment, however, must disclose the identity of any non-party to whom it hopes to apportion fault ("DeBenedetto party") in advance of trial. Since it may require investigation and discovery to determine the identity of a DeBenedetto party, the court will ordinarily allow the defendant a number of months before the disclosure is due.

The mere fact of the disclosure does not result in the DeBenedetto party becoming a party to the pending litigation (although the plaintiff may later seek to amend the complaint to add a disclosed DeBenedetto party as a defendant). After naming a DeBenedetto party, a defendant bears the burden of establishing that the DeBenedetto party caused or contributed to the plaintiff's injuries; if the defendant presents sufficient evidence at trial, the jury may be asked to determine the percentage of fault attributable to the DeBenedetto party. This apportionment alone, however, does not result in any financial liability on the part of the DeBenedetto party.

While DeBenedetto parties are frequently identified at the outset of litigation, the identity of a potential DeBenedetto party is sometimes not known until the defense attorney has invested a significant amount of time in the case. Sometimes, the potential DeBenedetto party may turn out to be an existing client of the defense attorney or the attorney's firm in an unrelated matter.

This opinion will tackle two questions. First, if an attorney who represents a defendant in ongoing litigation identifies a potential DeBenedetto party that is another current client, does that create a concurrent conflict of interest under Rule 1.7(a)? Second, if that does create a concurrent conflict of interest, is that conflict waivable under Rule 1.7(b)?

ANALYSIS

I. CONCURRENT CONFLICT OF INTEREST

NHRPC Rule 1.7(a) provides the definition of concurrent conflicts.

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.

The language of NHRPC Rule 1.7(a) is identical to the Model Rules of Professional Conduct (ABA 2004) (Model Rules). These two alternative avenues by which a concurrent conflict may arise are frequently referred to as "direct adversity" and "material limitation" conflicts, respectively.

Both direct adversity and material limitation conflicts arise due to the nature of a DeBenedetto apportionment defense. Comment 6 to the Model Rules provides some assistance in determining whether the representation of the original defendant is directly adverse to the DeBenedetto party under Rule 1.7(a)(1). In particular, Comment 6 provides in part:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

In naming a DeBenedetto party, a lawyer is not seeking some relief from (or seeking to avoid giving damages or other relief to) the DeBenedetto party. Yet it is unquestionable that the lawyer who names a DeBenedetto party in ongoing litigation becomes "an advocate" against that party. As the New Hampshire Supreme Court has explained, "a defendant who raises a non-litigant apportionment defense essentially becomes another plaintiff who must seek to impose liability on a non-litigant just as a plaintiff seeks to impose it on him." *State v. Exxon-Mobil Corp.*, 168 N.H. 211, 259 (2015) quoting *Goudreault v. Kleeman*, 158 N.H. 236, 256 (2009).

The naming of a current client as a DeBenedetto party also raises "material limitation" conflicts under Rule 1.7(a)(2), since the lawyer's duty of loyalty to the DeBenedetto party/client will frequently "materially limit" that lawyer's ability to pursue a DeBenedetto apportionment defense on behalf of the lawyer's litigation client.

The Committee found only one other state ethics opinion that addressed DeBenedetto-type conflicts, Arizona Ethics Opinion 03-04 (2003). That opinion dealt with a different version of Rule 1.7. It concluded:

If the applicable statute of limitations has run, identifying a client as a non-party at fault in another client's litigation, pursuant to Ariz. R. Civ. P. 26(b)(5), does not necessarily establish a conflict of interest under ER 1.7 because a non-party at fault cannot be assessed liability. A.R.S. § 12-2506(B). However, if the statute of limitations has not run, naming a client as a non-party at fault does create a conflict under ER 1.7, because it identifies the client as a potential defendant to other parties, who may then amend the complaint to add the client as a party.

Whether the conflict is waivable under ER 1.7(b) will depend on such facts as whether the statute of limitations has run, the legal sophistication of the affected client, and the ancillary effects of naming the client as a non-party at fault. If the conflict is waivable, then pursuant to ER 1.7(b)(2), the client named as a non-party at fault must give informed consent to the waiver.

This Committee does not agree that the absence of potential liability (due to the running of the statute of limitations for example) disposes of the broader conflict question. When seeking to deflect fault by apportionment to the DeBenedetto party, "the defendant carries the burdens of production and persuasion." *State v. Exxon-Mobil Corp., supra*. Thus, even

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Ethics Corners

Client Communications

Dear Ethics Committee:

I am representing an elderly client in a civil matter. The client is 80 years old and has been diagnosed with dementia. While there has been no finding by a court that she lacks capacity, the client does not seem to participate fully in, or follow the progress of, the representation due to some "diminished capacity." The client lives in a nursing home and becomes easily confused when talking with me over the phone. I am not certain she reads my letters. What are my obligations in terms of communicating with the client and ensuring she is participating in her case?

