

MAINTENANCE OF CONFLICT PROCEDURES

It doesn't matter how long you have been practicing – whenever a new client or a new matter comes into the office – you feel that sense of satisfaction. Having to then reject that representation because of the existence of a non-waivable conflict is one of the most frustrating experiences an attorney faces. A far more frustrating experience, however, is to be the subject of a civil claim or grievance as a result of the existence of a conflict of interest that was missed or ignored. According to statistics compiled on a nationwide basis, 6.3% of all malpractice claims are asserted because of administrative errors that occur in the identification of conflicts.¹ Based solely upon anecdotal evidence, law suits against attorneys involving errors in identifying, analyzing and resolving conflicts in New York well exceed the nationwide statistics.

Conflicts of interest must be addressed every day of a legal career; they are the bane of every attorney's existence. No single topic in the Code of Professional Responsibility is more problematic than the determination as to whether a conflict exists between an attorney and client or former client. Attorneys who believe that the client's consent to a conflict immunizes the attorney or law firm from the consequences of conflict issues are sadly mistaken.

It is important to remember when analyzing a conflicts issue that the appearance of a conflict is nearly as devastating as the existence of a true conflict. The perception of whether a conflict exists is from the point of view of the client or potential client, and it is often made from the vantage point of hindsight after something has gone wrong. As a result, the process of conflicts identification and resolution should always err on the side of caution. The

¹ ABA Standing Committee on Professional Liability, *Profile of Legal Malpractice Claims 2000 – 2003* Table 5, p.12 (ABA 2005).

consequences of failing to do so can be embarrassing, expensive and time-consuming. If the conflict is sufficiently egregious, it can even threaten your ability to practice law.²

Identifying and resolving identified conflicts are difficult processes and outside the scope of this particular article. But before any conflicts analysis can take place, the law firm must have in place procedures designed to permit a review of the entities and individuals the firm *and* its attorneys have represented. The Rules require all law firms to maintain a conflicts check system and to have a policy in place pursuant to which the law firm regularly implements the system to screen for conflicts.³ The rule creates what amounts to a *per se* violation of the disciplinary rules and provides a basis⁴ upon which attorneys and law firms⁴ may be found to have engaged in misconduct without the necessity of demonstrating intent. It is sufficient to show that the firm failed to keep contemporaneous records of engagements by clients and did not maintain a policy for checking past relationships with clients before new retentions are undertaken. However, the better practice is to reduce your conflict procedures to writing documenting the commitment to compliance with the Rule. In 2003, the New York City Bar released a comprehensive ethics opinion addressing the issue of what constitutes an effective procedure for identifying conflicts of interest.⁵ It is strongly recommended that the opinion be read by every practicing attorney with a critical eye to see how the attorney's current procedures compare to those found "effective."

² *In re Lazroe*, 825 N.Y.S.2d 389, 2006 N.Y. Slip Op. 09935 (4th Dep't 2006); *In re Green*, 36 A.D.3d 12, 827 N.Y.S.2d 67 (2nd Dep't 2006); *In re DeSousa*, 36 A.D.3d 121, 826 N.Y.S.2d 306 (2nd Dep't 2006).

³ 22 N.Y.C.R.R. § 1200.24 [DR 5-105(e)].

⁴ 22 N.Y.C.R.R. § 1200.3 [DR 1-102(a)(1)].

⁵ NYC Bar, Formal Op. 2003-03, *Checking for Conflicts of Interest*.

System Basics

If you have not done so already, the first step is to select conflicts software that is user-friendly. In this day and age maintaining a manual card file for conflicts identification and analysis is no longer appropriate. Choosing the proper program is important – talk with colleagues in your area of practice, check out the Vendor Resource Guide at the NYSBA Law Practice Management website, attend local trade shows, read reviews in magazine devoted to law office computer systems and consult with a professional to make sure that your needs are met. Ideally, the program you select should be able to integrate with other office systems; provide easy access to conflict data for everyone in the office; and allow the ability to search for spelling variations. In order to facilitate analysis, it must be able to show the party's relationship with client.

