

An Invitation to Malpractice (Part II)

Once a conflict of interest is spotted, take action promptly

BY HARRY H. SCHNEIDER JR.

Identifying a conflict of interest is only half the problem. Resolving the conflict cleanly and completely, once detected, is equally important. A conflicts check dutifully performed soon becomes worthless if the lawyer neglects to follow through in the appropriate manner. A few more practical tips:

Conflict Avoidance. The least complicated method of conflict resolution remains the most foolproof. Simply avoid the conflicting representation. Decline to take on the new client or the new matter, and refer the business to another law firm.

Unfortunately, while flawless in theory, conflict avoidance is not always that simple in practice.

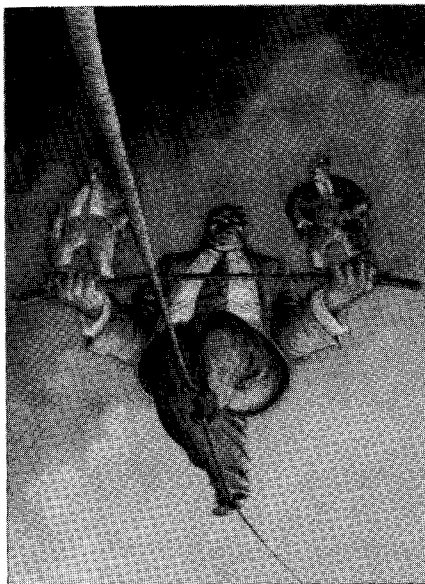
Some conflicts may not develop until the representation of both clients is well under way, as when an unforeseen merger results in your client being controlled by a company you currently are opposing on behalf of another client in an unrelated matter. Or, midway through a purchase-and-sale negotiation where you represent the seller, it surfaces that a late investor in the deal will be another of your firm's clients represented by independent counsel.

Where the lawyer reasonably concludes that dual representation of clients with conflicting interests can be accomplished without adversely affecting either, and with the clients' informed consent, many conflicts of interest can be waived and the representation undertaken. This action is in full compliance with both the Rules of Professional Conduct and the lawyer's ethical obligations.

For waiver and consent to be effective, the rules set forth a two-part test. First, the lawyer must conclude that the conflicting representation will not inure to the detriment of either client, and the lawyer's decision must be "reasonable." Second, each client must consent to the representation after being made aware of the conflict.

How to "Reasonably" Assess Whether or Not a Client Will Be Harmed. Is the simultaneous repre-

sentation in each client's interest? Ask someone else. Do not make this judgment alone. Have someone else in the firm do the analysis. Better yet, pay for each client to consult with independent counsel solely on the issue of whether to consent.



Except for the most modest engagements, paying for a couple of hours of independent advice is well worth the expense. For the smallest matters, it probably makes more sense to forgo the conflict entirely and refer one or both clients to successor counsel. For the more complex matters—where independent counsel on the consent issue could prove unduly expensive—perhaps it would be a stretch to conclude that the dual representation is fair to both clients.

What Constitutes Consent Under the Rules? What is required is *informed* consent, voluntarily and knowingly granted after full disclosure of all relevant information that likely would influence the client's decision.

A common tendency here is to confuse "full disclosure" with predicting the future. Some lawyers bypass adequate disclosure and, instead, proceed to inventory every possible factual scenario that could befall the client if consent is granted. The better practice is to focus on what is known.

With the permission of each client, make sure the other is informed fully as to the nature of the legal problems presented and the

scope of the representation to follow. More conflict waivers are later invalidated by a failure to disclose facts known by the lawyer at the time of consent than by the lawyer's inability to predict accurately all future developments in the competing representations.

Document the Clients' Consent. A letter memorializing each client's consent should be prepared, signed by each client, and should contain the following elements:

- ▶ Disclosure of the conflict in enough detail to apprise the client of the implications on future representation.

- ▶ Signature by each client, evidencing consent.

- ▶ A description of the consideration for consent (future or continued representation), and the procedures to be followed to ensure that secrets and confidences are not compromised (such as a "Chinese Wall" or other screening mechanism to prevent dissemination of client confidences).

- ▶ An acknowledgement of the clients' access to, and reliance on, the advice of independent counsel in consenting to the conflict.

- ▶ The scenario to be followed if any party later withdraws consent. Set out in writing that the law firm will be permitted to withdraw from the continued representation of one client, as well as an acknowledgement that such withdrawal will be the sole remedy—no disqualification and no disgorgement of fees will follow.

- ▶ An unequivocal statement that the firm's undivided loyalty will be exercised solely on behalf of each client in each matter.

- ▶ An indication that the consent letter is being sent to both affected clients.

Timeliness. Failure to identify a conflict early in a representation potentially compromises all advice given after the conflict should have been detected. Failure to resolve a conflict promptly once detected can be even more serious.

Better yet, detect the conflict before it technically is created. Failure to do so leaves you without the option of avoidance, and leaves the firm with only the possibility of client acquiescence (which may not be obtained) or technical violation leading to problems of client dissatisfaction or professional liability. ■

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