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“SO, I HAVE A CONFLICT, CAN’T I JUST GET A WAIVER?”¹

Did you know that the State Bar offers a confidential ethics helpline for New Mexico lawyers? The helpline provides an opportunity for a lawyer to call and seek some guidance on how the lawyer might analyze an ethical issue facing the lawyer. One of the most common ethical issues raised in helpline calls is concurrent conflicts under Rule 16-107 NMRA. Often the calling attorney wants to know if the conflict cannot simply be resolved by obtaining a waiver from all of the persons involved in the conflict. The good lawyerly answer, which we all learned in law school, is “well, it depends.”

Rule 16-107 NMRA starts with the admonition that a lawyer shall not represent a client if that representation involves a concurrent conflict of interest. Most lawyers are good at spotting a concurrent conflict (or potential conflict) by recognizing that there is either: (1) a real or potential direct adversity between two or more persons; or (2) that the representation of one or more clients is or may be materially limited by the lawyer’s duties to others, including other clients, former clients, third persons, or the lawyer’s own interest. After recognizing the conflict, some lawyers are tempted to jump to the question of whether informed consent from all affected persons will solve the conflict. But jumping to that question

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means that a lawyer is jumping over a necessary threshold issue that must be resolved before ever seeking informed consent, i.e., is the conflict “consentable?” In other words, can a lawyer even ask for consent?

By rule, some conflicts are nonconsentable. *See* Rule 16-107(b) and Committee Commentary [14] – [17]. First, if the representation involves the assertion of a claim by one client against another in the same litigation or in any other proceeding before a tribunal, the conflict is not consentable. *See* Rule 16-107(b)(3). Second, if the representation of two or more clients is prohibited by law, the conflict is not consentable. *See* Rule 16-107(b)(2). In practice, these two nonconsentable conflicts are generally easy to spot, and rarely at issue in a concurrent conflict analysis.

More commonly is the question of whether the lawyer “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” *See* Rule 16-107(b)(1). Stated another way, can the lawyer represent each affected client without an adverse effect on any of the clients? This requires consideration of, among other things, whether the clients’ interests and/or objectives are divergent, whether one or more of the clients wish to keep material confidences from the other clients, and whether the clients do or may have claims against each other. One possible way for a lawyer to think about this issue is to ask the question “can I represent each client as if they were the only client in this matter without compromising my duties of competence, diligence, communication, confidentiality, and all other duties owed to the client?” If the answer is “no,” in other words if one or more clients’ interests are favored or required to yield to another client, the conflict is not consentable.

Assuming the conflict is consentable then, of course, informed consent can be sought from each affected person. But remember too that conflict analysis is not a “one and done” proposition. Lawyers must evaluate conflicts on an ongoing basis, particularly when developments in the matter create new issues and new potential conflicting or divergent interests among represented clients.