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Conflicts of Interest

Conflicts of interest have constituted a leading cause of legal malpractice claims for years. Despite repeated warnings to lawyers and law firms about this risk, they continue to engage in conflicts of interest. The consequences for lawyers who betray their duty of loyalty to a client can be severe and include legal malpractice lawsuits, disqualification motions, bar disciplinary complaints, loss of reputation, sanctions, and disgorgement of legal fees.

> The most difficult thing is to recognize that sometimes we too are blinded by our own incentives. Because we don't see how our conflicts of interest work on us.
>
> – Dan Ariely, behavioral economist

If lawyers know of the risks and consequences that accompany conflicts of interest, why do conflicts remain such a persistent problem for the legal profession? As the quote above suggests, part of the dilemma may lie in the difficulty lawyers have in acknowledging conflicts when they know that such an acknowledgment will result in a loss of business and revenues. This article will focus on reviewing the most common types of conflicts of interest, as well as the best practices for overcoming biases that lead to flawed conflicts analysis.

Conflicts Involving Current Clients: Direct Adversity

Defining a conflict of interest depends, in part, upon the client's status. If the client is a current client of the law firm, conflicts develop in one of two basic ways— either through direct adversity or a material limitation.

A recent Alabama case[1] exemplifies how a law firm can mismanage a direct adversity conflict. The Law Firm represented Company B in "general representation" for about a decade in various matters in which Law Firm learned confidential information about Company B's finances and corporate structure. The Law Firm characterized its work for Company B as light and sporadic, which did not generate significant revenue for Law Firm.

In late 2018, Company A asked Law Firm to represent it in a significant patent infringement case against Company B. Company A alleged in the underlying lawsuit that Company B had infringed on one of Company A's patents for a product that simultaneously brewed and sweetened tea.

Law Firm accepted the representation of Company A in the patent infringement case against Company B, relying on an advance conflict waiver in the engagement letter with Company B. Since it had never done any patent work for Company B, Law Firm believed the advance waiver was valid and enforceable.

1 *Southern Visions, LLP v. Red Diamond, Inc.*, 370 F. Supp. 3d 1314 (N.D. Ala. 2019)

Upon learning of Law Firm's intention to represent Company A, Company B informed Law Firm that it revoked its consent to the advance waiver and considered the Law Firm's actions a betrayal of trust. In response, Law Firm withdrew from all matters in which it was representing Company B. Company B moved to disqualify Law Firm from its representation of Company A.

The court deciding the disqualification motion first looked to Alabama's Rule of Professional Conduct 1.7, which is based on the ABA's Model Rules of Professional Conduct (hereinafter "ABA MRPC"). It determined that Law Firm had a direct adversity conflict with Company B and failed to obtain a proper conflicts waiver. The court noted that other courts across the country have held that broad, open-ended advance conflict waivers, such as the waiver at issue in this case, were ineffective to provide consent to future conflicts involving litigation against the client. Moreover, even if a specific waiver had been obtained from Company B, an impermissible conflict would have arisen, since the Law Firm would have to reasonably believe that the new representation would not adversely affect its relationship with the existing client. In the instant case, the court concluded that the breach of trust would be so significant that no objective lawyer would reasonably surmise that his or her relationship with the existing client would not suffer. Accordingly, the Court granted Company B's motion to disqualify Law Firm.

The case exemplifies the dangers of overreliance on advance conflict of interest waivers. However, courts will be more inclined to uphold an advance conflicts waiver if the following factors are present:

- sufficient details as to the benefits and risks of consenting to the waiver are provided;
- the client is advised of the importance of having independent counsel review the waiver and given sufficient time for independent counsel to review it;
- the client is a sophisticated legal consumer; and
- the underlying matter for which the waiver is sought is a non-litigation matter.

In this case, a number of these factors were not present. In addition, lawyers must remember that clients have the right to withdraw consent to a waiver at any time for any reason. In some cases, if the client waited too long to revoke consent to the waiver, courts will reject disqualification motions and rule in favor of the law firms.

Conflicts Involving Current Clients: Material Limitation

Material limitation conflicts involving current clients are often harder to detect than direct adversity conflicts. A recent Louisiana case[2] highlights the failure of two law firms to conduct a proper conflicts analysis.

In the underlying personal injury matter that led to the conflicts, an Amtrak train collided with a tractor-trailer at a railroad crossing. Two law firms (hereinafter referred to as "the Law Firms") agreed to represent eight of the plaintiffs as co-counsel in a lawsuit against Amtrak and the company that owned the tractor-trailer. All but one of the client-plaintiffs worked as Amtrak employees, including a locomotive engineer and six service crew members. The other client-plaintiff was a passenger on the train.

