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The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

Conflicts of Interest—Advance Waivers—Adequacy of Disclosure as a Predicate

Brigham Young University v. Pfizer, Inc., et al., 2010 WL 3855347 (D. Utah Sept. 29, 2010)

Risk Management Issue: What constitutes sufficient disclosure in an engagement letter in order to obtain an effective waiver of future conflicts of interest and avoid subsequent disqualification?

The Case: Judge Ted Stewart of the U.S. District Court for the District of Utah upheld the decision of a magistrate judge in favor of Brigham Young University (BYU), which had disqualified the law firm of Winston & Strawn LLP (Winston) from representing defendant Pfizer in litigation with BYU. Judge Stewart agreed with the magistrate judge that the advance patent waiver found in the 2001 engagement letter between BYU and Winston did not apply to the specific conflict which had arisen in this case, thereby negating Winston's argument that BYU had previously waived this conflict. He also agreed that Winston's violation of Utah's Rule of Professional Conduct 1.7 was sufficiently egregious to merit disqualification.

Winston had included the following language in its 2001 engagement letter with BYU:

> Advance Patent Waiver: As you may know, universities frequently hold patents in the products and inventions developed at such universities. Winston & Strawn LLP currently represents multiple pharmaceutical and other companies with respect to patent and intellectual property matters (collectively, the 'Other Clients'), including litigation (the 'Patent Matters'). Winston & Strawn LLP is not currently representing any Other Clients in matters adverse to the University. Because of the scope of our patent practice, however, it is possible that Winston & Strawn LLP will be asked in the future to represent one or more Other Clients in matters, including litigation, adverse to the University. Therefore, as a condition to Winston & Strawn LLP's undertaking to represent you in the BYU Matters, you agree that this firm may continue to represent Other Clients in the Patent Matters, including litigation, directly adverse to the University and hereby waive any conflict of interest relating to such representation of Other Clients.

The term "Other Clients" was defined within the waiver provision to mean "companies that Winston currently represents 'with respect to patents and intellectual property matters.'"

Judge Stewart accepted the magistrate judge's conclusion that, as a result of this language, the "waiver only applies to clients that Winston was representing with respect to patent and intellectual property matters as of the date of the agreement." Winston argued that this was an inappropriately narrow and unreasonable interpretation of the engagement letter, such that the advance patent waiver should cover all "existing clients" in matters relating to intellectual property and patents, including litigation.

The court disagreed, noting that when evaluating waivers courts should look primarily to the language and construction of the waiver to determine its validity. For a consent to be interpreted as validly waiving the client's right to exclusive representation, "[l]anguage in a contract of release . . . would have to be positive, unequivocal and inconsistent with any other interpretation." Where the terms of a waiver are not explicit, the client should not be held to the terms of the document. Accordingly, the magistrate judge's disqualification of Winston was affirmed.

Comment: There are, arguably, two definitions of "perfect" disclosure language: (1) language so clear and precise that it discloses the risks to the client with such force that no client in its right mind (or properly advised by independent counsel) would ever agree to the requested waiver; or, conversely, (2) every disclosure statement—until the client later changes its mind and disputes the waiver because of the inadequacy of the disclosure on which it was based. Here, Winston evidently thought that it had effectively threaded the needle, giving clear cut disclosure to a sophisticated institutional client sufficient to permit the later adverse

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representation notwithstanding the client's change of mind. This case demonstrates just how hard it is for lawyers and law firms to foresee the precise conflict that an advance waiver is supposed to encompass, and also how at least some courts hold that unless the disclosure actually does predict with absolute clarity the exact conflict to be waived, the disclosure, and hence the waiver, will fail.

Risk Management Solution: The facetious solution, of course, is to consult a crystal ball before drafting advance disclosure and waiver language. Even expressed in more realistic terms, the solution that lawyers and firms should take greater care and seek to be as precise as possible in describing the circumstances in which a future conflict will be deemed to have been waived, really carries the matter very little further. In the last analysis, so long as the ethics rules are predicated on the principle that loyalty is owed to a client overall, and not just to an individual engagement (as is the case in many other countries), and so long as courts so interpret the rules, law firms have no choice but to accept that the best that can be said of advance waivers of conflicts is that they represent hopes, not certainties.

Conflicts of Interest—Imputation—Lateral Movement—When Ethical Screens Work

In re Columbia Valley Healthcare System, L.P., 320 S.W.3d 819 (Tex. 2010)

Kirk v. First American Title Ins. Co., 183 Cal. App. 4th 776 (2010)[1]

Silicon Graphics, Inc. v. ATI Technologies, Inc., 2010 WL 3860374 (W.D. Wis. Oct. 5, 2010)

Risk Management Issue: Is it possible for a firm to erect an effective ethical screen? If so, what is required in order to avoid disqualification because of the existence of a conflict of interest where there is no provision for screening in the applicable ethical rules?

The Cases: Three recent cases illustrate what is required for an effective ethical screen, and when such a screen may prevent imputation of a disqualifying conflict of interest. The cases are discussed in the order of the least to most effective screening.

The court in *In re Columbia Valley Healthcare System, L.P.* examined whether the lateral move of a paralegal from a firm representing defendant in a lawsuit to the firm representing plaintiff in the same case should result in disqualification of the law firm representing plaintiff. In opposing a motion to disqualify, plaintiff's firm offered testimony that the paralegal had been informally screened, and had been warned twice—with the second warning including a threat of termination—that she should not work on the case giving rise to the conflict. The testimony indicated, however, that both before and after receiving the second warning, at the direction of her supervising lawyer, the paralegal had performed administrative tasks on the case, including calendaring, docketing, copying documents and filing correspondence.

