

PERSPECTIVES

Strategies to Manage Your Law Firm's Professional Liability Exposures

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Practice Management Strategies

Part 3:

Conflict of Interests

Be aware that conflict of interests identification and management is the most critical risk management issue facing law firms – The seemingly ever-increasing changes, restructurings, and mobility of both lawyers and clients creates a “double whammy” from a conflict of interest standpoint. Not only does all of this constant change and movement create an ever increasing level of potential conflicts; it also becomes far more difficult to identify and track potential conflicts. A law firm must make a major effort to adhere to and execute the ensuing strategies and more if it hopes to avoid conflict of interest situations.

Promulgate and distribute to everybody in your law firm a written set of clearly defined procedures and rules relative to conflict of interests issues – It is critical that you enunciate a clear, formal written policy in advance on all relevant conflict issues which foreseeably could arise. All prohibited representations and situations should be clearly communicated to all of the lawyers and support staff. Since conflict issues and situations usually are intrinsically nebulous and confusing, the

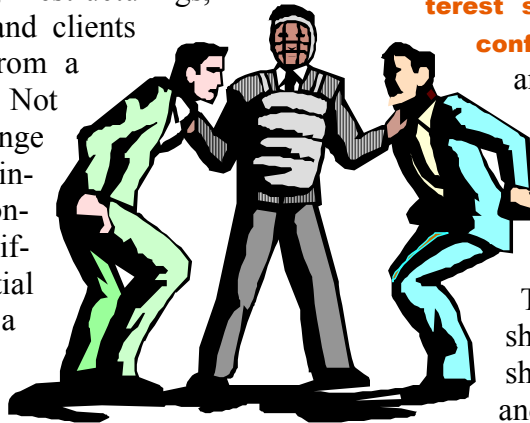
lack of a clearly defined and communicated stance creates an atmosphere of confusion and uncertainty.

Use a centralized computerized conflict of interest system to identify all potential conflicts – Given all of the change

and movement going on, a firm cannot realistically purport to identify potential conflicts without performing computerized conflict of interest searches on each new client.

Top-grade conflicts software should be used, and the system should be able to search all active and closed files. The best computerized systems will facilitate a large number of data entries and crosschecks.

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Circulate new client intake memos on each and every new client to all lawyers in your firm –

A main goal of the initial client interview and the use of a standard pre-printed client interview form is to elicit and record as much key information on the prospective client as possible, from which a systemized conflict of interests search can be performed.

Additionally, the completed client intake memo, including as many key informational entries relative to possible conflicts as possible, should be circulated immediately to each lawyer in your firm to review for any potential conflicts. It is especially important that all recently hired lateral partners and lateral associates be included in this process, since they are the lawyers most likely to bring unknown or “hidden” conflicts, based on their activities or representations at their previous law firms.

A particularly insidious conflict situation can occur when, unbeknownst to the lateral hire, the lateral hire’s previous firm participated in a representation that was adverse or conflicting with the representation being conducted by the current law firm. There is no clear safeguard to avoid this situation if you have already made lateral hires. The best that can be done is to circulate new client information as frequently, quickly, and widely as possible, and for all lawyers to review and consider the circulated information as quickly and vigilantly as possible.

Utilize the most powerful conflicts safeguard procedure that exists – If you establish a procedure whereby a client file cannot be opened or a case or file number cannot be assigned until a suc-

cessful conflicts check has been completed and documented, you will have instituted the most important safeguard there is in trying to avoid conflict of interests. You can be sure that any procedure which must be completed *before* the initiation of billable time will be completed.

Do not allow the originating lawyer to evaluate the conflict – The originating lawyer should not be involved in the process of evaluating and making a determination on a potential conflict. Due to financial and other ramifications, the originating lawyer rarely can be expected to be totally objective. The evaluation and final determination should be made by an independent senior partner or by your client acceptance committee.

Do not take on known conflicts – Even if a particular situation appears to be permissible under the applicable ethical rules, it always is inadvisable from a professional liability standpoint to take on any known or existing conflict. This is because the potential for problems in such settings is so great, along with the fact that, as a practical matter, conflict-laden claims most often are indefensible from a professional liability standpoint.

Even with full disclosure to your client, and the use of conflict waiver forms or consent forms, a high hazard still exists. This is because the twists and turns that usually will occur in these situations are largely unforeseeable, and therefore cannot be “disclosed” in advance. Your clients can simply say that they did not fully understand all of the possible ramifications and consequences, and if they had, they never would have consented. It is very easy to predict what side the judge or jury will invariably take in that type of situation.

Avoid multiple or successive representation of clients with actual or potentially conflicting interests – These settings usually are indefensible if a professional liability claim occurs. Common situations are when one lawyer represents both the husband and wife in a divorce, or both the buyer and seller in the sale of a business. Less obvious, but just as perilous, multiple representations include representing joint plaintiffs, whose interests can bifurcate sharply at many different junctures in the proceeding, or criminal co-defendants.

When more money is involved, multiple representations become ultra-hazardous. This can include representing both the directors of a corpora-

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tion and its shareholders, an estate and its beneficiaries, or as occurred in a recent multi-million dollar law firm malpractice verdict, simultaneously representing the seller (insurer) and the underwriter in a bond offering. From a malpractice standpoint, all of the above situations are extremely hazardous.

The common dynamic in all of these situations is that, at the outset, all of the parties seem to have a clear, unified, and common purpose and objective. However, as the matter evolves, their interests can, and usually do, sharply diverge. This leaves the lawyer in an incongruous position from which he is often unable to extricate himself.

Perform extensive conflict searches on all job applicants for all positions before extending any offer of employment – The simple act of hiring someone can result in the creation of a conflict of

interest situation. If a paralegal is hired without checking his or her prior employment closely, and it turns out that the paralegal spent the last 12 months working at the law firm that represents the opposing party in your current major case, problems may result in the form of disqualification, disgorgement of all fees, and an ensuing professional liability claim. The endless movement and ever-increasing impersonal nature of things in an increasingly anonymous world create a minefield of potential conflicts simply based on who you hire.

While many law firms recognize and query lawyers who they are considering hiring, support staff, and especially temporary lawyers and other employees can bring unknown and unintended but potentially damaging conflict situations with them. The hiring process should formally incorporate and use with all job applicants a rigorous attempt to identify potential conflict situations. ✨

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