Sincerely,
Attorney Doe

Dear Attorney Doe:

If a client's capacity impairs his or her ability to adequately consider decisions concerning representation, Rule 1.14 obligates you to maintain a normal client-lawyer relationship, as far as reasonably possible. This may necessitate adjusting the way you communicate with the client. When a client decision is required to advance the case, you may need to schedule an in-person meeting to accommodate your client's difficulties in communicating over the telephone. You will need to make reasonable efforts to provide your client with updates on the representation. Status updates which do not require a client response or input may reasonably be sent via letter.

Below are some of the specific rules that should be considered when trying to strike the ethical balance between substantive work and client communication in a busy practice.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client & Lawyer

The client controls the objectives of representation, and Rule 1.2 requires a lawyer to consult with the client as to the means by which the objectives are pursued.

Rule 1.4: Client Communication

This rule expressly requires a lawyer to promptly respond to reasonable requests for information and to promptly inform a client of topics that require informed consent, as such term is defined under Rule 1.0(e). A lawyer also must reasonably consult with the client about the means by which client objectives are to be accomplished. In addition, the lawyer must explain the legal and practical aspects of the legal matter and any alternative courses of action when it is necessary for the client to make informed decisions.

Practical Tips:

• If your client can participate in their representation, even if meaningful participation requires an accommodation by the lawyer, Rule 1.14 obligates the lawyer to make reasonable efforts to maintain a normal client-lawyer relationship and Rule 1.2 requires that the client direct the scope of the representation. If maintaining the client's meaningful participation means scheduling in-person appointments, versus phone calls, emails or letters, the lawyer may be obligated to do so. However, the client should be advised of additional expenses that may arise due to any accommodation the lawyer considers necessary to comply with the Rules.

Bartering Legal Fees for Goods or Services from Client

Originally published in the NH Bar News on December 20, 2017.

Dear Ethics Committee,

I have a new client who is an architect. She asked me to draft her will, and wanted to pay my bill in part by providing me with plans for my new office. Do you see any problems with bartering legal fees for goods or services from a client?
– Yankee Trader

Dear Trader,

Bartering is permitted under the New Hampshire Rules of Professional Conduct (NHRPC). There are, however, several portions of the Rules that you will need to carefully consider.

Rule 1.5. A lawyer may not charge or collect an "unreasonable fee." NHRPC Rule 1.5(a). So, you first need to make sure that the value of your services is commensurate with the value of the goods or services received.

Rule 1.8. A "fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client." ABA Com. 4 to Model Rule 1.5.

The ABA comments further provide that the requirements of Rule 1.8 "must be met when the lawyer accepts … nonmonetary property as payment of all or part of a fee." Com. 1 to Model Rule 1.8 (emphasis added).

The Committee recently reviewed the application of Rule 1.8 to barter transactions and reached the following conclusion:

The lawyer will need to comply with all the provisions of NHRPC Rule 1.8(a), including the requirement to advise the client in writing of the desirability of seeking the advice of independent legal counsel, in any agreement to exchange goods or services for legal fees entered into at the outset of legal representation or during the course of such representation. Even if the lawyer strictly complies with Rule 1.8(a), however, the courts may view the transaction as voidable if the client later feels aggrieved by the transaction.

"Providing Legal Services in Exchange for a Client's Goods and Services," Ethics Committee Advisory Opinion #2017-18/xx.

Taking Stock

The Committee reached a similar conclusion with respect to NHRPC Rules 1.8 and 1.5 when considering the specific situation where a lawyer takes an ownership interest in the client in exchange for legal work.

A lawyer who takes stock in payment of legal fees or as an investment enters into "a business transaction with a client" and must satisfy Rule 1.8(a). The first requirement of that rule is that the transaction and its terms must be "fair and reasonable to the client."

"Taking Stock in Your Client As Legal Fees Or An Investment," NHBA Ethics Committee, Practical Ethics Article (November 8, 2000), https://www.nhbar.org/legal-links/Ethics-PEA-11-00.asp.

Rule 1.15. In a barter situation, you may receive some or all of the goods or services prior to completion of the agreed-upon legal services. In that case, the "fees" may not have been earned yet, and will likely be viewed as the client's property. This implicates NHRPC Rule 1.15(a) which requires a lawyer to "hold property of clients … that is in a lawyer's possession in connection with a representation separate from the lawyer's own property."

