

Watch Out for These Common Conflict of Interest Traps

by Mark Bassingthwaighe

I've spent years trying to encourage solo and small firm lawyers to develop and consistently use a formal conflict checking system that tracks all of the information best practices currently dictate. In all honesty, I will admit that I have had limited success in this endeavor. This doesn't mean I won't keep trying; but it does mean I've got to accept the reality of the situation because, truth be told, conflict missteps in the solo and small firm arena are not typically a "whoops, we missed that name" kind of thing. More often than not the attorney simply failed to recognize that a conflict was in play, or if she did see it, decided that the issue wasn't significant enough to worry about. Given this, I'm changing my approach and instead of trying to convince you to expand your conflict database and run every name under the sun through it, I thought I'd share a few general tips that can help you avoid many of the more common conflict missteps.

Be wary of representing two or more parties at once such as a divorcing couple, a husband and wife wanting wills, multiple plaintiffs in a personal injury matter, multiple partners forming a new business, or the buyer and seller in a real estate transaction just for starters. I'm not saying you can never take on multiple parties. There are situations where it is ethically permissible and entirely appropriate. However I would advise that if you do, fully disclose to each of the multiple clients the ramifications of agreeing to joint representation. Discuss how both potential and any actual conflicts will affect your representation of everyone. Advise the clients that on matters concerning the joint representation there is no individual client confidentiality among the group. In addition, consider advising each of them to seek independent outside advice as to whether they should agree to joint representation. Regardless, do not proceed

with the representation until all clients have given you their informed consent which should be in writing.

Now, two quick side notes are in order. First, I can share that non-waivable conflicts do exist, in spite of what some of our peers choose to believe, and they often appear in these types of settings. When in doubt, seek advice from someone well versed in our ethical rules. Second, in an attempt to avoid dual representation problems some attorneys will agree to represent one of the parties and document that the other has been advised to seek independent counsel. Should the remaining non-client decide to proceed without representation, understand that you don't get it both ways. In spite of any documentation to the contrary, if you continue to interact with this individual by answering questions to help move the matter along you can unintentionally establish an attorney client relationship and undo the precautions taken. Your actions will always speak louder than your written words. Never answer any legal questions from the non-client. Simply advise them to seek independent counsel, and if that slows things down, so be it.

Avoid joint representation in those potential conflict situations where there is a high probability that potential conflicts will evolve into actual conflicts such as with criminal co-defendants or with certain situations involving multiple plaintiffs. Remember Murphy's Law. More often than not the actual conflict will arise. If it does and is one that cannot be waived, your only option will be to completely withdrawal from the entire matter. Stated another way, in most multiple client representation matters if you're conflicted out for one client, you're conflicted out for all. This is just one of the risks that come with joint representation. In the world of ethics and malpractice, we call an attempt

to stay in with one client while dropping another the "Hot Potato Drop." Should a claim ever arise as a result of your dropping all but one as a client, the lawyers on the other side will put this spin on your actions. They'll argue that you put your financial interests above the interests of the client or clients you dropped and that rarely turns out well for the lawyer being sued.

Always document the conclusion of representation with a letter of closure. In terms of conflicts, an interesting question that arises from time to time is when does a current client become a past client for conflict resolution purposes? The temptation is to rationalize that the passage of time coupled with a bright line gets you there. After all, doesn't the fact that the deed was delivered four months ago, the settlement proceeds were disbursed two years ago, the judge signed the final order last year, or the contract was signed over five years ago mean these various matters are concluded and all of these clients are now past clients?

Our conflict rules don't speak of bright lines or the passage of time as being determinative. Keep it simple. For conflict resolution purposes, once someone becomes a current client, they are always a current client unless and until you clearly document otherwise. So, for example, one would be well advised to never alter a will for one party after having done wills for both parties a year or so earlier absent clear documentation that the prior representation of both had ceased. I would also caution you to keep this in mind if you ever get to the point where you're considering suing a client for fees. You can't sue current clients so make sure documentation that the client is a past client exists. Again, this is typically done in a closure letter that plainly states something along the lines of "this concludes our representa-

tion of you in this matter.” In fact, this is the reason why conflict savvy firms keep all letters of closure even after destroying the related file years after closing it. The closure letter is part of the conflict database because it documents who is a current client and who is a past client.