The defendant Amtrak moved to disqualify, contending that the plaintiffs' differing theories of recovery conflicted with each other and required the Law Firms to cease their representation. For example, one client-plaintiff crew member testified in a deposition that Amtrak's failure to warn that the train was about to use its emergency brakes was the basis of her claim against Amtrak. Her co-plaintiff engineer testified in his deposition that although he was capable of providing a warning about using the emergency brakes, he failed to do so. According to Amtrak, the six service crew members and the passenger alleged that Amtrak was vicariously liable based upon the negligent actions of the locomotive engineer, all of whom were represented by the same Law Firms.

The court looked to the ABA MRPC to decide the disqualification motion, ruling in favor of Amtrak in finding that a material limitation conflict of interest existed. For example, the locomotive engineer has an interest in denying fault for not issuing a warning because his potential damage award could be reduced or voided due to contributory negligence. The other client-plaintiffs have an interest in proving that Amtrak was at fault for not providing a warning about the emergency brakes, and the locomotive engineer's testimony may be relevant to establishing Amtrak's negligence.

2 *Johnson v. Clark Gin Service, Inc., et al.*, 2016 WL 7017267 (E.D. La. 2016)

The conflicts of interest among the joint plaintiff clients places the Law Firms in an untenable position. For example, the Law Firms could provide a vigorous defense on behalf of the locomotive engineer in an attempt to show that he was not at fault for failing to warn others about the use of the emergency brakes. Such a defense would be in the locomotive engineer's best interest because his potential award could be reduced if it was shown that he was contributorily negligent in failing to warn. But promoting that defense on behalf of the locomotive engineer might foreclose the other client-plaintiffs from proving that Amtrak acted in a negligent manner. Conversely, if the Law Firms argued that Amtrak was negligent due to the locomotive engineer's failure to warn, they would be sacrificing the interests of one of their clients to advance the interests of their other clients.

According to the court, the Law Firms suffer from a second conflict problem related to their representation of one of the passengers. In the complaint against the defendants, the passenger alleged vicarious liability against Amtrak via the theory of *respondeat superior*. For the *respondeat superior* argument to prevail, it is probable that the Law Firms would have to prove that some of the other joint clients breached a duty to the passenger. Such conflicts of interest would materially limit the Law Firms' ability to represent all of the joint clients.

The Law Firms should have spent more time in the client intake stage assessing each potential client's relationship with Amtrak, including the potential theories of recovery for each individual, prior to agreeing to represent all eight plaintiffs. Had the Law Firms taken this precautionary measure, they would have seen the value in declining some of the representations so that they could fully advocate for the client or clients that they chose to represent. The determination of the existence of a conflict does not depend on whether a specific claim or defense will succeed but rather whether the lawyer's ability to recommend or advocate on behalf of one client will be materially limited due to the lawyer's representation of another client.

In some instances, clients in a joint representation can waive any conflicts issues provided that such waivers are given with informed consent by the clients. In this case, however, the court determined that the conflicts were not waivable, since no reasonable lawyer would have concluded that he would be able to provide competent and diligent representation to each affected client.

Former Client Conflicts: Substantial Relationship and Material Adversity

Lawyers can accept new matters that are adverse to former clients, if the new representation is not substantially related to the former representation of the former client. The Commentary to the ABA MRPC defines a substantial relationship as involving the same transaction or legal dispute. Such a relationship also exists if there is a substantial risk that confidential factual information obtained in the former representation would materially advance the new client's position in the new matter.

A recent intellectual property case[3] demonstrates the liability risks for lawyers who ignore the duties owed to former clients. In this Louisiana case, the plaintiff-company sued its former lawyer for breach of fiduciary duty and legal malpractice. The attorney had represented the plaintiff-company for a number of years as its trademark counsel, assisting in trademark applications as well as protecting against trademark infringement. In the complaint, the plaintiff-company asserted that its former lawyer represented another client in attacking its trademarks. It further alleged that the lawyer had disclosed the plaintiff-company's confidential client information to the other client and third parties. The lawyer defended himself by stating his representation of the plaintiff-company ended years prior and that he shared no confidential client information. According to the lawyer, since the challenge to the trademark asserted genericness, which is based upon public perception, no confidential information needed to be disclosed.

