The Increasing Danger of Conflicts of Interest

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Professional Liability Litigation

By Peabody and Arnold on August 4, 2017

Courtney Shea Winters' article on The Increasing Danger of Conflicts of Interest which appears in the ABA/BNA publication Lawyer's Manual on Professional Conduct appears here. For the pdf version in the ABA/BNA publication Click Here.

Conflicts of interest are a major driver of legal malpractice claims, according to a panel at the Spring 2017 Legal Malpractice Conference. The panel, which discussed the increasingly dangerous role of conflicts of interest within the profession, included William Freivogel, a private consultant to law firms and corporate legal departments on ethics and professional liability issues and author of *Freivogel on Conflicts—A Guide to Conflicts of Interest for Lawyers*; Anne Thar, Deputy Legal Counsel, Conflicts and New Business at Sidley Austin, LLP; and Douglas Richmond, Managing Director of the Professional Services Group of Aon Risk Solutions. Charles Lundberg served as moderator. In 2015, Lundberg retired after 35 years with the firm of Bassford Remele and now consults with lawyers and law firms through Lundberg Legal Ethics.

Conflicts Generally

Richmond discussed the problems that conflicts pose for lawyers. For example, a conflict of interest can give rise to a breach of fiduciary duty claim. Plaintiffs' lawyers will often emphasize conflicts because they put "heat" in a case: a conflict claim can turn negligence into something nefarious.

Richmond looked at the 68 largest publically reported cases against lawyers and 11 of those were based on a conflict of interest. Many others had a conflict of interest element to the case. He further found that a conflict of interest claim is one of the top four causes of loss and, therefore, is a major concern for lawyers. Conflicts of interest can further damage an attorney by damaging the lawyer's reputation and making it difficult to get new business.

One suggestion the panel had to avoid potential problems is to refrain from litigating cases where your firm worked on the underlying matter. For example, if you drafted a lease and a dispute arises based on a clause in the lease (possibly caused by poor drafting), that is not a case in which you should be litigation counsel. You might be called as a witness in the litigation, and your drafting could be a subject of dispute. The question the lawyer should ask in such situations is not "*can* you represent the client in the subsequent litigation," but, "*should* you?" This underlying work problem can have severe consequences. Thar suggested that firms should ask right at the intake meeting whether the dispute is based on work the firm previously did.

In order to further illustrate the various situations in which conflicts may arise, the panel discussed four hypothetical situations.

Hypothetical No. 1 (Joint Representation)

Law Firm is contacted by the General Counsel of its longtime client, Bucky Capital Partners, in

connection with the purchase of a wind farm. Bucky finds another investor, Sparty Brothers, and asks Law Firm to represent both Bucky and Sparty. Bucky and Sparty will hold the same equity interest in wind farm. Law Firm agrees to represent both Bucky and Sparty and has both clients sign a detailed joint representation engagement letter. However, the winds don't blow hard enough and the wind farm deflates. Sparty sues the Law Firm.

The panel said this situation is an example of a joint representation you technically could take, but maybe you should not. Joint representation is complex and should be analyzed one situation at a time. In this case, on its face there is a problem because it is a "David-and-Goliath" situation. In the real world, Sparty is often someone who came into money unexpectedly, is unsophisticated, and is looking for something to invest in. On the other hand, Bucky is an example of a very sophisticated, longtime client.

Even if there is a robust joint representation letter, the representation exposes the lawyer to the hindsight argument that a reasonable lawyer should have known he could not represent these two clients equally. For example, Bucky and Sparty do not have the same tax issues. There is also a question of who oversees case expenses. Additionally, unlike Bucky, Sparty does not have its own in-house counsel to review the joint representation letter.

If you were to go forward with such a joint representation, the lawyer should insist that Sparty have outside counsel review the joint representation letter and even put the name of the reviewing attorney in the letter. The key is to look at whether the two clients really have a common interest, or if can you foresee different interests arising.

The panel said that even when there is no animosity between the parties at the outset, that is typically because the parties plan to be sharing in success. If success does not materialize, the parties could see things differently. The safest route is to suggest that Sparty gets its own counsel, even if your firm carries most of the work.

Hypothetical No. 2 (The Accommodation Client)

Patent Troll Inc. files a patent infringement suit against Law Firm's major client, Computers R Us (CRU), and Chippy Corporation, the supplier of chips for CRU's computers. Pursuant to their contract, Chippy agrees to indemnify CRU. CRU asks Law Firm to defend CRU and Chippy, both Fortune 500 companies. Chippy is not a current client. In fact, CRU is often adverse to Chippy in contract disputes. Nonetheless, Chippy and CRU agree that the Law Firm will jointly defend them in the suit. Chippy and CRU both sign a joint representation engagement letter.

This hypothetical involves an "accommodation" client. The situation arises when a big client would like you to defend another company or individual as well, because it puts everyone together with an aligned defense. Usually, the firm has no preexisting relationship with the accommodation client.

The lawyer first needs get a joint representation letter. Where the problems arise is that some lawyers fail to think of Chippy as a true independent client. In order to accept Chippy as a client, the firm should have done its due diligence, given Chippy a full engagement letter, and obtained a full advanced waiver from Chippy. Everything about the representation should be included in the engagement letter.