How a lawyer complies with this rule may depend on the nature of the goods or services. If you receive architectural drawings or a case of wine, you may be able to keep those items segregated, and not used or consumed until earned. On the other hand, it would be difficult to comply with the rule in the case of pastries or a pedicure.

One way around this problem of "payment" before legal services might be to pay the client in cash for the goods or services as they are provided. The client could then turn around and give the lawyer the cash back in settlement of her responsibilities under the fee agreement. That way, the lawyer could segregate unearned funds in the usual way. Unfortunately, this may somewhat defeat the ostensible purpose of the barter.

Taxes

The lawyer should advise the client of the tax consequences of the transaction. "The value of products or services from bartering is normally taxable income" to both parties. "Bartering Produces Taxable Income and Reporting Requirements," IRS Tax Tip 2016-46 (March 23, 2016). If you exchange services with another person and you both have agreed ahead of time on the value of the services, that value will be accepted as fair market value unless the value can be shown to be otherwise. IRS Publication 525.

Clear Prohibitions

There are a few types of barter, however, that are clearly prohibited. NHRPC Rule 1.8(d) prohibits a lawyer, prior to the conclusion of representation, from making an agreement giving the lawyer

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Ethics Corners

The Ethics of Texting: Preserving Client Files

Originally published in the NH Bar News on December 16, 2015.

Dear Ethics Committee: I have been practicing business law for many years. Several years ago I brought on two young associates, one a lateral and one right out of law school. Both have worked out very well. They have expanded my practice by attracting a number of younger entrepreneurs. I have recently noticed that they use text messaging for much of their communication with these clients. I understand that the younger clients, as well as my associates, prefer this informal and prompt mode of communication. I am wondering if this presents any ethical concerns.

Dear Attorney Doe:

The NH Bar Association Ethics Committee is aware of no case or ethics opinion finding the use of text messages to communicate with clients to be per se prohibited by the rules of professional conduct.

Ethics committees in other jurisdictions that have examined the use of text messaging in law practice have done so primarily in two contexts. First, several committees have issued opinions on whether it is considered solicitation to send advertisements by text message. *See* e.g., Ohio Supreme Court Ethics Op. 2013-2, 29 Law. Man. Prof. Conduct 238 (2013) (concluding that lawyers may solicit professional employment by text messaging, but placing conditions on use of this technology). The second issue is whether text messages are public records for right to know purposes. *See* e.g., blog.gulflive.com (finding text messages sent by public officials about governmental business to be a public record).

The Committee notes attorneys may have clients for whom text messaging is the preferred mode of communication. For example, lawyers representing clients in criminal matters or emergency family law cases often need to be "on call," and responding to clients by cell phone text is more immediate than by a computer-hosted email system.

The ABA added a comment to its Model Rules of Professional Conduct specifying that in order to maintain competence, a lawyer "should keep abreast of … the benefits and risks associated with relevant technology …" ABA Model Rules of Professional Conduct 1.1, cmt. 8. This comment was included in the rules, as are other ABA comments, by the New Hampshire Supreme Court. *See* Order of the New Hampshire Supreme Court, dated Nov. 10, 2015. The Court does not adopt the ABA comments.

Nonetheless, lawyers using this technology should be mindful of record-keeping and preservation issues. *See* e.g., NH Ethics Committee Opinion 2005-06/03 (stating that the content of the client's files would necessarily include both paper and electronic forms of communication). Aon Risk Solutions raised this issue in its Loss Prevention Bulletin 15-03 (October 2015). The Bulletin points out that texts are not easily printed off to be placed in client files. This is especially true if the lawyer is not using a firm-issued device.

Techniques such as taking a screenshot of the text message and forwarding it to the firm's email account and document management system become inconvenient as the complexity of the communication increases. Aon points out that there are applications and third-party programs that can do this efficiently. Two of these are SMS Backup and Decipher TextMessage. Several members of the Ethics Committee have used these systems to back up all text messages in their firm email system and report that they work quite well.

Using third-party programs may solve the problem of how to get the messages into the firm's system, but it does not answer the more difficult question of identifying those messages that should be retained in client files for billing or other purposes.