The court denied the lawyer's motion to dismiss the lawsuit. According to the court, the conflicts rule concerning former clients codifies a limited duty of loyalty that survives termination of the attorney-client relationship. Moreover, the lack of a breach of confidentiality fails to nullify an otherwise valid breach of fiduciary duty or legal malpractice claim by a former client. The adversity between the new client's interests and the former client's interests, coupled with a substantial relationship between the two matters, provides a sufficient basis on which to bring such a professional liability lawsuit.

Lawyers must recognize that they owe a limited duty of loyalty to their former clients. Adhering to this duty may require lawyers to decline certain representations involving their former clients. In this matter, the lawyer's mistaken belief that he owed only a duty of confidentiality to his former client subjected him to liability in the legal malpractice lawsuit.

3 Annie Sloan Interiors, Ltd. V. Kappel et al., 2019 WL 2492303 (E.D. La. 2019)

Other Conflict of Interest Concerns

The three cases discussed above cover only the most common types of conflicts of interest. Other types include a conflict between a client and a personal interest of the lawyer, conflicts among joint clients, and conflicts that lateral hires may bring to their new law firms, to name just a few. Lawyers should consult their jurisdiction's rules of professional conduct and relevant case law to learn more about potential conflicts that may affect their law firm.

Conclusion

Preventing conflicts of interest should represent a paramount concern for law firm leadership, as well as every lawyer in a law firm. Conducting a thorough self-assessment of a law firm's strength and vulnerabilities with respect to its conflicts checking system will assist a law firm in learning what changes, if any, it must make to better protect itself. At the end of this article, we have included a Law Firm Conflicts of Interest Self-Assessment checklist. Law firm leadership in conjunction with its subordinate lawyers, support staff, and any outsourcing providers, should review each item on this list to ensure that it either has established, or will implement, adequate safeguards to address each issue raised in the checklist. Taking proactive measures now, rather than hoping a conflict will not occur or waiting until one does will minimize the law firm's risk of encountering the leading cause of legal malpractice claims.

This article was authored for the benefit of CNA by:

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Conflicts of Interest Self-Assessment

General Risk Control Procedures	Yes	No	Comments
Does my law firm maintain a conflicts of interest checking system?			
Does my law firm have written policies and procedures on how the systems work and instruct that all lawyers and relevant support staff in my law firm must use the system?			
Are the following data entered into the system?			
• Clients, subsidiaries of clients, and aliases;			
• Primary contact persons at entity clients;			
• Opposing parties and opposing counsel (and their law firms);			
• All close family members of lawyers and staff who work at other law firms, legal departments, government agencies and client offices.			
• Expert witnesses, major fact witnesses, and adverse witnesses;			
• Non-parties at fault;			
• Former clients;			
• Prospective clients;			
• Individuals, entities and insurance companies paying clients' legal fees; and,			
• Vendors to the firm (e.g, landlord for law firm, IT companies, ethics counsel, investigation companies, insurance agents, etc.).			
Is law firm staff trained to re-run a conflicts check every time a new party, a non-party at fault, new counsel, or new expert/key fact witness is added to a proceeding or a new proceeding commences?			
Is law firm staff also trained to re-run a conflicts check when entity clients experience changes in management or ownership?			
Does my law firm review its conflicts of interest system on a periodic basis to confirm that categories of information entered into it still make sense?			
Has my law firm assigned at least one lawyer dedicated to reviewing and maintaining the conflicts checking system?			
Are conflicts checks run at least once a year for every matter regardless of whether there have been any new names entered into the system?			
Does my law firm regularly distribute a new client/matter list to everyone in the law firm?			
Does my law firm have a disinterested partner or conflicts committee evaluate any conflicts identified prior to opening the matter?			
Do my law firm's client intake communications contain a disclaimer that the disclosure of information on the form is for the purposes of conflicts checking and does not establish an attorney-client relationship?			
Has my law firm trained its staff, including receptionists, paralegals, administrative assistants and others who have contact with prospective clients, about guarding against the unintentional creation of an attorney-client relationship?			