Standardized Intake

Once you have selected your software, all potential retentions with new or existing firm clients (even if rejected) must be entered on standardized intake sheets and entered into the firm's system. No exceptions – everyone must be required to follow the same practice. A reasoned conflicts analysis can only be performed if this practice is rigorously and scrupulously maintained. At a minimum, the intake sheet, which should be modified to suit your practice areas, should contain the following information:

the name, address and contact number of the client and any entities related to the client;

the date of the intake;

the nature of the representation;

if the client is a new client without established terms of compensation, the terms and conditions of the engagement;

if the client is a new client, the identity of the person authorizing the engagement;

the name, address and contact numbers of all parties involved in the representation;

the terms/names which should be included in a conflict search. Identification of the terms that must be searched should not be left to the discretion of a clerical employee.

Remember that accuracy counts. A name misspelled will not be properly recorded in the law firm's conflict system and may form the basis for a missed conflict. Consistency counts as well. Those individuals charged with entering information into the conflict system must be taught to enter names and other information in the same manner every time it is done.

What to Enter

The ability to identify the existence of a conflict is dependent upon the extent of the information put into the conflict system. The current and former names of every person or entity represented by the law firm must be entered *as well as* every person or entity represented by "of counsels," lateral hires and even suite members. Lateral hires and "of counsels" present special challenges. As lateral hires are brought into the firm, care must be taken to incorporate the new attorney's prior representations into the firm's system. While NYSBA Ethics Opinion 720 concludes that, unless protected as a client confidence or secret, the firm must seek the names of clients represented by a new lawyer (or if the former firm was small, all clients of the former firm), the opinion sidesteps the all important issue as to how this information is obtained if the original firm refuses to voluntarily disclose the information or if the lateral hire does not

want any contact with the former firm prior to acceptance of the new employment opportunity.⁶ Attorneys seeking to change law firms must be very cognizant of the impact that a proper conflicts analysis may have upon a prospective employer or even the attorney's current employer.⁷ Before even interviewing a candidate, the question of whether or not a conflict might preclude a law firm from hiring the attorney or face losing a significant client must be effectively analyzed.⁸ The failure to perform such an analysis can be devastating. The decision of *Ogden Allied Abatement & Decontamination Services, Inc. v. ConEd*,⁹ presents a factual scenario that constitutes the ultimate nightmare for any associate. After making a job offer to an associate from an adversary law firm during a pending litigation, the new law firm withdrew the offer when the adversary law firm made a motion to disqualify when the associate gave notice. While the *Ogden* court did not disqualify the law firm that had made the offer to the associate because of the fact that the associate did not actually start employment, the firm's conduct in continuing the interview process while discovery was underway was soundly criticized.

⁶ New York State Bar Association Committee on Professional Ethics, Opinion 720, 8/27/99, 2000 N.Y. App. Div. LEXIS 7754.

⁷ It is recommended that any attorney contemplating a change in employers read Altman, James, *Ethical Problems Caused By Job Search*, 10/20/2000 N.Y.L.J. 24, (col. 1) and Altman, James, *A Young Lawyer's Nightmare*, 2/16/2001 N.Y.L.J. 16, (col. 1).

⁸ Absent the former client's consent, a lawyer changing firms may not undertake representation adverse to the former client if (1) moving lawyer personally "represented" the client or otherwise acquired relevant confidences or secrets of the client, and (2) moving lawyer would be undertaking representation in the same matter or in a matter that is substantially related to one in which the moving lawyer or the old firm previously represented the former client. Absent the client's consent, if the moving lawyer is disqualified from engaging in representation under this rule, the moving lawyer's new law firm is also disqualified. N.Y.S. Bar Association Ethics Opinion No. 723.

⁹ 6 Misc.3d 1012(A), 800 N.Y.S.2d 351 (N.Y. Sup. 2000).