Committee members are aware from personal experience that text messages often contain a good deal of irrelevant (and sometime irreverent) information. Aon recommends that if the law firm is not convinced that "its lawyers will take the time to transfer important text messages from smartphones to client files, then the firm should at least remind its lawyers to place a short note or memo in the client file summarizing any significant events in the matter that were initially discussed by text …." *Id.* The Committee agrees with this advice and believes it also makes sense for lawyers to consider the type of discussions that are suited for this technology. For example, texting to confirm the time and place of a court hearing is probably acceptable, but providing substantive legal advice may not be appropriate.

Although this question deals only with text messaging, the Committee notes that many clients and witnesses use electronic communications other than email. This is especially true of clients and witnesses under 40 years old and/or who are not part of the white-collar business community. These methods include Facebook messaging, other instant messaging services, or "chat" programs. It is not unusual for an attorney to receive such messages from a client or witness unexpectedly.

To avoid the risks of inappropriate, non-secure communications, an attorney should discuss with the client what forms of communication will be used. A good practice may be to limit all electronic communication to arranging in-person meetings or phone calls. It is always important to warn clients that electronic communications may not be secure and that the client should take precautions. The client should consider the risks — whether the client's phone or computer is encrypted, whether a secure network is being used, etc. The attorney must be aware of these possibilities as well and take appropriate precautions.

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literary or media rights to a portrayal or account based in substantial part on information relating to the representation. NHRPC Rule 1.8(j) prohibits sexual relations with clients, so that cannot form the basis of a bargain. See *Cleveland Bar Assn. v. Feneli*, 712 N.E.2d 119 (Ohio, 1999) (attorney's misconduct in having sexual relations with female client and proposing that she barter sexual favors for legal fees that she owed him warranted 18-month suspension).

ENDNOTE [1] Of note, the New Hampshire Ethics Committee has previously addressed the issue of third-party payors in a variety of contexts. E.g., New Hampshire Ethics Opinions Annotated 1985-86/3 partially superceded by NH Opinion 1990-91/5 (payment by insurer for representation of the insured); New Hampshire Ethics Opinions Annotated 1988-89/17 (payment by a pre-paid legal services program for legal services provided to a program participant); New Hampshire Ethics Opinions Annotated 1991-92/9 (payment by a non-profit corporation for representation of individual members of the corporation); and New Hampshire Ethics Opinions Annotated 1989- 90/9 (concerning lawyer employee leasing).

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if the DeBenedetto party is not joined as a formal defendant by the plaintiff or is immune from liability, the lawyer must anticipate the need to pursue litigation that is adverse to the interests of the DeBenedetto party in other ways.

The lawyer may, for example, need to cross examine the DeBenedetto party/client in order to establish the apportionment defense. As discussed in comments to the ABA model rules, this can lead to direct adversity conflicts under NHRPC 1.7(a)(1):

... [A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

ABA Comment 6 to NHRPC Rule 1.7. These circumstances can also give rise to a "material limitation" conflict under NHRPC 1.7(a)(2), since the lawyer's ability to cross-examine the DeBenedetto client aggressively on behalf of his or her litigation client may be undermined by his or her concurrent fiduciary duties to (and desire to maintain an amicable relationship with) the DeBenedetto client.

To carry the burden of proof under RSA 507-7:e and successfully argue that liability should be apportioned to a non-party client, trial counsel will also likely be required to seek third-party discovery from that client, forcing the client to incur the costs of responding to written discovery. Seeking discovery from that client can also present the very same situation alluded to in the ABA commentary cited above, requiring the attorney to cross-examine his or her non-party client on behalf of the other client. Cf. ABA Standing Comm. on Ethics & Prof'l Resp., *Lawyer Examining a Client as an Adverse Witness, or Conducting Third Party Discovery of the Client*, ABA Formal Op. 92-367, at 5-6 (Oct. 16, 1992) (discussing nature of conflicts presented by this situation). And if the non-party client does not want to relinquish that discovery, the attorney may have to seek court intervention to obtain it — in the process becoming a direct litigation opponent of that client.

In addition, to apportion liability successfully to a DeBenedetto party, an attorney will frequently need to develop and disclose expert testimony regarding the DeBenedetto client's liability for, and causation of, the injuries at issue in the litigation. The DeBenedetto party will likely suffer damage, such as lost time for its employees and expenses for representation, and may even suffer damage to reputation in certain cases. For all these reasons, the Committee has concluded that the two clients will be directly adverse under NHRPC Rule 1.7(a)(1), and that the litigation lawyer will often have a "material limitation" conflict under NHRPC Rule 1.7(a)(2) due to his or her conflicting responsibilities to the client that is targeted through the DeBenedetto defense and the client asserting that defense. *See also Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981) ("specific adverse effect need not be demonstrated to trigger [the predecessor of Rule 1.7] if an attorney undertakes to represent a client whose position is adverse to that of a present client").