Engagement Agreements and Other Documentation	Yes	No	Comments
Does my law firm send written engagement agreements to all clients clearly documenting the identity of the client, the scope of the representation, how legal fees and expenses will be charged, an explanation of the law firm's file retention policy, and a required client countersignature?			
Does my law firm send a written confirmation of a new matter for an existing client?			
Does my law firm prohibit legal work from starting and billing from being entered into the system on any matter until the client has countersigned the engagement agreement?			
Does my law firm have a designated in-house lawyer review all engagement agreements prior to client signature? If not, does my law firm have a disinterested lawyer review engagement agreements prior to client signature?			
Does my law firm maintain a repository of all engagement letters?			
Does my law firm send declination letters where a non-waivable conflict exists or where my law firm decides to decline the representation?			
Does my law firm send "awaiting further action" letters when waiting for the potential client to provide additional information/documentation or a retainer fee payment as a condition of either continuing to consider accepting the representation or accepting the representation?			
Does my law firm website include a disclaimer and warning that sending e-mails directly to the firm does not constitute the creation of an attorney-client relationship and that confidential information should not be transmitted to the law firm and will not be maintained as confidential?			
Does my law firm send closure letters to all clients when work on a specific case or matter for a client has concluded?			
Does my law firm have a centralized process for reviewing Outside Counsel Guidelines ("OCGs") prior to the formation of an attorney-client relationship?			
Does my law firm assign a designated disinterested lawyer(s) to ensure that the law firm can agree to the terms of the OCGs prior to agreeing to abide by the OCGs?			
Does my law firm implement processes and procedures to ensure that the law firm's conflicts checking system complies with any terms and conditions of OCGs to which my law firm has agreed to abide?			

Prospective Clients Conflicts	Yes	No	Comments
When a prospective client consults with my law firm about the possibility of forming an attorney-client relationship, does my law firm:			
• Limit the discussion to information required for the conflicts check?			
• Advise the prospective client not to reveal any highly sensitive information and explain that any requested information is solely for the purpose of checking for conflicts?			
• Condition the discussion on the party's consent that "no information disclosed during the consultation will prohibit my law firm from representing a different client in the matter?"			
Are a client's interests materially adverse to those of the prospective client in the same or a substantially related matter?			
Could the information provided by the prospective client be significantly harmful to a client in the same or a substantially related matter?			
If a client's interests are materially adverse to the prospective client, have both the prospective client and the current client provided informed consent to the representation, documented in writing and maintained by the law firm?			
If my law firm concludes that it is disqualified from the representation of the prospective client:			
• Did my law firm take reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary?			
• Where screening is permitted, were all conflicted lawyers screened on a timely basis from the law firm's participation in the matter?			
• Were the clients timely notified of the screening procedures?			

Current Client Conflicts	Yes	No	Comments
Will the client representation be directly adverse to another client?			
Is there a significant risk that my law firm's representation of one or more clients will be materially limited by the law firm's responsibilities to another client, a former client, a third person or by a personal interest of a lawyer at the law firm?			
Notwithstanding the existence of a conflict of interest, do all of the following statements apply (such that the representation may proceed):			
• My law firm reasonably believes that it will be able to provide competent and diligent representation to each affected client;			
• The representation is not prohibited by law;			
• The representation does not involve the assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal; and			
• Each affected client has given informed consent, documented in writing and maintained by the firm.			
If the client is a corporation, have any constituents of the entity company been advised that my law firm does not represent them as well?			
If someone else is paying the legal fees for a client, or my law firm will have regular contact with a third party (family member, friend, etc.) who is assisting in the representation, does the engagement letter specify that my law firm does not represent those individuals as well? Has my law firm sent a non-engagement letter to that third-party clarifying that the third party is not a client of my law firm?			

Former Client Conflicts	Yes	No	Comments
Is my law firm representing a current client in a matter that is the same or substantially similar to a matter in which it represented a former client, and the current client's interests are materially adverse to the former client's interests?			
Have the former and current clients given informed consent, documented in writing and maintained by the firm, to my law firm's representation of the current client?			
Would the disclosure of confidential information regarding a former client serve to disadvantage the former client?			
Has the information regarding my former client become "generally known" or is it otherwise permissible to disclose it?			
Is my law firm considering a lateral hire where the lateral hire's former law firm represented or currently represents a client, person, or entity with interests materially adverse to my current client? If so:			
• Did the lateral hire candidate acquire material information about the matter when he/she was with the former law firm?			
• Is screening the lateral hire candidate regarding the current representation permitted in order to cure the conflict?			

