Business Lawyers in the Crosshairs:
Issues to Spot
and Liabilities to Avoid

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Introduction

- Business Intake
- Conflicts of Interest
- Avoiding Common Drafting Errors
Business Intake

• Engagement Letters

- the Rules

- the practical advantages
Business Intake

• **Who is your client?**

  - **Who is authorized to act for the corporation and direct the lawyer’s work?**
Business Intake

• **Who is not your client?**

  - “I’m not your lawyer” letters

  - confidential information
Business Intake

- What work will you do for the client?
  - description of scope of work
Business Intake

• What work will you *not* do for the client?

  - overly broad descriptions of scope of work

  - “engagement creep”
Business Intake

• Should you accept the client or matter?

- due diligence to screen for 
  unworthy clients: incompetent, financially weak, dishonest
Business Intake

• A “hypothetical” – practical analysis of certain business intake issues
Business Intake
Conflicts of Interest: Rules Review

• Rule 1.7 – Current Clients

“a lawyer shall not represent a client if the representation involves a concurrent conflict of interest”
Conflicts of Interest: Conflicts of Interest:

Rules Review

• A concurrent conflict exists if:

“(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one . . . client will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”
Conflicts of Interest: Rules Review

• Current Clients – Rule of Thumb

Cannot be adverse to a current client in any matter without a waiver.
Conflicts of Interest: Rules Review

• Rule 1.9 – Former Clients

“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client” without a waiver
Conflicts of Interest: Rules Review

- Former Clients – Rule of Thumb cannot be adverse to a former client in the same matter or a matter substantially related to the matter(s) in which the lawyer/firm used to represent the former client.
Conflicts of Interest: Rules Review

- Former clients – when are matters substantially related?
  - same transaction or legal dispute
  - substantial risk that information learned during first representation would materially advance new client’s position
Conflicts of Interest

• Corporate Family Conflicts
  - General rule: corporate affiliates *not* treated as one and the same for conflicts purposes
  - *Unless* there is some reason to treat them as one and the same

ABA Formal Op. 95-390
Conflicts of Interest

• Corporate family issues

- any agreement with client, e.g., outside counsel guidelines?

- nature of work for corporate client: for benefit of another entity, confidential information of another entity?
Conflicts of Interest

- Corporate family issues – cont’d
  - relationship: alter ego?
    - separate management?
    - separate boards?
    - corporate formalities observed?
    - shared legal department?
    - separate offices, business activities?
    - ownership of sub’s voting stock?
Conflicts of Interest: Rules Review

• Waivers – see Rule 1.7(b)
  - lawyer must reasonably believe he can provide competent and diligent representation to each client
  - representation not prohibited
  - cannot be on both sides in same litigation or tribunal proceeding
Conflicts of Interest: Rules Review

• Waivers
  - based on informed consent:
    what disclosures required?
  - confirmed in writing
  - beware of representation
    beyond the scope of the waiver
Conflicts of Interest

• Future Waivers – ABA Formal Opinion 05-436
  - sophisticated client
  - separately represented by independent counsel
  - unrelated future matters

See also DC Ethics Opinion 309
Conflicts of Interest

- A “hypothetical” – lawyer for the deal/multiple representation issues
Conflicts of Interest
Conflicts of Interest

- Joint/Multiple Representation

  1. confidentiality?

  2. what if a conflict develops?

  3. use of confidences of former joint client?
• Another “hypothetical” – litigating lawyer’s/firm’s own transactional work
Conflicts of Interest
Conflicts of Interest

• Prospective Clients
  - confidential information
  - declination letters
  - screening?
A True Story from the Trenches

• Donald Developer seeks new counsel for a mixed-use real estate development, asks David Dealmaker for representation

• Developer LLP and Co-Developer Partnership, comprised of partners Smith and Jones, to be equal partners in Sunshine Acres Partnership, which would own development
A True Story from the Trenches

- First step – conflicts check: how to classify parties?
- Due diligence – any red flags?
- Engagement letter – what should be covered?
A True Story from the Trenches

- Development plan – Developer to contribute land ($5 million) and cash ($5 million), Co-Developer to contribute two parcels of land ($10 million total), 50% share each

- Land must have clear title, certain zoning, basic public utility access – if not, cash penalties or reduced ownership share
A True Story from the Trenches

- Co-Developer’s problems – mortgage on one parcel and needed zoning change for both

- Co-Developer asked Dealmaker to represent it in mortgage foreclosure and zoning matter

- Time for penalties near
A True Story
from the Trenches

• What are the issues with representing Co-Developer?

• Review and comments on waivers – Exhibits C, C-2, C-3 and D
A True Story from the Trenches

- Dealmaker resolved foreclosure matter for Co-Developer – Co-Developer to obtain bank financing

- Dealmaker unable to obtain zoning changes for 1 of Co-Developer’s parcels – default under partnership agreement, Co-Developer accepted reduced share
A True Story from the Trenches

- Golf course borders development – Dealmaker meets with owner to discuss possible acquisition
- Development project in trouble – Developer tells Dealmaker of another developer who may want to buy whole project if golf course included
- Dealmaker concludes purchase of golf course – straight cash purchase
A True Story from the Trenches

- Construction delays – partners must contribute more capital
- Co-Developer failed to contribute – share reduced
- Flippee offers to purchase project – partners eventually agree
A True Story from the Trenches

- Substantial profit to Developer from sale
- Only small profit to Co-Developer – greater profit if it had not reduced its share
A True Story from the Trenches

• The Fall Out

Co-Developer sues Developer and Law Firm – fraud, breach of fiduciary duty and contract, legal malpractice

Golf course owner sues Developer and Law Firm – fraud and breach of fiduciary duty
A True Story from the Trenches

• The Fall Out – P.S.

If any judgment against Developer, Developer will sue Dealmaker and Law Firm
Common Drafting Errors and How to Avoid Them

- The Varied Species of Drafting Errors
  - The pure drafting bobble
  - The failure to understand the deal
  - The conflict or bad client, thrown in for spice
The Pure Drafting Bobble

- Inattention

- Misuse of technology
  - dropping phrases between drafts
  - cannibalizing a previous document, failing to recognize deal differences

- Failing to reconcile documents when the deal changes mid-stream

- Misuse of defined terms
Failure to Understand the Deal

- Mistakes in formulas, e.g., prepayment provisions
- Failure to include information in proxy statement
- Failure to identify all inventors on a patent
- Failure to provide for real estate tax payments in a lease
The Conflict or Bad Client

- A recurring problem – trying to litigate your way out of your own (alleged) mistakes
- Allegations of divided loyalty
- The client who claims that changes in the deal had not been explained
Conclusions

- Vet new clients and matters
- Written Engagement Letters
  - identify client (and non-clients)
  - scope of work – and update
- Careful with Conflicts
- Involve risk management/loss prevention experts
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