Tennessee Commission on Continuing Legal Education & Specialization

LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET P

RESOURCES FOR ETHICAL ISSUES

Worksheet P is intended to facilitate a discussion about the potential resources for dealing with complicated ethical issues, including conflicts of interest.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

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Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- Suggest resources that the new lawyer can consult for making important ethical decisions, including the following:
  - Identify the procedure for obtaining in-house ethics advice (if you are in an in--house mentoring relationship).
  - Provide suggestions for finding outside ethics counsel and when such action is recommended.
  - Identify other helpful ethics materials, where they can be found, and the importance of supplementing general ethics resources with independent research on Tennessee disciplinary case law when the ethics resources reviewed are not based on the Tennessee Rules of Professional Conduct
  - Discuss resources available from the Tennessee Board of Professional Responsibility, including
    - Formal ethics opinions: http://tbpr.org/Attorneys/EthicsOpinions/
    - Informal ethics inquiries: http://tbpr.org/Attorneys/InformalEthicsInq.aspx
- Review the conflict of interest rules. See Tennessee Rules of Professional Conduct Rules 1.7 – 1.10 and 1.18.
- Read and discuss the attached article by Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical Requirements*.

- If the new lawyer is a government employee (or has been in the past), discuss Tennessee Rules of Professional Conduct Rule 1.11.

- If the new lawyer served (or is serving) as a law clerk to a judge or other adjudicative officer, see Tennessee Rules of Professional Conduct Rule 1.12.
- Discuss the importance of adequately screening for conflicts of interest. Share with the new lawyer the firm's procedure for screening for conflicts (if in an in-house mentoring relationship) or the mentor's office procedure for screening for conflicts (if in an outside mentoring relationship). Refer to the Tennessee Bar Assocation's guidelines for *Case Acceptance and Client Screening*, attached below
- Discuss different types of conflicts of interest that can arise - particularly in the new lawyer's practice area(s) - and give examples of conflicts which can be waived with informed consent. Explain how to document your client's consent to conflicts.
- Discuss screening walls, when they apply, and how a law office manages them.
- If the new lawyer works in a small firm or has a solo practice, discuss the conflict of interest rules articulated in the attached materials excerpted from the Louisiana State Bar Association's *Practice Aid Guide: The Essentials of Law office Management*, http://www.lsba.org/2007Publications/index.asp, and compare it to Tennessee's disciplinary rules. Also review the Louisiana State Bar Association's sample conflict of interest forms and letters and discuss whether they are good samples to use in Tennessee. Share with the new lawyer ideas for other conflict forms and letters.
- If the new lawyer works in a small firm or has a solo practice, discuss the attached article that gives tips on effectively managing conflict checking. Todd C. Scott, *Conflict-Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking,* GP/SOLO LAW TRENDS & NEWS Vol. 2, No. 2.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

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RESOURCES

Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical Requirements*, Tennessee Bar Journal (10/27/2010) at, http://www.tba.org/journal/upjohn-warnings-best-practices-and-tennessee-ethical-requirements

American Legal Ethics Library http://www.law.cornell.edu/ethics/

LegalEthics.com www.legalethics.com

NeoEthics: Law and Insurance Resources for the ABA's Tort Trial and Insurance Practice Section http://www.edicta.org/NeoethicsBucklin/Neoethics.htm

practicePRO by the Lawyers' Professional Indemnity Company http://www.practicepro.ca/

sunEthics http://www.sunethics.com/

American Bar Association Standing Committee on Lawyers' Professional Liability: Understanding Your Insurance Coverage http://www.abanet.org/legalservices/lpl/insurancecoverage.html

Tennessee Bar Association, *Case Acceptance and Client Screening*, at http://www.tba.org/case-acceptance-and-client-screening

TENNESSEE RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest 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 or more clients 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and

(2) each affected client gives informed consent.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client to the lawyer or a person related to the lawyer, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:

(1) each client is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(2) each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client or prospective client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client and advises the client in writing of the desirability of seeking and gives the client a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) [Reserved]

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) 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 unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7, 1.9 or 2.2, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

(c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may represent the person, notwithstanding paragraph (a) above, if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by RPC 1.9(c);

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if:

(1) the disqualified lawyer was substantially involved in the representation of a former client; and

(2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

(e) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in RPC 1.7.

