Ethics Matters

By John Gaal

Q I recently started work on a litigation matter for a new client. Now that I have jumped into the details, I can see that there are several non-parties that I may have to subpoena to testify or provide documents. Do I need to run those names through my firm's conflicts system before I can proceed?

A You certainly do, and if any turn up as current firm clients, you may need to get their consent, confirmed in writing, before proceeding. The New York City Bar Association's Committee on Professional Ethics ("Committee") recently addressed this issue in Formal Opinion 2017-6.

In New York, a conflict with a current client exists under Rule 1.7(a) "if a reasonable lawyer would conclude that either (1) the representation will involve the lawyer in representing differing interests, or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." Rule 1.0(f) provides that "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." Of course, even if a conflict does exist, in most cases a representation may continue provided the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and each affected client provides an informed consent confirmed in writing. See Rule 1.7(b).

After reviewing a number of earlier ethics opinions issued by the ABA and the New York County Bar Association, as well as several New York court decisions, the Committee concluded that "ordinarily" issuing a subpoena to a current client to obtain testimony will create a conflict. The Committee noted that obtaining testimony often involves "inconveniences [to] the witness, involves probing a witness' recollection, and at times may involve challenging and confronting the witness," each of which can be perceived as disloyal and give rise to a conflict. Similarly, subpoenaing a witness to produce documents typically requires an allocation of resources (time and money) by the subpoenaed party and may even require the retention of counsel to work through production issues, which also can be contrary to that person's own interests. Thus in those circumstances as well a conflict will "ordinarily" arise.[1] This is true even if you do not envision "attacking" the credibility of the subpoenaed witness or otherwise getting into a significant dispute over testimony or documents.

Thus a critical first step prior to subpoenaing any non-party is to run a full conflicts check so that you know whether you are about to subpoena an existing client. In fact, this step should be undertaken as soon as you have any sense that you may need to subpoena that witness because the consequences of failing to do so can be severe, and in some cases may even prevent you from being able to proceed with the representation. Needless to say, if you only discover this dilemma well into the litigation (because you did not bother to run the conflicts check initially)—and worse yet, after you already issued the subpoena—you could severely prejudice your client by creating a need to withdraw or face disqualification.

On the other hand, if you uncover the issue early there may be alternative ways to deal with the problem. The first is to secure the subpoenaed client's consent to the subpoena. (While this approach could also resolve the issue even if employed "mid-litigation," the risk you run in waiting is that if consent is not forthcoming you may not be able to proceed at a crucial time, potentially harming your litigation client.) A second approach, if you know early enough that this problem exists, may be to limit the scope of your representation of your litigation client. As long as it does not render your counsel inadequate, and your litigation client consents, you may be able to limit your representation to avoid the conflict. See New York City Formal Ethics Opinion 2001-3. Of course that consent must be "informed" and the client must be advised of the reasonably foreseeable impacts of that limited scope.

If all else fails and you do not secure the early consent of your non-litigation client, there may still be an option short of mid-term withdrawal from the litigation. In Formal Opinion 92-367, the ABA noted that, in some circumstances at least, you might be able to secure "conflicts

Ethics Matters is provided by the Ethics and Professional Responsibility Committee of the Labor and Employment Law Section. The Committee is pleased to mark the return of this column after a several year hiatus and we hope to continue it on a quarterly basis. Specific columns are authored by various members of the Committee. If there is a topic/ethical issue of interest to all Labor and Employment Law practitioners that you feel would be appropriate for discussion in this column, please contact either Co-Chair of the Committee, John Gaal at jgaal@bsk.com, or Jae Chun at jchun@friedmananspach.com.

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counsel" to separately deal with your other client—that is, to be solely responsible for subpoenaing and otherwise dealing with that client and its testimony/documents. To have a chance of success with this approach, you must be careful not to assist conflicts counsel with its efforts (e.g., you may not instruct or otherwise strategize with conflicts counsel on how to proceed, or provide it with information related to the subpoenaed client). And, of course, there is no guarantee that a court would find this approach acceptable in any given case. As a result, it should only be considered as a last resort.

Consequently, you should always run non-party witnesses through your firm's conflicts system, and do so as early as possible, so you can determine whether you will have an issue going forward. If you find that a non-party witness is a current client, the prudent course would be to treat that situation in all instances as a conflict and to seek the clients' consent, [2] confirmed in writing. If consent is not forthcoming from the client to be subpoenaed, you should consider the appropriateness of limiting the scope of your representation of your litigation client and/or using "conflicts counsel" to deal with your other client.

Endnotes

1. The Committee did acknowledge that in "exceptional" cases, a subpoena may not create a conflict if the subpoenaed client is not burdened by the subpoena and has no objection to compliance. However, as the Committee pointed out, in order for the subpoenaing lawyer to "know" that the other client does not find the subpoena burdensome or objectionable, he or she must communicate with the subpoenaed client in a manner substantially similar to the communication needed to secure the client's "consent" to waive any conflict. As a result, the prudent course would be to treat all situations involving a subpoena addressed to a current client as requiring consent and to secure a consent confirmed in writing. This is likely the best approach from a "client relationship" perspective as well. No client likes to be surprised by receiving a subpoena from "their" lawyer, even if the substance of the subpoena is not otherwise burdensome or objectionable. By reaching out to that client in advance, the likelihood of securing a consent to proceed is much greater and any potential harm to your existing relationship with that client as a result is likely minimized.
2. You need the consent of not only the client to be subpoenaed, but you also need to disclose to your litigation client that this relationship exists and secure its consent to your proceeding on their behalf.

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