For the joint representation to work, you need to be aggressive and careful and leave no basis for misunderstanding on what you can and cannot do for the accommodation client. The panel noted that although advanced waivers are important to obtain, they are not upheld in all states. The lawyer needs to be cognizant of applicable state laws.

It is also helpful to put right into the engagement letter that you are only representing the accommodation client for this limited purpose.

If accommodation clients are not treated as real clients, several problems can arise. For example, sometimes a firm will not put an accommodation client in its database and, therefore, they do not show up during conflict checks.

Another problem can arise when the accommodation client is not the one paying the bills. Sometimes a firm will confuse them as an inactive client and they will erroneously be closed out of a firm conflicts database. The key is to remember that you owe the accommodation client the same loyalties as the firm's existing large client.

The panel also discussed that perhaps the term "accommodation client" should be discarded–the individual or entity is either a client or is not.

Hypothetical No. 3 (The Accidental Client)

Joe and Jane are mechanics who repair train engines for their employer B&O Railroad. While conducting repairs, Joe slips on oil and is injured. Jane is the only witness. In her first statement written shortly after the accident, Jane states that she did not see Joe fall, but saw Joe lying on the oily concrete floor immediately after the fall. Sometime later, a high ranking B&O supervisor directs Jane to write a second statement with additional details. In the second statement Jane says she saw Joe slip. Joe sues B&O and Larry Lawyer, in-house counsel for B&O, is pegged to defend the suit. Joe notices Jane's deposition. Larry assures Jane he will be her attorney at the deposition. Jane is later fired from B&O for dishonesty. Jane then sues B&O for wrongful discharge and Larry for legal malpractice.

This hypothetical address by the panel is based on a 2013 California appellate case, *Yanez v. Plumber*, 221 Cal.App.4th 180 (2013). In that case, the plaintiff alleged that the lawyer favored Union Pacific Railroad to the detriment of its employee. The employee was a fact witness to an accident. The lawyer represented the employee for purposes of his deposition. The allegations were that the defense attorney should have protected the employee from testimony that was adverse to him. The lawyer's view was that he was a corporate attorney representing the corporation's employee. The lower court granted summary judgment in favor of the lawyer, but the appellate court reversed. The attorney was also disciplined based on his actions.

In the *Yanez* case, the lawyer affirmatively accepted the case, as the lawyer in the hypothetical did. This is an "accidental client" in the sense that no one structured the relationship at the outset of the case. The lawyer "accidently" fell into this client in the middle of the case. This makes it more difficult to do a proper conflicts check.

This situation often occurs in situations where an employee asks the corporation's lawyer, "Are you my

lawyer?" and the lawyer says "yes," likely thinking she needs to do so to protect the attorney-client privilege. However, the lawyer should be thinking about the consequences of accepting the attorney-client relationship.

A problem can arise if the witness tells the lawyer something the lawyer should tell the company, but the witness requests that it not be shared with the company. Under Rule 1.6, which addresses the duty of confidentiality, there is no co-client exception to lawyer confidentiality. Now the lawyer is put in a tough position. The lawyer has information that he or she needs to share with the corporation, but cannot. The only option is for the lawyer to tell the company that there is a conflict and the lawyer needs to withdraw. A lawyer cannot tell the employee that there is an attorney-client relationship without the loyalties that go along with that.

Richmond said attorneys need to think about the conflict of interest problems when representing both a corporate employee and the corporation. Most of the time, it is not a problem. However, when it becomes a problem, it is usually a major one. Freivogel added that if you are representing an employee at a deposition under these circumstances, you need to consider stopping the deposition if the witness says something harmful to themselves. If you think the employee might be lying, he or she may need a criminal attorney. The best course is just to suspend the deposition at that time.

Hypothetical No. 4 (Lawyer Mobility)

Larry Lateral at Firm 1 neither works on, nor bills time to Big Case. Another lawyer at Firm 1, Paul Partner, at lunch, confides in Larry about a potential problem with Big Case. Sometime thereafter, Larry decides to join Firm 2 and for conflicts purposes, shares a list of all matters handled at Firm 1. Big Case is not on the list. Firm 2 is on the other side of Big Case. After Larry settles in at Firm 2, Firm 2 serves Firm 1 with a discovery request that smells like Firm 1 might have been tipped off about the problem. Paul calls Larry, now at Firm 2, and asks, "What the hell are you guys doing over there?" Larry says, "I can't talk about it."

In a situation such as this, Firm 1 might try to disqualify Firm 2. Although Larry did no work on Big Case, he left Firm 1 with material information about it. If Firm 2 gets disqualified, it could get sued, and Firm 1 could also potentially go after Larry.

Lawyers who move can cause serious problems at their new firm. Motions to disqualify and issues surrounding a potential conflict can be costly. One solution to conflicts caused by switching firms is a screen; however, courts have found that some firms are too small for a screen to work. The ABA Model Rules were modified to recognize screening, but it is important to always notify the other firm that a screen is being used. In additional to lawyers, paralegals and secretaries can also cause conflict issues for lawyers.

Thar suggested that when dealing with laterals, the new firm really needs to grill them on the work they performed. Even if the lateral does 95 percent corporate work, he or she might have done a small amount of work on a litigation case, which the firm needs to know about. This might be something the lateral forgets to put on a conflict form, so it is important for the firm to check into the matter. Even 10 hours of work on a case can cause a conflict.