Avoid becoming a director, officer or shareholder of a corporation while also acting as the corporation’s lawyer.

This dual role can create all kinds of problems to include loss of attorney client privilege, an increased risk of a malpractice claim, and an inability to participate in certain decisions. If you do find yourself on a client corporate board, do not further compound the conflict issues by taking an ownership interest in the company that exceeds 5%. At that point the potential conflict problems reach a point where malpractice carriers will often decide to exclude the risk. The safest play is to never take a financial interest in a client entity due to the difficulty in proving down the road that you never put your financial interests above the interests of your client.

Periodically stop and remind yourself just who the client is and act accordingly because sometimes it can get messy.

For example, an attorney was approached by the son of two long-term clients. Son introduced several non-clients to the attorney and asked the attorney to incorporate a startup business and handle related matters for a small stake in this new company. The son’s contribution was to be his intellectual capital and the non-clients were the money guys. The attorney accepted the work and had frequent contact with the son and the investors throughout the process. Sometime later, one of the investors contacted the attorney and asked him to remove a preemptive rights clause from the organizing documents in order to facilitate a needed cash infusion from two additional investors who would only make a contribution if they were granted a substantial stake in the company. There were no funds available to pay the attorney for this additional work but he was offered the opportunity increase his own stake in the company. This request forced the attorney to determine who his client was. At that point

he realized that his failure to clarify and document who was a client and who wasn’t, coupled with past actions that seemed to allow corporate constituents and investors to believe that he represented everyone, resulted in his correctly deciding that he had no other option but to withdraw.

Never solicit investors on behalf of a client’s business. If and when that business goes south, you will be the one targeted for the recovery of all losses and guess what? Malpractice policies do not cover investment advice. This one will be on you.

Be extremely cautious about entering into business relationships with clients. At the outset, Rule 1.8 is clear. The transaction must be fair and reasonable to the client. The client must be made fully aware of and clearly understand the terms of the transaction, the material risks and disadvantages to the client, any reasonable alternatives, the attorney’s part in the transaction, and any potential conflicts of interest. The client must not only be advised to seek independent legal advice but actually given a reasonable amount of time to do so. Finally, the client must provide written consent.

The problem here is that the attorney needs to be particularly mindful that he cannot continue employment if his independent professional judgment will be affected by the business interest taken. Additionally, the full disclosure requirements of the rule brings about an obligation to disclose the fact that at some point the attorney and the client may potentially have differing interests in this business transaction that would preclude the attorney from continued service. Further, while the client should be encouraged to seek independent legal counsel, many times the reason that the issue comes up is that the client has no money to pay for legal services and the business deal being considered is an offer of stock in exchange for legal services. At a minimum, the client should be counseled to seek independent advice from another source, perhaps their CPA or financial advisor.

One real risk with these deals is that the business really does prosper or terribly falters. In either case the attorney

can be in a difficult position. It’s either that he has been substantially overpaid from the client’s perspective or is now facing the reality that no payday is coming. While there are no specific boundaries as to how much of an ownership interest is too much, certainly the degree to which an attorney can maintain independent legal judgment would seem to be directly correlated to the percentage of ownership interest owned. As a guideline I would recommend that the ownership interest obtained never exceed 5% as the conflict concerns become too high at that point and beyond.

Last but not least, **remember that memory doesn’t cut it** and conflict checking systems are only as good as the people who use them. Always keep the system current and use it consistently or it will be ineffective. Check and update your conflict database every time you consider taking on a new matter, regardless of whether the matter was accepted or declined. Circulate new client/matter memos throughout the firm. Make sure the memo affirmatively documents that all attorneys and staff have reviewed the memo to include thinking about personal and business interest conflicts they may individually bring to the table. Finally, don’t forget to look for potential conflicts that might exist if the firm has gone through a recent merger with another firm or had any new lateral or staff hires. (I know, I just couldn’t stop myself.)

See disclaimer on page 69.



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