(f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to RPC 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm; and

(4) advise the government agency in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if both the personally disqualified lawyer and the lawyers who are representing the client in the matter comply with the requirements set forth in paragraph (b).

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

(1) is subject to RPCs 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing, or under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(ii) negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a staff attorney to a court or as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by RPC 1.12(b) and subject to the conditions stated in RPC 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

RULE 1.12: FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk or staff attorney to such a person or as an arbitrator, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator. A lawyer serving as a staff attorney to a court or as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the lawyer is participating personally and substantially, but only after the lawyer has notified the court, judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in RPC 1.11(b)(1), (b)(2), and (b)(3) and have advised the appropriate tribunal in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as RPC 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that prospective client in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

An Invitation to Malpractice

Ignoring conflict-of-interest rules can open Pandora's box

BY HARRY H. SCHNEIDER JR.

Not that long ago, most professional liability errors were clear-cut cases of culpability—failing to commence a lawsuit within the statute of limitations, or drafting a will in violation of the rule against perpetuities. Not any more.

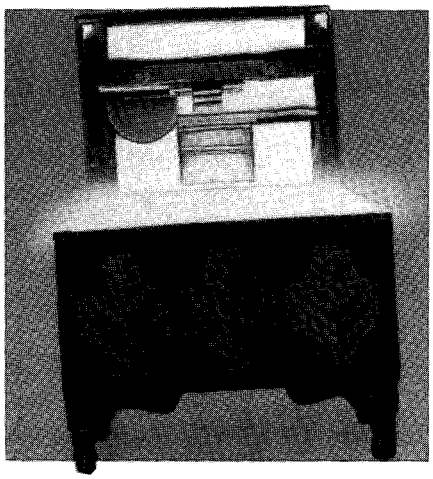
Malpractice today arises out of situations where the error can be subtle, and no more apparent in retrospect than when the advice was given. Increasingly, lawyers are being sued almost as insurers of the financial success of their clients' business transactions, where the client—who has taken some business risk and lost—can demonstrate that the loss could have been avoided if the lawyer had provided different advice.

A key component of those claims is an allegation that the lawyer had a conflict of interest that impaired his or her ability to render objective advice. If proved, that allegation at once supplies the trier of fact with an explanation and motive for the lawyer's failure to give legal advice that would have avoided the client's problem. It also satisfies the breach of duty element of the malpractice claim. The client's business loss then becomes the lawyer's responsibility.

All too often, practitioners unwittingly invite these claims by failing to recognize the rules governing conflicts of interest. If not detected early and resolved properly, conflicts of interest can create liability where otherwise none would lie. A few practical tips:

Read the Rules. Most lawyers are not conversant with the conflict-of-interest rules in their jurisdictions. They assume that once they have implemented a conflicts-checking system, their problems are solved. Not true. The most elaborate conflicts check is simply a fancy name-matching device. There is no substitute for knowing the rules once a name is matched, and a conflict detected.

Spot-check Your System. Make sure your system works. Does it include all the necessary information to allow the conflict to be analyzed? In addition to client names and related parties, does it identify all other parties as adverse? Does it distinguish between closed matters and ongoing matters? Do you have a method to prevent a new client or a new matter from being opened until the conflicts check is completed?



Does your system allow for the introduction of new names that may be discovered after the initial conflicts check has been performed?

What Constitutes a Conflict? The rules in most jurisdictions simply codify the general principle that a lawyer owes undivided loyalty to the client: A lawyer may not represent a client, absent informed consent, in any situation where the interest of anyone else interferes with the lawyer's ability to provide objective representation.

Model Rule 1.7 establishes two general prohibitions. First, a lawyer may not simultaneously represent a client on a matter where the client's interests are "adverse" to another existing client. Second, a lawyer may not represent a client in any situation where the lawyer's abilities are "materially limited" by the lawyer's responsibilities to third parties, another client, or where the lawyer's own self-interest would conflict with the client's.

What Is an Adverse Party? The best practical definition of adverse party is "anyone other than your client who has anything to do with the subject matter of your client's legal problem." Resist the temptation to label other parties as "similarly situated," and to interpret "adverse" to mean hostile. Anyone whose interests are other than identical with your client's is adverse.