Personal Conflicts of a Lawyer	Yes	No	Comments
Does my law firm have written policies and procedures with respect to one of my law firm lawyer's seeking and obtaining my law firm's permission prior to entering into business transactions with clients?			
Is the lawyer considering participation in a business transaction with a client or knowingly acquiring an ownership, possessory, security or other pecuniary interest adverse to a client?			
Are the proposed transaction and the terms under which the lawyer will acquire the interest fair and reasonable to the client?			
Will the transaction and terms under which the lawyer will acquire the interest be fully disclosed and transmitted to the client in a writing that may be reasonably understood by the client?			
Will the client be advised in writing to seek the advice of independent legal counsel regarding entering into the transaction, and will the client be given a reasonable opportunity to seek such advice?			
Will the client be advised that he/she is not required to consent to the conflict waiver?			
Will the client give informed consent, in a writing signed by the client, to the essential terms of the transaction as well as lawyer's role in the transaction, including whether the lawyer was representing the client in the underlying transaction?			
Did the lawyer obtain my law firm's permission before entering into the business transaction with the client?			
Did any lawyer solicit a substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving a law firm lawyer, or a relative of a law firm lawyer, any substantial gift?			

Personal Conflicts of a Lawyer (continued)	Yes	No	Comments
Is a lawyer making or negotiating an agreement giving him/her literary or media rights to a portrayal or account based in substantial part on information relating to a representation involving my law firm?			
Is a lawyer considering providing financial assistance to a client in connection with pending or contemplated litigation, other than:			
• An advance of court costs and expenses of litigation, the repayment of which is contingent on the outcome of the matter; or			
• A payment of court costs and expenses of litigation on behalf of the client, where my law firm represents an indigent client.			
Is a lawyer considering agreeing to accept compensation for representing a client from someone other than the client, without the client's informed consent, where the lawyer's independent professional judgment or the attorney-client relationship may be affected?			
Is a lawyer considering entering into an agreement prospectively limiting the lawyer's/law firm's liability to a client for legal malpractice where the client will not be independently represented in making the agreement?			
Is a lawyer considering the settlement of a claim or potential claim for legal malpractice liability with an unrepresented client or former client?			
Will the unrepresented client or former client be advised in writing of the desirability of seeking the advice of independent legal counsel regarding that matter and given a reasonable opportunity to seek such advice?			
Is a lawyer considering acquisition of a proprietary interest in any cause of action or subject matter of litigation of a client, other than a lien authorized by law to secure my law firm's fee or expenses or a contract for a contingent fee in a civil case?			
Is a lawyer considering sexual relations with a client, other than in a consensual sexual relationship that commenced prior to the time the attorney-client relationship was formed?			

Obtaining Informed Consent	Yes	No	Comments
Have the clients been advised of the nature of the conflict?			
Have clients been advised of the risks and benefits of granting the conflict waivers and the alternatives?			
Have the clients been advised of their right to consult with independent counsel regarding this conflict waiver and provided sufficient time to do so?			
Have the clients been informed that they are not obligated to consent to the conflicts waiver?			
Have the client(s) given informed consent to waive the conflict, in writing?			
Does the written waiver note all of the above factors in its language?			
Does my law firm have a designated in-house conflicts lawyer who reviews all conflict waivers prior to client signature? If not, does my law firm have a disinterested lawyer review the conflict waiver prior to client signature?			
Does my law firm maintain a repository of all conflict waivers?			

Joint Representations	Yes	No	Comments
Does a proposed representation involve two or more clients jointly in a transaction or litigation?			
Are the interests of the clients currently aligned?			
Can my law firm reasonably believe that it can competently and impartially represent each joint client in this matter?			
Have the joint clients shown any signs of conflict with one another?			
Is contentious litigation or negotiations between the co-clients either imminent or contemplated?			
How likely is it that a conflict of interest between the co-clients will develop later?			
Has my law firm advised the client(s) as to what will happen if an actual conflict arises during the course of the representation?			
Does my law firm have a written engagement letter or conflict waiver to the client that explains how confidential information will be shared among the clients?			
Has my law firm explained the risks and benefits of representing the clients jointly?			
Have the clients been advised of their right to consult with independent counsel regarding this conflict waiver and provided sufficient time to do so?			
Have the clients been informed that they are not obligated to consent to the conflicts waiver?			
Have the clients given informed consent to the joint representation, confirmed in writing?			

This self-assessment tool serves as a reference for law firms seeking to evaluate risk exposures associated with conflicts of interest. The content is not intended to represent a comprehensive listing of all actions needed to address the subject matter, but rather is a means of initiating internal discussion and self-examination. Your practice and risks may be different from those addressed herein, and you may wish to modify the questions to suit your individual practice needs. The information contained herein is not intended to establish any standard of care, or address the circumstances of any specific law firm. These statements do not constitute a risk management directive from CNA. No organization or individual should act upon this information without appropriate professional advice, including advice of legal counsel, given after a thorough examination of the individual situation, encompassing a review of relevant facts, laws and regulations. CNA assumes no responsibility for the consequences of the use or nonuse of this information.

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