Accordingly, this Committee concludes that the representation of the original defendant in the pursuit of a DeBenedetto apportionment defense will create concurrent conflicts of interest that must be resolved before the representation is undertaken and/or continued.

II. WAIVER OF CONFLICT

The existence of the concurrent conflict of interest does not necessarily end the analysis. NHRPC Rule 1.7(b) provides an explicit exception to such conflicts.

(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.

Because the pursuit of a DeBenedetto defense against a current client will create concurrent conflicts under Rules 1.7(a)(1-2), both the litigation client and the DeBenedetto client would have the power to refuse to waive the concurrent conflicts and thereby prohibit the representation. Before reaching the mechanics of a valid waiver, however, the Ethics Committee devoted substantial time to the preliminary and more difficult question of whether the lawyer may even, consistent with Rule 1.7(b), seek conflict waivers from both clients that would allow the attorney to undertake or continue the litigation.

The Committee was unable to reach consensus as to whether DeBenedetto conflict waivers are permissible. Some members of the Committee felt strongly that in a DeBenedetto scenario, a lawyer could not reasonably conclude that he or she could "provide competent and diligent representation to each affected client," and that waivers of such conflicts therefore must be categorically barred under Rule 1.7(b)(1). Other members of the Committee felt equally strongly that it would be inappropriate to endorse a per se rule barring such waivers. All members of the Committee agreed, however, that at least in some situations, DeBenedetto conflicts are non-waivable.

A. AT LEAST IN SOME SITUATIONS, THE CONFLICTS INHERENT IN THE PURSUIT OF A DEBENEDETTO DEFENSE ON BEHALF OF ONE CLIENT AGAINST ANOTHER CLIENT WILL NOT BE WAIVABLE.

As set forth in NHRPC Rule 1.7(b)(1), a lawyer may seek informed consent from each of the affected clients for continued representation under a concurrent conflict of interest only if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." The ABA's comments to Model Rule of Professional Conduct 1.7, Rule 1.7(b)(1) explain that continued representation is prohibited if "in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation (to each affected client)". ABA Model Rules of Professional Conduct 1.7, cmt. 15. In such circumstances, "the lawyer involved cannot properly ask for" a client to waive the conflict "or provide representation on the basis of the client's consent." *Id.* cmt. 14.

The Committee recognizes that conflicts can arise in a wide variety of factual circumstances, and the general rule is that determining waivability of a conflict requires a case-by-case analysis of the particular circumstances presented by each case. *See* NHRPC Rule 1.7, Ethics Committee Comment. However, the Committee cautions attorneys facing DeBenedetto conflicts that there are certain types of situations where pursuit of a waiver of a DeBenedetto conflict will not be possible (and will frequently be unwise from a risk-management perspective).

In this regard, the Committee's opinion is guided by the "harsh reality" test that has been applied in New Hampshire in this Committee's previous ethics opinions for almost 30 years. *Id.* This test is a rigorous one, calling for an attorney's decision to continue representation in the face of a concurrent conflict to be scrutinized retrospectively after something goes wrong in the litigation. Under this test, the subjective belief of an attorney that he or she could provide competent, diligent representation to both clients, although required under Rule 1.7(b)(1) before seeking a waiver, does not determine the viability of the waiver if challenged by either client after-the-fact (in malpractice litigation or disciplinary proceedings, for example). Rather, the court, jury or Professional Conduct Committee must "look back at the incep-

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tion of the representation" and determine whether a "disinterested lawyer" would "seriously question the wisdom of ... requesting the client's consent to [the] representation or question whether there had been full disclosure to the client prior to obtaining the consent." *Id.*, quoting from N.H. Ethics Opinion 1988-89/24. The test, therefore, is one of objective reasonableness.

Some on the Committee believe that there are no circumstances in which an attorney can develop the objectively reasonable belief necessary to request conflict waivers in order to develop a DeBenedetto apportionment case on behalf of one of his or her current clients against another current client. As discussed previously, the areas of adversity and antagonism that can arise in such situations are wide-ranging, involving compelling the DeBenedetto party client to incur litigation fees, the pursuit of adverse discovery against the DeBenedetto party, the development of expert witnesses to testify against the DeBenedetto party on issues of liability and causation, questions concerning the use of protected or confidential information against the DeBenedetto party, the potential for motions to disqualify the litigation attorney by lawyers retained by the DeBenedetto party, reputational harm to the DeBenedetto party, and litigation exposure if the plaintiff chooses to add the DeBenedetto party as a co-defendant. Given these and other significant areas of potential adversity, which create both "direct adversity" and "material limitation" conflicts for the trial attorney, some members of the Ethics Committee believe that a "disinterested lawyer" would seriously question an attorney's decision to undertake or continue the representation of a civil defendant in a case in which a meritorious *DeBenedetto* claim against another current client is available — and that a waiver of the conflict cannot and should not be sought, i.e. that the conflicts are non-waivable.