Isn't There a Difference Between Contested Litigation Matters and Business Advice? No. Interested parties are adverse whether they sit on the opposite side of the courtroom or around the friendly side of the bargaining table. Lawyers who represent multiple clients until they square-off against each other are fooling themselves. The simultaneous representation of clients with non-identical interests in the same subject matter is just as prohibited before relations turn sour as it is afterward.

What Is a Material Limitation on the Lawyer's Abilities? A material limitation is any circumstance external to the client's situation and peculiar to the lawyer, that would tend to influence the lawyer's advice in a manner that could affect the outcome of the client's legal problem.

Can a Lawyer Represent Adverse Clients in Unrelated Matters? No. Under the rules, if you represent a client on a single matter, you cannot represent another client adverse to the first client on *any* matter. Accordingly, a lawyer could not represent the manufacturer of an exploding bottle in a product liability suit and at the same time represent a landowner selling property to the same bottle manufacturer.

Nor can your partner, even if he or she practices in a different office or in another jurisdiction. Rule 1.10 disqualifies all affiliated lawyers from doing what any one of them would be prohibited from doing.

How About Former Clients? While Rule 1.7 strictly forbids *contemporaneous* representation of clients with conflicting interests, Rule 1.9 specifically permits the *consecutive* representations adverse to a former client so long as the subject matter is unrelated and the lawyer has not acquired confidences material to the subsequent representation.

Thus, the lawyer who has completed defending the bottle manufacturer in the product liability case is free to represent another client in a sale of real property to the same manufacturer. But the lawyer could not represent a subsequent client in a similar product liability case involving the manufacturer.

Can the Conflict Be Waived? Yes, but more on that next time. ■

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ILLUSTRATION BY RICHARD MARTIN

Case Acceptance and Client Screening

It is tempting (sometimes necessary) as a new lawyer or at the start-up of your own firm to take whatever clients or cases walk in the door. Even the most successful lawyers sometimes suffer from the fear that the most recent client that engaged the attorney will be his or her last. But there are dangers in accepting every case. Lawyers who fail to initiate some discipline in the types of cases they accept early in their practice are the lawyers who eventually find that they are not managing their law practice - their law practice is managing them.

In the small firm, this often leads to overwork, mistakes, errors in judgment, missed deadlines, lapses in communication with clients, strained firm financial and labor resources; and, finally, an unprofitable and stressful practice. The dangers do not stop there. The lawyer's personal life can then become affected in very negative ways. Malpractice claims and ethical complaints can jeopardize the lawyer's career and can contribute to depression, failing personal relationships or substance abuse. Case acceptance criteria or guidelines, therefore, are an essential management tool for the practice of law, particularly in the small firm.

Large firms must also be vigilant in analyzing their practice mix. The types of problems arising in larger law firms when they fail to control their practice or case mix are usually internal ones. Equity in partner compensation is difficult when the practice areas within a firm do not generate compatible billing rates. The marketing dynamics of certain practice areas can be offensive to other members of the firm and firm clients. Client mix can also become an issue. Corporate clients may not be comfortable sitting in the reception area with the typical personal injury or criminal client. Proper and profitable legal and non-legal staff utilization can also be an issue. A practice area that is more labor intensive than others may strain the resources available to other practice areas. The viability of a larger firm can be threatened if proper consideration and attention is not given to practice and case mix. Case acceptance guidelines in the larger firm, therefore, focus the firm on the most compatible and profitable types of practice areas and mix and help to reduce the internal conflict in a large firm.

Establishing Case Acceptance Guidelines

Establishing case acceptance guidelines can be as simple as making a list of clients, case types or practice areas that you prefer not to handle. You may develop criteria within certain practice areas that must be present in a case in order for you to accept it (i.e., clear liability, insurance coverage, etc. in personal injury cases, for example). You may decide that you don't want to handle certain types of matters (i.e., domestic matters, real estate, bankruptcy, contingency fee work). With experience, you may determine that certain client characteristics are difficult for you to work with. Your guidelines can remind you to look for those characteristics and steer away from clients who possess them.

