

# Ethical Issues at the Inception of Representation

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# Prospective Clients

- Situations in which a person or entity may become a prospective client:
  - “Beauty contests” or Requests for Proposals (RFPs) in which firm competes with others to handle work;
  - Internet inquiries;
  - Casual conversation with prospective clients;
  - Voice mail messages.

# Prospective Clients (2)

- Danger of having a prospective client relationship:
  - The particular lawyer(s) who deal with the prospective client may be disqualified from representing an adverse client in the matter if the prospective client for any reason does not retain the firm.

# Prospective Client (3)

- Duties to a prospective client are governed by SCRPC 1.18.

**(a) A person with whom a lawyer discusses the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.**

# Prospective Client (4)

- Note that a person who calls your office and leaves a voice mail message that contains confidential information would not be entitled to the protections of 1.18.
- Comment 2 provides: **“Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, therefore is not a "prospective client" within the meaning of paragraph (a).”**
- However, avoid this problem by not allowing voice mail messages to attorney from individuals who are not clients.

# Prospective Client (5)

**(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 Rule 1.9 would permit with respect to information of a former client.**

# Prospective Client (6)

**(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 person 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) [which provides for client consent or screening],**

# Protections to Consider

- When dealing with prospective client, limit information that is conveyed to avoid receiving disqualifying information. What is essential?
  - Identity of adverse parties to determine if conflict exists.
  - Nature of matter to determine if firm is interested in taking case because of economic viability or other reasons.
  - Warning to prospective client not to reveal more than is necessary.

## Protections to Consider (2)

“Thank you for expressing an interest in retaining this firm. The first step in the process is for you to provide us with basic information about you and your case so that we can determine whether we are in a position to handle your case and if so the terms of our engagement. Please do not share with us any confidential information about your case except as requested by my assistant.”

# Protections to Consider (3)

- When engaged in beauty contests or RFPs, condition firm's participation on client consent that firm will not be precluded from representing adverse parties or using any information disclosed to firm if firm is not retained by prospective client.
  - SCRPC 1.18, comment 5, permits.
  - Query whether prospective client will accept such a condition?

# Protections to Consider (4)

- Adopt policies prohibiting new clients from leaving voice mail messages.
- Review website disclaimer to make sure it contains appropriate language dealing with prospective clients and submitted information. See ABA Formal Opinion #10-457.
- If firm is retained by adverse party, immediately adopt screening procedures with regard to any lawyer who dealt with former prospective client unless those lawyers are essential to new representation and it is (at a minimum) more probable than not that they did not receive any disqualifying information.

# Types of Conflicts of Interest

- Direct adversity, SCRPC 1.7(a)(1)
- Material limitations, SCRPC 1.7(a)(2)
- Former client, SCRPC 1.9
- Miscellaneous conflicts, SCRPC 1.8, including especially business transactions with clients, SCRPC 1.8(a)
- Advocate-witness conflicts, SCRPC 3.7
- Imputed disqualification rule generally applies all conflicts to other members of firm, 1.10. But see SCRPC 3.7(b) and 1.8(j).

# What is Direct Adversity?

- Based on duty of loyalty because applies even when matters are unrelated. See comment 6.
- Client against whom representation is undertaken is likely to feel betrayed with resulting damage to attorney-client relationship.
- Client on whose behalf representation is undertaken may reasonably fear that firm will “pull its punches” because of relationship with adverse client.

# What is Direct Adversity? (2)

- Comments 6 and 7 provide examples but no definition.
- Examples of direct adversity:
  - Representation of one client in litigation matter against second client that firm represents in unrelated matter;
  - If follows, therefore, that representation of one client against another client in the same litigation matter is improper. E.g., Firm represents multiple parties in a matter and one party has cross-claim against other. This conflict is nonconsentable. SCRPC 1.7(b)(3).

# What is Direct Adversity? (3)

- Examples of direct adversity continued:
  - In litigation, cross examination on behalf of one client of another client who appears as a witness in that matter when the firm represents the witness/ client in an unrelated matter. Comment 6.
  - In transactional matter, representation of one client when the counterparty is a client that the firm represents in another matter. Comment 7.

# What is Direct Adversity? (4)

- Comment 6 provides one general principle for identifying situations in which client are not directly adverse:

“On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.”

# What is Direct Adversity? (5)

- Preparation of legal opinions and direct adversity:
  - Opinions that relate to specific disputes with other clients may and probably do involve direct adversity.
  - General opinions, for example opinions about intellectual property rights, in my opinion do not involve direct adversity because there is no litigation, administrative, or transactional matter in which the clients are directly adverse.

# What is Direct Adversity? (6)

- However, general opinions may require the informed consent of the client on whose behalf the opinion is being written because the relationship with the other client may “materially limit” the representation. SCRPC 1.7(a)(2).
- *Andrew Corporation v. Beverly Manufacturing Co.*, 415 F. Supp.2d 919 (N.D. Ill. 2006) (holding that it is improper for a firm after a merger to write noninfringement letters for one client regarding the patents of another client), is distinguishable from the writing of general opinions.