Further, even if the objectively reasonable belief necessary to approach clients for conflict waivers can be formed, it is frequently difficult to predict the types of conflict that may arise in the future as the DeBenedetto apportionment defense is pursued. When conflict waivers are challenged, it can often be the case that the conflict that has caused harm has not been set forth and explained in the conflict waiver letter — undermining the lawyer's argument that "informed consent" was obtained.

As discussed in more detail in the following section, however, others on the Committee differ significantly and believe that waiver can be appropriate in DeBenedetto situations, as well as other direct adversity conflict cases, if the clients are sophisticated and knowingly make an informed choice to waive the conflict.

B. THE VIEW THAT UNDER LIMITED CIRCUMSTANCES, INFORMED CONSENT WAIVERS MAY BE PERMISSIBLE.

Some on the Committee believe that there may be circumstances in which a lawyer may, consistent with Rule 1.7(b), seek a waiver of DeBenedetto concurrent conflicts, and undertake or continue in the litigation if informed consent is provided by both clients. They point to the language of NHRPC Rule 1.7(b), which explicitly allows an attorney to seek waiver, provided the requirements set forth in the Rule are satisfied.

Those members of the Committee argue that there are many circumstances that could lead rational DeBenedetto parties and litigation clients to consent to waiver. As the leading treatise on professional responsibility states:

Many clients do consent in these [direct adversity] situations. One reason is simply that it is not worth the trouble to object, where no real detriment appears. A large business may have dozens or hundreds of cases pending at one time, and they are handled as a matter of business routine. If the law firm seeking consent is denied consent, some other law firm will quickly step in, and little will have been gained for significant interests of the company. ... Another reason is that a company that has had good experience dealing with a law firm as its counsel may conclude that it is better to be sued by lawyers who are competent and trustworthy than unknown entities who might use questionable litigation tactics or be unreasonable during settlement negotiations. Of course, this relaxed attitude on the part of clients is unlikely to hold in major "bet the company" litigation, or where fraud or other serious wrongdoing is alleged.

Hazard, Hodes and Jarvis, *The Law of Lawyering* (4th ed.), § 12.32, p. 12-87 (Wolters Kluwer 2018).

The Restatement also suggests that there are situations where waiver is permissible:

Decisions holding that a conflict is non-consentable often involve facts suggesting that the client, who is often unsophisticated in retaining lawyers, was not adequately informed or was incapable of adequately appreciating the risks of the conflict. Decisions involving clients sophisticated in the use of lawyers, particularly when advised by independent counsel, such as by inside legal counsel, rarely hold that a conflict is non-consentable.

Restatement (Third) of the Law Governing Lawyers § 122, comment g(iv) (references to other comments omitted).

While the use of independent, outside counsel to advise either client on the significance of the concurrent conflicts may be an effective means of ensuring that the clients provide "informed consent," it does not eliminate the lawyer's independent responsibility under Rule 1.7(b)(1) to analyze the conflicts he or she faces and determine whether "competent and diligent representation" of each affected client is possible.

Some on the Committee also felt that a *per se* rule barring any waiver in such situations could interfere unnecessarily with the rights of lawyer and client. The following case summarizes the concerns shared by those members of the Committee:

[An] inflexible application of a professional rule is inappropriate because frequently it would abrogate important societal rights, such as the right of a party to his counsel of choice and an attorney's right to freely practice her profession. A court must take into account not only the various ethical precepts adopted by the profession but also the social interests at stake. Among the factors that we have considered in the past are "whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case."

FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995).

C. EVEN IF WAIVER IS PERMISSIBLE UNDER RULE 1.7(B)(1), AN ATTORNEY SHOULD EXERCISE CAUTION.

To determine if a waiver is permissible under Rule 1.7(b), the lawyer must carefully comply with all four sections of the rule. Section (b)(2), barring waivers that are "prohibited by law," will not apply in most cases. Section (b)(3), barring waivers of conflicts that arise among parties to "the same litigation or proceeding," will not be implicated as long as the lawyer does not offer representation to the DeBenedetto party if that party is brought into the current litigation by the plaintiff. The other two sections will be dealt with separately below.