Factors that may be considered in establishing case acceptance guidelines are:

• practice areas the lawyer desires to develop or in which he or she has expertise
• types of cases within practice areas for which the lawyer has expertise or desires to develop
• the types of clients with whom the lawyer desires to work
• the revenue generated by selected practice areas or case types
• the labor and cash requirements of the firm by certain types of cases or practice areas
• facts that must exist in certain types of cases (i.e., clear liability, insurance coverage, etc., in personal injury cases)
• the type of fee arrangement of the case (i.e., hourly, flat fee or contingency)

It should be a firm policy that each case be analyzed by a partner (or a committee of partners in larger firms) prior to acceptance based on your firm's case acceptance guidelines. Consistent compliance with pre-established case acceptance guidelines will help protect the lawyer and the firm from the types of problems mentioned above.

Case and Client Screening

Once case acceptance guidelines are established, case and client screening procedures should be developed. Proper case and client screening assists the attorney in identifying whether the case falls within the pre-established case acceptance guidelines.

Case and Client Screening Procedures

As previously stated, case and client screening is the process by which information is obtained which will enable you to make an informed decision regarding whether or not the matter meets your case acceptance guidelines. Pre-screening may expose other information which will assist you in evaluating the prospective client. Finally pre-screening provides the opportunity for you to communicate important information to the client about his or her case and to establish realistic expectations.

Case and client screening procedures should include the following components:

Client Pre-screening. Before accepting a new client, you should:

• Conduct a telephone interview with the client to obtain initial client and case information which will be reviewed to determine if a face-to-face interview is warranted. A staff person may conduct the telephone interview.

• Conduct a face-to-face client interview with the client to obtain client and case facts and to observe the demeanor of the client. The attorney should conduct the face-to-face interview. In addition to questions relating to fact, the face-to-face interview should also provide the following information or impressions:

• Has the client engaged or attempted to engage other lawyers for this case? If so, why was the case rejected by one or more lawyers?

• What is the client's attitude toward other professionals such as doctors, accountants, bankers, lenders?

• Does the client have a reasonable approach to the case?

• Does the client agree with the fee arrangement and is the client able to pay the fees for your services?

• Is the client willing to pay a retainer in advance of services rendered?

• Does the client have all of the documentation associated with the case and is he or she prepared to submit those to you?
• Complete a New Client Information Sheet. This form is for firm use in opening the client's file, tickling the file for important dates, deadlines and file review dates, and performing a conflicts check.

• Complete a client/case questionnaire. This type of questionnaire varies with practice area or case type. This form is designed to provide all client and case facts and to document the sending of engagement/non-engagement letters and other appropriate forms.

• Complete a conflict-of-interest check. The New Client Information Sheet should provide space for the listing of related and adverse parties to the case. This list should be checked against the firm's conflicts information to be sure no conflicts exist that would prohibit the firm from accepting the case.

Case Analysis.Once client and case information has been obtained the solo practitioner, partner or committee of partners should review the information against the firm's case acceptance guidelines. In doing so, the following factors should be considered:

• Do the facts of the case support proceeding with the case?

• Your expertise and experience with similar cases.

• Your availability to handle the case.

• Your "gut" reaction to the client and the case.

• The prospective client's attitude toward the case (e.g., unreasonable expectations for the case, attempts to tell you how to handle the case, unreasonably focused on winning at all cost).

• The ability of the client to pay for services provided and advance expenses. This is particularly important in risky cases.

• Case value vs. cost to represent (use of firm resources, expense advance requirements, loss of opportunity);

Establishing Realistic Expectations
After the screening process has been completed and a decision to represent the client has been made, the attorney should discuss the merits and problems of the client's case with the client. It is important that the attorney convey verbally and in writing (via an engagement letter) the following to the client:

• The issues involved with the case.

• The problems regarding the case.

• The process involved in pursuing the case.

• The client's obligations throughout the case and any specific requirements of the client.

• The estimated time frame for case resolution.

• The economics of taking the case to trial or settling the case.

• The attorneys and/or staff who will be involved with the case.

• How the firm will manage the case.• How the firm will communicate case status with the client.

• Warning: Avoid any guarantees to the client regarding the outcome of the case.