The Code recognizes the existence of ‘of counsel’ relationships which it defines as a “continuing relationship with a lawyer or law firm, other than as a partner or associate.”¹⁰ If there is an ‘of counsel’ relationship, a law firm or an individual attorney may so indicate on the letterhead. However, as a usual practice, for purposes of analyzing conflicts of interest, the ‘of counsel’ relationship should be treated as if the ‘of counsel’ and the law firm are conducting business as a single firm.¹¹ As was summarized by the New York State Bar Association: “if a lawyer acting alone would be disqualified from a particular representation based on any of the rules enumerated in DR 5-105(D), then that disqualification is imputed to a law firm with which that lawyer has an “of counsel” relationship.”¹² In other words, where an “of counsel” relationship exists, their conflicts are your conflicts. On a disqualification motion where the criteria is whether the conflict has tainted the court proceedings, the Second Circuit rejected the blanket imputation of an ‘of counsel’s’ conflicts to a law firm and instead took a more pragmatic approach in holding that the conflict would depend on the nature of the relationship between the “of counsel” and the law firm.¹³ Finding that the relationship between the “of counsel” attorney and the law firm was attenuated and the attorney clearly continued to operate his sole practice in addition to serving as transactional counsel for certain enumerated firm clients and that adequate screening procedures negated any taint, the court denied the motion to disqualify.

¹⁰ DR 2-102(A)(4) [22 N.Y.C.R.R. § 1200.7(A)(4)].

¹¹ *See, e.g.*, ABA 90-357; ABCNY Formal Op. 1995-8 (“attorneys will need to keep in mind that for purposes of analyzing conflicts of interest, ‘of counsel’ relationships are treated as if the ‘counsel’ and the firm are one unit”). ABCNY Formal Op. 2000-4.

¹² NYSBA Committee on Professional Ethics Op. 773, 1/23/04.

¹³ *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2nd Cir. 2005).

Notwithstanding the content of this decision, however, from the point of view of compliance with the Code, effective risk management and just plain good client relations, law firms having “of counsel” relationships should follow the one entity rule.

In addition to the clients, every person or entity involved in every matter the firm, its attorneys and ‘of counsel’ has handled must be entered into the clients. This includes the parties, related parties, attorneys, important witnesses and even experts. In the event a prospective client is rejected by the firm, the information on the prospective client must also be entered. Although technically the rejected prospective client need only be entered if confidential information was exchanged, including all rejected clients allows a firm to recognize the potential for a conflict and decide how to address it upfront rather than after the fact – after a problem has arisen. In addition, any business entity in which any attorney at the firm serves as an officer or director or has a significant ownership or any municipality in which the attorney is formally involved, e.g. the planning board, board of trustees, zoning board of appeals, etc., should be entered into the conflict system.

As each entry is made, the nature of the relationship (or role in the matter), the type of the representation in which the relationship between you and the party arose and whether the matter is active or inactive, must be included. For the purposes of conflicts analysis, it is important to keep accurate records of whether a matter is open or closed since the standard is different if the individual or entity is a former client.

When to Update

Since the Code provides attorneys may not continue a representation in which a conflict exists, attorneys are obligated to constantly update the conflict entries on every

representation. As with the need to maintain the confidentiality of client secrets and confidences, attorneys also need the assistance of staff to identify times when the conflict entries need to be updated. At a minimum automatic updates must be made whenever a new client or matter is accepted (or rejected), whenever an individual or entity's name changes, whenever a new party, expert, witness or attorney is added to existing representations, and whenever the relationship of a party changes, e.g., adverse claims are asserted, businesses merge or split, divorces, etc.

When to Run the Conflict Search

More often than not, law firms that are diligent in their conflict check practices get it right on the intake but the procedures tend to fall down as the representation proceeds. A law firm practice of performing a conflicts check only at the intake does not comply with an attorney's obligations under the Code. Conflict checks should be performed before initial consultations, before a new file is opened, whenever a new party, attorney, witness or expert enters the representation and whenever the firm decides to interview a candidate for possible hire.

Conclusion

No one said this was easy. All of the above must be put into place before an attorney even begins to the difficult process of effectively analyzing a conflict and deciding how an identified conflict should be resolved. The obligation to identify conflicts is the responsibility of every attorney – not just the senior attorneys in a firm. Above all, if a conflict comes to your attention, do not take the ostrich approach. Conflicts ignored become harder to address after the problem arises.