INFORMED CONSENT. Section 1.7(b)(4) requires that the client give informed consent in writing. "A precise definition of 'informed consent' and 'full disclosure' is difficult, necessitating a case-by-case factual analysis." *Celgene Corp. v. KV Pharm. Co.*, 2008 U.S. Dist. LEXIS 58735, 26-27 (D.N.J. 2008) (holding an advance waiver ineffective). Courts and treatises have set demanding standards for obtaining informed consent.

Determining whether a client provided adequate informed, written waiver of a representational conflict is a fact-specific inquiry, and the courts consider, among other things, the breadth 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, the sophistication of the client, and the interests of justice. The requirements for full disclosure, for purposes of a client's consent to a conflict, turn on the sophistication of the client, whether the lawyer is dealing with inside counsel, the client's familiarity with the potential conflict, the longevity of the relationship between the client and the lawyer, the legal issues involved, and the ability of the lawyer to anticipate the road that lies ahead if the conflict is waived.

32 Am. Jur. 2d Federal Courts § 157.

REASONABLE BELIEF. In addition to the need for informed consent, Section 1.7(b)(1) requires that the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client. Under this section, as discussed above, there will clearly be some conflicts that are non-consentable. ABA Model Rule 1.7, Comment 14.

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to both clients.

Id., Comment 15.

The Restatement offers a similarly cautious view of consentability.

Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent. ... The general standard stated in Subsection (2)(c) assesses the likelihood that the lawyer will, following consent, be able to provide adequate representation to the clients. The standard includes the requirements both that the consented-to conflict not adversely affect the lawyer's relationship with either client and that it not adversely affect the representation of either client. In general, if a reasonable and disinterested lawyer would conclude that one or more of the affected clients could not consent to the conflicted representation because the representation would likely fall short in either respect, the conflict is non-consentable.

Restatement, supra, at comment g(iv).

HARSH REALITY. The Restatement's standard is akin to the Harsh Reality Test, described above. *See* Ethics Committee Formal Opinion #1988-89/24. The Committee wishes to underscore that while pursuit of waivers may be permissible in limited circumstances, New Hampshire courts and disciplinary authorities will likely assess the adequacy of the explanation and disclosure of the concurrent conflicts retrospectively under the "harsh reality test" — a test that may be difficult to meet if the conflicts ultimately are the arguable cause of either an unsatisfactory result, or unexpected injuries, for the litigation client or the DeBenedetto client.

Since in practice, it can be difficult to determine whether a lawyer can meet the requirements of Rules 1.7(b)(1) and 1.7(b)(4), one commentator has suggested a test.

A*n informed conflict waiver must be rejected as incompetent if limitations on the means or procedures by which the attorney pursues the matter caused by the conflict of interest are likely to defeat the client's objectives for the representation. In the subsections that follow, we will elaborate on the core elements of the proposed test: (1) the identification of client objectives; (2) the limits on the means that can be undertaken by counsel as a result of the conflict; and (3) the "likely to defeat" standard.*

W*hat Conflicts Can Be Waived? A Unified Understanding of Competence and Consent*, 65 Rutgers L. Rev. 109, 138 (2012). *See also When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law*, 33 Willamette L. Rev. 145 (1997).

III. CONCLUSION

As set forth above, this Committee concludes that a concurrent conflict of interest under Rule 1.7(a) arises when an attorney, representing one client in civil litigation, attempts to apportion liability to another current client under RSA 507:7-e and *DeBenedetto*.

All members of the Committee agree that, at least in some circumstances, these types of conflicts are non-waivable under Rule 1.7(b). Some members of the Committee take an even broader view: they would conclude that such conflicts could never be waived. Others on the Committee conclude that there may be circumstances in which the pursuit of informed consent is permissible, including situations in which the client(s) receive independent counsel or advice prior to a decision on waiver of the concurrent conflicts; cases where the party waiving is sophisticated in legal matters or business issues; cases in which liability/damages apportioned to the DeBenedetto party/client is not likely to be significant; cases in which the DeBenedetto claim is unlikely to require discovery, depositions or litigation costs for the DeBenedetto party; and other similar situations.

Ultimately, the areas of disagreement among the Committee's members should not detract from the central message of this Opinion: DeBenedetto conflicts are real and serious. When encountering them, members of the bar should proceed with caution, ensuring that they have fully complied with their obligations under the Rules of Professional Conduct and do not run afoul of Rule 1.7.

This opinion was submitted for publication to the NHBA Board of Governors at its June 28, 2018 Annual Meeting.