Case acceptance guidelines and good client and case screening procedures are the first steps in building a profitable, quality practice. Doing good work will ensure that good clients and cases continue to walk in the door.

Resources used for this piece and which may be beneficial to you in establishing case acceptance and client intake procedures are:

The Lawyer's Desk Guide to Preventing Legal Malpractice, American Bar Association Standing Committee on Lawyer's Professional Liability. (Available through the TNBAR Management Services Library.)

Risk Management, Survival Tools for Law Firms, by Anthony E. Davis, ABA published jointly by the Section of Law Practice Management and Center for Professional Responsibility. (Available through the TNBAR Management Services Library.)

Attachment	Size
newclientinfo.doc	61.5 KB

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Conflict-Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking

By Todd C. Scott, Esq.

The purpose of a conflicts check is to ensure that your commitment to your client's matter will not be distracted by your commitment to any other person. Many attorneys believe that this commitment can be upheld by a brief moment of thought, comparing their client's circumstances to that of the firm's other clients, at the time they are being retained for their services.

Professional liability insurers and risk management professionals continually stress the importance of a conflict-checking system in law firms to help identify potential conflicts at the time the attorney-client relationship is established. Consistently, it has been shown that a check for conflicts-of-interest that does not include the use of a thorough list or database will leave the firm vulnerable to an embarrassing, and potentially negligent conflict-of-interest problem.

Establishing a reliable conflict-checking system in your firm can be a relatively easy thing to do. However, the system is only as good as the information that is put into it. Therefore, creating the conflict-checking system and maintaining it should be viewed as an ongoing and permanent commitment to securing your client's confidence and your devotion to their best interests will never be questioned.

The elements necessary for conducting an effective conflicts check in your law practice are:

- Establishing a thorough, well-maintained list of names;
- Ensuring that the conflict-checking procedure becomes a part of firm's routine;
- Everyone in the firm is trained in the procedure and involved in the system.

The best conflict-checking system is one that will work, and that the members of the firm will find easy to use and maintain. There is nothing inherent in a computer-based conflicts program that makes it superior to a well-maintained manual system. However, since a computer-based conflicts system can conduct a thorough check rather quickly, it is more likely to be used routinely by the firm, and it is less likely to overlook a single name buried in a large database.

A Forms-Based Conflict System

In a forms-based conflict system, you search for conflicts by checking a list of the firm's clients (current and former), a list of "other parties," and a list of lawyers who have represented other parties involved in your client matters. These searches must be conducted prior to the new client signing a retention agreement with your firm.

The primary conflict review occurs when you check the client list. You are looking to see if any person who is an adverse party to a new matter is currently being represented by the firm in another matter, or has been represented by the firm in the

past.

If a review of the client list reveals no potential conflicts, you should then review the other parties list and the lawyer list to see if there are any relationships involving the firm's current or past legal matters that the new client would probably want to know about.

The best way for the law firm to establish and maintain these lists is to keep them in three separate binders. The client list in the first binder is updated every time a new client retains the firm to handle a legal matter. A Client Data Sheet containing basic information about that client is added to the binder in alphabetical order, and is permanently stored in the binder.

The second and third binders containing lists of other parties and lawyers are always being updated as a client's matter is ongoing. As you learn of new parties and individuals, as well as attorneys that become involved in your client's matter, you fill out a short Conflicts File Memorandum form indicating the name of the person and their relationship to the legal matter involving one of your clients.

Be aware that of the three binders described above, it is the list of other parties related to your legal matters that will easily become the largest volume. Knowing exactly which names to add to that list can change depending upon the areas of practice that you are involved in. The list should include any person significantly involved in any of your legal matters, as well as any individual closely associated with the firm. The parameters described here are wide and may include witnesses, heirs, and parties, as well as investigators, adjusters, and the third-party vendor who fixes the firm's computers. (For further guidance about the names that should be included in this list, see the Conflict Parties list included in MLM's online library.)

Remember, a conflict of interest can be waved by your client if the individual agrees to the waver after you have fully disclosed the potential conflict to them. Therefore, if you are on the fence as to whether a conflict of interest does exist, advise your prospective client of the relationship you have discovered in your search, and let them decide whether the connection is too close for their comfort.

