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DAILY REPORT
IN PRACTICE

Conflicts of interest don't go away when they're ignored. Potential conflicts come back to bite lawyers who fail to evaluate them.

Conflicts checks—just do it

EVALUATING CONFLICTS of interest up front can prevent major problems later

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OTHER THAN BILLING, there is virtually nothing that lawyers dread more than checking, responding to, and resolving potential conflicts of interest. After all, "conflicts" issues seem to focus on why a lawyer should not take on a new representation rather than how to get the business in the door. Yet, consistently, unidentified or unresolved conflicts costs lawyers more clients and money than anyone can imagine.

Legal newspapers are replete with articles about motions to disqualify, bar complaints, and legal malpractice claims based on an unidentified or unresolved conflict of interest. Even when successfully defended, conflicts-based allegations cost lawyers lots of time, money and expense. And, when lawyers lose, the risks are serious—disqualification from a client, bar discipline, and verdicts by juries based on disloyalty with the option of punitive damages.

In addition, defenses to claims (like the protections of independent professional judgment or "trial tactics") are brushed away based on a breach of the lawyer's fundamental fiduciary duty of loyalty to the client.

Unfortunately, in today's fast-paced world, the path of least resistance when a new client walks in the door is to just get started without performing even a rudimentary conflicts check. Yet, when it comes to conflicts, haste really does make waste.

Conflicts are one of those things that do not get better with time and cannot simply get undone. Instead, once a conflict-laden representation begins, there is no "just give back the confidences and secrets and everyone forget that it ever happened." The fact is that once the attorney-client relationship attaches under the cloud of a potential or actual conflict of interest, there is no going back to the way things were before.

As a result, the most important moment for lawyers to identify and resolve conflicts of interest is BEFORE the attorney-client relationship begins. It is indeed one of those areas where an ounce of prevention really is worth a pound (if not a ton) of cure.

With conflicts, systems aimed at 100 percent compliance are critical. Inevitably, it is the one representation that escaped the system that creates the most problems. Typically, the reasons for operating outside the conflicts process for this one representation (too important, too complicated, too rushed) are the same reasons why the conflicts analysis was so important for that representation.

Hence, the single most important part of conflicts is NO EXCEPTIONS. (Undoubtedly, every rainmaker in every firm just said "just great.") The challenge then is to make conflicts as painless as possible. The easier and faster, the more likely it will be that every lawyer will "run conflicts" on every representation.

One last point on the "no exceptions" rule bears emphasis. Every new representation—even if it does not involve a new client—should be screened for conflicts. Importantly, conflicts screening should be done each time that a new party becomes involved as a plaintiff, defendant, lender, buyer or seller.

Computers make conflicts screening much easier. But, computers are no substitute in the final conflicts analysis for involving lawyers in the process. Effective conflicts procedures involve both. The key is to make sure that both are looking for the right things.

There are two kinds of conflicts—potential conflicts and actual conflicts. It is an important distinction. Potential conflicts means that there is some issue that must be addressed before a lawyer can accept the representation. Typically, the issue is some form of consent or waiver from either the new client, another client, or a former client.

Actual conflicts means that the lawyer cannot accept the representation. For example, a law firm cannot represent both a plaintiff and a defendant in the same lawsuit (although it has been tried.) This is an actual conflict that cannot be waived regardless of the amount of disclosure and consent. Screening the lawyers from each other does not work.

The fact is that there are some conflicts that cannot be waived.

Effective conflicts systems identify these direct adversity actual conflicts and make it impossible to open a matter when they arise.

There are two types of potential conflicts. Their names are "successive representations" and "multiple representations." The types are different, but the waiver is largely the same—full disclosure and consent.

Successive representation conflict rules involve potential conflicts between a current (or prospective) client and a former client. Under the conflict rules, a lawyer cannot represent a new client in a matter substantially related to the representation of an former client without the former client's consent after full disclosure. While there are many cases defining "substantially related," the essence is whether the lawyer learned (or could have learned) confidential information from the old client that could be used in the new representation for the new client.

If the answer is "no"—the lawyer did not and could not have learned confidences and secrets that could now be used, then the lawyer can accept the new representation. If, however, the answer is "yes" (and lawyers should err on the side of "yes" if in doubt), then the former client must consent after full disclosure.

Multiple representation conflict rules involve potential conflicts arising out of the representation of more than one client. Many lawyers overcomplicate the analysis. It is actually pretty straightforward. If there is more than one client, then the multiple representation rules should be applied. In most situations, it is easy to spot—more than one client listed on the new matter form, and the rules have to be applied.

Sometimes, it is not so apparent. These situations can arise of probate litigation (representing the executor, estate, heirs, etc.); securities litigation (representing both the corporation and the directors/officers); domestic litigation (the parents and the children); and bankruptcies.

If there is more than one client, then the lawyer should ask "are there things that I might do differently if I represented only one of the clients as opposed to both?" If the answer is "no" (like representing tenants in common in a dispossessory action), then there is no potential conflict and the lawyer can accept the representation without more.

If the answer is "yes," then there is a potential conflict that requires a more thorough analysis. This analysis involves determining whether the lawyer can "adequately" represent the interests of all of the clients. If the answer is "no," then there is an actual conflict and the lawyer must decline the representation. The conflict cannot be waived.

One simple way to determine whether a conflict is an actual conflicts is to determine if the clients interests are linked in any way, i.e. to advance one client's interest necessarily impacts another. In the domestic area, no lawyer could advance one spouse's interests without impacting the interests of the other spouse. Hence, the representation of a wife and husband in the same proceeding is not permissible with or without consent.

Assuming there is no actual conflict, then the lawyer must provide full disclosure to all of the clients and obtain all of the clients' written consent.

Conflicts really are not that complicated. It just requires practice discipline. Before the representation begins, get the names and run the conflicts. There is really no substitute to "Just Do It!" DR

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