# What is Direct Adversity? (7)

- With one exception, in principle all direct adversity conflicts are subject to informed client consent confirmed in writing. SCRPC 1.7(b)(4).
  - Note informed consent. SCRPC 1.0(g). General waiver of conflicts is probably not sufficient.
  - Exception: when the conflict involves representation of adverse parties in the same litigation before a tribunal. This conflict is nonconsentable because of the systemic interest in an adversarial presentation. SCRPC 1.7(b)(3).
  - However, to be subject to informed consent, the lawyer must reasonably believe he can provide “competent and diligent representation.” SCRPC 1.7(b)(1).

# Application of Direct Adversity Concept to Corporate Groups

- When firm represents a member of corporate group, whether parent, wholly owned, or partially owned subsidiary, questions arise as to which entities the firm represents.
- Example: firm represents subsidiary corporation in defending products liability litigation. Firm is asked to represent a client in commercial litigation against sister corporation.

# Application of Direct Adversity Concept to Corporate Groups (2)

- Under old per se rule, no longer followed by most courts, firm that represented member of corporate group, was treated as representing the entire group.
- Most courts today will probably follow a functional test rather than a per se rule.
- See ABA Formal Opinion 95-390 and comment 32 to SCRPC 1.7.

# Application of Direct Adversity Concept to Corporate Groups (3)

- Under a functional test courts will consider various factors to determine whether a member of the group is a client, such as:
  - Same or substantially overlapping boards of directors;
  - Same or substantially overlapping officers;
  - Common legal department;
  - Extent of interactions through computer networks, email, benefit systems, and administrative support;
  - Extent of common letterheads, business cards and email address.
- See *Discotrade, Ltd. V. Wyeth-Ayerst Int'l., Inc.*, 200 F. Supp.2d 355 (S.D.N.Y. 2002).

# Identifying the Client in Insurance Defense

Common situation: Firm (insurance defense firm) has long-standing relationship with carrier. Carrier turns over defense of insured to firm, typically when litigation is filed.

Who is client?

If firm fails to act, traditional view is that both insurer and insured are clients.

Traditional view works so long as harmony of interest between insured and insurer.

# Identifying the Client in Insurance Defense (2)

- Harmony can break down in various ways:
  - Possible lack of coverage
  - Excess claims or other differences over settlement
  - Counterclaims by insured
  - Litigation guidelines and audits
- If lawyer is following traditional approach of multiple representation, lawyer should make disclosure and obtain informed consent of both insurer and insured as to how firm will act in case of conflict.

# Identifying the Client in Insurance Defense (3)

- Alternative approach:
  - Engagement agreement provides that firm only represents insured. Insurer as third part payor complying with SCRPC 1.8(f).
  - Solves disharmony problems because defense counsel owes duty to insured, not insurer.
  - Insurers may not like because lose objective evaluation by counsel. Defense counsel will advocate interest of insured client.

# Identifying the Client

## When Forming a Business

- Common situation: Several individuals want to form an entity for some business purpose.
- Who are the possible clients:
  - Individuals
  - Individuals and entity
  - One or more individuals
  - One individuals and entity
- Result of failure to address the issue: All are likely to be treated as clients based on “reasonable expectation principle.”
- How to proceed if lawyer does not intend to represent one or more of the participants. SCRPC 4.3.

# Dealing with Direct Adversity

- Limited Engagement Agreements are one way in which the firm can deal with direct adversity conflicts.
- SCRPC 1.2(c) provides that a lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent. See also comments 6-7 to Rule 1.2. More on limited engagements to follow.

# Dealing with Direct Adversity (2)

- Analogy to insurance defense practice. Representation of insured typically limited to defense and does not include representation against the insurer in coverage or other disputes.
- Example of *Sumitomo Corp. v. J.P. Morgan & Co.*, 2000 WL 145747 (S.D.N.Y.).

# Dealing with Direct Adversity (3)

- Withdrawing from representation of one client to represent a more favored client is not a way to deal with direct adversity.
- Most courts recognize the “hot potato” doctrine, which precludes a lawyer from doing so. See Rotunda & Dzienkowski, *Lawyer’s Deskbook on Professional Responsibility* 1.7-5 (on Westlaw).
- Some courts recognize a “thrust upon” exception to the hot potato rule.

# Use of Limited Engagement Agreements

- Lawyers commonly believe that it is unethical to limit liability to their clients.
  - Rule 1.8(h) (prohibitions on limitations of liability to clients)
- Rule 1.2(c): “(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”
- See comments 6-8 for further discussion.

# Limited Engagements by Transactional Lawyers

Example: *Barnes v. Turner*, 606 S.E.2d 849 (Ga. 2004) (finding that lawyer who handled closing of sale of company for seller had a duty to either inform the seller that financing statement lapsed after five years or to renew the financing statement before it lapsed).

# Limited Engagements by Litigators

Example: *Flatow v. Ingalls*, 932 N.E.2d 726 (Ind. Ct. App. 2010) (lawyer not liable for malpractice for failure to file response to employer's motion for summary judgment when engagement agreement limited lawyer's representation to preparation of motion for summary judgment and reply brief to response to motion).