Using Software to Search for Conflicts

One common misunderstanding involving law office software is that there is a category of software products called "conflict checking software." Although there are a handful of software programs that purport to be used exclusively for conflicts checking, for the most part, there are no software titles available for lawyers to perform this exclusive task.

In the world of law office software, conflicts checking tools are commonly available in case management software programs. The connection between conflicts checking and case management software makes sense. After all, if you take the time to enter detailed information about your clients, former clients, witnesses, opposing counsel, interested parties and just about everyone else who has ever come in contact with the firm in a software program, what it starts to resemble is a large database of firm information that can be used for several purposes – including conflicts checking.

Since case management products became affordable for use in small law offices in the days of Windows 95, this category of software has rapidly secured its spot as the hub of a law firm's information system. Case management software performs two vital functions for a law practice: it is a comprehensive database of information concerning the firm's clients, and it also serves as a calendaring/docket-control system that can be accessed throughout the firm.

The manufacturers of case management software understand that lawyers want to have the ability to quickly and easily perform conflict checks across the program's

entire database. Therefore, performing a conflict check in a case management program is usually as simple as pushing a single button after entering a name to search for within the system. The searches are so quick and so thorough, that after determining that the name “John Smith” was not found in the lists of current clients, former clients, and other parties, it will then search the calendars of the lawyers in the firm, and even the note pads within the electronic client files to see if someone has come in contact with the name in an informal way.

For those lawyers interested in the conflicts-checking features of case management software but don’t have an interest in establishing a firm-wide database program, you may want to consider purchasing a single-user version of a case management application and use it exclusively for maintaining the conflicts database. With this type of set-up, the software program would be installed on one workstation within the firm, and the computer user would become the firm’s designated conflicts checking clerk.

Case management software comes with many dynamic features for tracking client information all throughout the firm – but there is no requirement that the purchaser use the software for all that it can do. Just as many users logon to Microsoft’s Outlook for nothing more than to send and receive e-mail, it would be okay if your firm purchased a case management software product simply for its conflict-checking abilities.

A Simplified Tool That You Already Own

Not all automated conflict checking systems for law firms need to be in a specialized software application. Did you know that you can create a simple, searchable database in any word processing program? By taking advantage of the search features in your word processor you can easily create a dynamic conflict checking tool.

To create this simple database in Microsoft Word, start by creating a table in your document by selecting “Insert/Table” from the “Table” menu. Indicate in the Insert Table screen that you want your table to have 8 columns and 100 rows, and then click OK. When the table is inserted in the word document, label the tops of each column as follows: No., Date, Contact, File, Matter Type, Relation Code., File Status, Misc. Information.

Once the table is created with column headings, it should be permanently saved in the firm’s computer network. As new files are opened at the firm, enter names of persons related to the matter in the table just as you would enter them in the binders of your forms-based conflict system. Over time, the document will become quite lengthy as the names of many persons associated with your case files are added to the table. (To add more rows to the table, put your cursor in the bottom right cell and click the Tab key. Let the table get as long as you like.)

You need not worry about searching for potential conflicts in such a long list because your word processor has a quick search tool for finding a needle in a haystack. In Microsoft Word 97 or 2000, the search tool can be found if you click on the “Edit” menu and choose “Find.” After that, just enter the name you are searching for, and if the name appears somewhere in the table, it will be indicated during the search.

If the name of an individual that is about to retain your firm appears somewhere on the list, you may have a potential conflict of interest with another matter. It is up to the attorney who is assigned to the matter to determine if a conflict of interest exists, using the criteria in ABA Model Rule 1.7 and your local rules of professional conduct.

The conflict checking database you create in your word processor is really no different than the manual, form-based system – it just holds more information, has an easy search feature, and does not need to be printed and kept in binders. Like all

databases, it should be back-up regularly on tape or disk and copies of the backup should be kept off-site. The system meets the needs of most small law firms, but larger firms should consider employing the larger database capabilities found in case management software.

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Upjohn Warnings: Best Practices and Tennessee Ethical Requirements

By Wade Davies on Wed, 10/27/2010 - 4:29pm

Corporate crime is big news. Lawyers practicing in Tennessee face an increasing likelihood of being asked to assist business clients in responding to an allegation of criminal wrongdoing. To protect the business and to avoid inadvertent harm to others (and your license), counsel must both understand the attorney-client privilege of an organization.