About the New Hampshire Bar Association Ethics Committee

This Committee studies questions of lawyer ethics and publishes its opinions in the *Bar News*. The Committee has developed and will continually update an index of these opinions. The Ethics Committee also contributes a periodic column to *Bar News* entitled "Ethics Corner" containing helpful advice and practical information on common ethical dilemmas. The Ethics Committee may also make recommendations to the NHBA Board of Governors regarding appropriate amendments to or clarifications of the NH Rules of Professional Conduct. The Committee usually meets the second Wednesday of each month.

Learn more: www.nhbar.org/resources/ethics/

Note: The Ethics Committee should not be confused with the N.H. Supreme Court Attorney Discipline Office (ADO) or the Professional Conduct Committee (PCC).

How to Obtain Answers

The Ethics Committee provides several services for members of the Bar.

- Opinions – on complex or difficult questions of general interest.
- Ethics Corner Articles – on simpler issues of general interest.
- Helpline – informal assistance by individual members of the committee.

What should I do before seeking help from the Ethics Committee?

- Review the New Hampshire Rules of Professional Conduct.
- Peruse the Bar website for relevant Ethics Opinions and articles.

What should I do if these resources do not solve my problem?

Contact staff liaison to the Ethics Committee
Robin E. Knippers, (603) 715-3259, or
NH Bar Association
2 Pillsbury Street, Suite 300
Concord, NH 03301-3502.

Is my issue appropriate for an opinion from the committee?

- The committee will accept for consideration written inquiries by members of the Bar.
- The committee will not render opinions pertaining to conduct which is an issue of pending litigation or disciplinary action.
- The committee will not render opinions involving past conduct.
- The committee may decline to render an opinion as to the proposed conduct of someone other than the inquirer.

What is the process for obtaining an opinion?

Requests for action by the full committee must be submitted in writing. A response can take two to three months, sometimes more, depending on the complexity of the issues involved. The committee member assigned to draft an opinion may contact you for more information.

The full committee will consider the draft, and any redrafts that may be necessary, at its monthly meetings. If the committee agrees on a final opinion or Article, it will be presented to the Board of Governors. After review by the Board of Governors, you will be sent a letter with a copy of the opinion responding to the inquiry.

May I request that my identity as the inquiring attorney be kept confidential?

The procedural rules of the Ethics Committee specifically prohibit the voluntary disclosure of the identity of a member of the Bar requesting an opinion on his or her own behalf to any person other than the current members of the committee and the Bar staff members assigned to the committee, unless otherwise ordered by compulsory legal process.

Is my issue appropriate for Helpline?

- It must involve proposed conduct, rather than past conduct.
- It must involve your own conduct, not the conduct of another attorney.
- It cannot involve conduct which is an issue of pending litigation or disciplinary action.

What is the process for obtaining assistance through Helpline?

Contact Robin by telephone, (603) 715-3259. She will take your preliminary information and try to put you in touch with one of the members of the committee who might be able to help you.

The committee members are lawyers who are volunteering their time to help other lawyers work through their ethical issues. Accordingly, it can sometimes take a day or two for someone to contact you.

Is Helpline providing me with legal representation?

Absolutely not. That is not the purpose of Helpline. The members are acting as a "sounding board" and providing "reality checks."The members will try to be helpful in directing the further research of the inquirer. Due to the limited nature of the informal telephone conversation, the members will not give definitive answers to Helpline questions.

Even without the attorney-client relationship, however, both you and the member should be careful about conflicts. Please consider carefully the identity of the person you are assigned, as well as his or her firm and business affiliations, to avoid conflicts.

Will my conversations with the committee member be "confidential"?

Since there is no attorney-client relationship between you and the committee member, there is no confidentiality or privilege with respect to such communications in the legal sense. As with opinion inquiries, however, the committee will limit the voluntary disclosure of the identity of the inquiring attorney, and of all discussions, deliberations, files and records of the committee, to the extent that they may disclose the identity of the inquiring attorney, to members of the committee and Bar staff assigned to the committee, unless otherwise ordered by compulsory legal process or unless the inquiring attorney waives these protections in writing. If you have reason for greater restriction on disclosure, let your assigned member know.

What if Helpline doesn't help?

The member may conclude that your issue is too difficult or complex for informal assistance, and may provide you with the names of New Hampshire attorneys who handle these sorts of issues professionally. When you are in need of counsel, staff liaison, Robin E. Knippers, is able to connect you with the Bar Association Lawyer Referral Service for courtesy referrals.

The NH Bar Association Ethics Committee

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