A common misstep is to fail to inform potential employee/witnesses of the scope of the attorney-client privilege, thereby either causing the employee to waive the privilege involuntarily or the organizational client not to be able to use the information obtained because of a reasonable claim of privilege by the employee. The American Bar Association has published "best practices" guidelines that all lawyers should carefully consider when planning a corporate investigation. The ABA recommends giving employee witnesses a formal disclaimer about the nature of the representation and then documenting it fully. While the recommended warnings may seem awkward in some situations, it is imperative that counsel adopt a consistent and workable way to protect the attorney-client privilege.

ABA Best Practices

To ensure witnesses make informed decisions and that no attorney-client relationship is created inadvertently, lawyers have developed various versions of what are known as "*Upjohn* warnings," from *Upjohn v. United States*, 449 U.S. 383 (1981) (the scope of corporate attorney-client privilege can extend beyond "control group" to employees whose acts may bind corporation). The *Upjohn* decision itself provides no guidance on the issue of warnings to witnesses and considerable confusion has existed regarding how much of a warning is required.

In response, the ABA Criminal Justice Section recently endorsed "best practices" for providing Upjohn warnings.[1] The ABA suggests that, prior to all interviews with employees, counsel make the following statements orally:

> I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
>
> I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
>
> Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
>
> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened, but you may not discuss this discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?

The ABA recommends reading this statement to the witnesses and making a record either through handwritten notes or a contemporaneous memorandum.

Reading such a formal statement can produce awkward moments. Counsel should be aware, however, that some attempts to use "watered down" warnings have been strongly criticized by courts as potentially misleading to witnesses.[2]

The Importance of the Warnings

Counsel must not create an unwarranted belief that counsel also represents the interviewed witnesses. When lawyers create that misimpression, witnesses may forfeit what they subjectively believed to be attorney-client privileged information, or corporate clients can end up losing control of the privilege, the right to use the information, or could lose their lawyer.[3]

The Tennessee Ethical Rules

Tennessee's Rules of Professional Conduct provide some guidance, but the actions required by the Rules may come too late. When dealing with an organizational client, Rule 1.13(d) mandates a warning only when "it is or becomes apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." As a practical matter, the interview may be the source of the information making it "apparent" that the witness's interests differ, and the witness may already believe his or her interests, including privileged communications, are being protected.

Similarly, Rule 4.3 provides that when a lawyer knows or reasonably should know an unrepresented witness "misunderstands the lawyer's role," the lawyer must "make reasonable efforts to correct the misunderstanding" and that when there is a reasonable possibility that a conflict exists, a lawyer may not give the witness advice, other than to secure counsel.

By recommending that a warning be given to all "constituents," the ABA's "best practices" aims to prevent misunderstandings and identify preventable conflicts on the front end.

The best solution is often for the witness to have counsel and for the lawyers to discuss whether to enter into a common interest or joint defense agreement to preserve privileges. It is both proper and often necessary for corporations to indemnify employees for legal fees.[4]

Conclusion

While it might be difficult, for example, for a lawyer to read the ABA statement to a nurse he or she has known for years in representing a medical practice, the small business setting potentially makes formal warnings even more important, because it is imperative that the lawyer does not create the false impression that the employee is personally represented or controls the privilege, if that is not the intent.
Regardless of whether counsel chooses to read the ABA warning verbatim, counsel must

(1) determine whether the client company desires the witness to be able to control the privilege,
(2) if not, inform the witness that counsel represents only the entity that controls the privilege, including the right to disclose the substance of the statements,
(3) obtain the consent of the employee-witness, and
(4) document the warning.

Notes

1. *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees*, American Bar Association, White Collar Crime Committee Working Group (July 17, 2009). Available at http://meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/...
2. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 35-36 (4th Cir. 2005).
3. See *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (examples of issues created when experienced white collar defense counsel failed to give adequate *Upjohn* warnings to CFO; district court referred matter for disciplinary action).
4. *Tenn. Code Ann.* § 48-18-507 (indemnification of officers, employees, agents); *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)(the government violated the Sixth Amendment right to counsel of employees by pressuring corporation not to advance legal fees).

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