The Texas Supreme Court ordered the disqualification of the law firm representing plaintiff. The Court determined that a firm cannot merely erect an informal screen and warn a conflict-tainted employee not to work on a file. Rather, the firm must also adopt "formal, institutionalized screening measures that render the possibility of the [conflict-tainted person] having contact with the file less likely." The Court did not provide a definitive list of such measures, but cited the comment to Texas Disciplinary R. Prof'l Conduct 1.10 (restricting lateral moves of government lawyers) and suggested that the restrictions should include a provision that the screened employee has not and will not furnish "information relating to the matter, will not have access to the files pertaining to the matter, and will not participate in any way as a lawyer or adviser in the matter."

Kirk v. First American Title Ins. Co. provides a clearer statement of what California courts, at least, require for an effective ethical screen. The attorney at issue in *Kirk* was a former state department of insurance lawyer working as in-house counsel at an insurance company when plaintiff's counsel asked him to serve as a consultant on class action litigation involving a different insurer. During their initial 17-minute telephone discussion, plaintiff's counsel told the attorney confidential information, including litigation strategy. Ultimately, the lawyer declined the potential consulting role. Instead, the attorney left his in-house position to join a private law firm, which was later joined by the lawyers defending against the same class action.

After defendants' litigation team gave notice that it was joining the firm, plaintiff's lawyers objected to the new defense firm's involvement on the basis that the attorney with whom they had discussed serving as a consultant worked at the same firm. Plaintiffs' objection alerted the defense firm of the potential conflict. The defense firm therefore erected an ethical screen and sent a memorandum to all employees, notifying them that the lawyer was screened. After the screen was erected, however, the subject attorney billed 3.35 hours on another class action against the same insurance company defendant, and pleadings from that second class action were later cited in the case from which the lawyer had been screened.

The trial court granted plaintiffs' motion to disqualify the defense firm. But the appellate court reversed and remanded for further consideration, concluding that, "in certain cases," screening might prevent disqualification of a "party's long-term counsel due to the presence of another attorney in a different office of the same firm, who possesses only a small amount of potentially relevant confidential information, and has been effectively screened."

According to the appellate court, to be effective a screen must be timely imposed when the conflict first arises, and preventive measures must be imposed to "guarantee that confidential information [would] not be conveyed." These measures include: (1) physical, geographic, and departmental separation of attorneys; (2) sanctions for discussing confidential matters; (3) established procedures that prevent access to confidential information and files; (4) preventing a disqualified attorney from sharing in the profits from the representation; and (5) continuing education in professional responsibility. The appellate court emphasized that what is required is a case-by-case inquiry that focuses on "whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation."

[1] In *Kirk*, Hinshaw & Culbertson LLP filed a brief for *amici* supporting respondent law firms. This summary was prepared independently, and without information or assistance, from the lawyers who worked on the appellate brief.

In the final case, *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, a lawyer billed 186 hours working for plaintiffs in 2006-2007 and then moved law firms, ultimately landing at the firm representing defendants in the same matter in 2009. The potential conflict was identified before the attorney joined the defense firm. The lawyer therefore requested a waiver of the conflict from plaintiffs. Plaintiffs did not respond. Then, concluding that he could join the firm despite the unwaived conflict, the attorney gave notice to plaintiffs that he was doing so. Both the waiver request and the notice provided details of the anticipated screening procedures.

Plaintiffs subsequently moved to disqualify the defense firm. The court analyzed the screen erected by the defense firm under a five-element federal law test. The court found the screen adequate and denied the motion to disqualify, noting in particular that:

(1) three weeks before the affected lawyer joined, the firm notified the relevant litigation team that the attorney would be joining the firm and would be screened from the matter;

(2) the firm's computer system blocked the affected lawyer from accessing documents on the case, and the firm could produce records to demonstrate that he had not in fact accessed any such documents;

(3) although the affected attorney was in the same practice group as the litigation team, the practice group was quite large (more than 100 lawyers), and the attorney was in a different office from the litigation team;

(4) the firm had arranged that the affected attorney would not work on any case with any member of the litigation team; and finally

(5) the affected lawyer did not attend any meetings with the litigation team, including department and partner meetings.

Risk Management Solution: These decisions demonstrate the importance of identifying potential conflicts when they arise and timely erecting effective ethical screens. Such screens should isolate the lawyer from information on the matter giving rise to the conflict, and include both technological and, if possible, physical barriers to prevent the affected individual from working on the matter. Law firms should also prevent the affected individual from sharing fees derived from the matter. A law firm should document the measures it takes in erecting the screen, demonstrate that it has educated its staff to the screen (as suggested in *Kirk*), and consider giving notice to the impacted client (as occurred in *Silicon Graphics*). The more steps that a law firm undertakes to put each of these elements in place, the more likely the firm will be to survive a motion to disqualify arising from the screened conflict.

Ethical Methods of Obtaining Information From Social Networking Websites—Use of Subterfuge

New York State Bar Association, Committee on Professional Ethics, Opinion 843, Sept. 10, 2010

The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2010-2, Sept., 2010

Risk Management Issues: What social networking data may a lawyer access from an unrepresented party for use in litigation, either as possible impeachment of another party or against an unrepresented third party? What means may a lawyer use to obtain such information?

The Opinions: In *Opinion 843*, the New York State Bar Association Committee on Professional Ethics (NYSBACPE) addressed whether a lawyer may view and access data that is publicly available on another party's social networking website. Social networks such as Facebook and MySpace allow users to create an online profile that may be accessible to other users if both users "friend" each other. Some other social networking sites do not require pre-approval to gain access to member profiles. The NYSBACPE noted in the opinion that a lawyer may obtain information that is publicly available on a social networking site so long as he or she does not use deception. The NYSBACPE concluded, "[T]he lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so."

The NYSBACPE observed that the Philadelphia Bar Association's Professional Guidance Committee had addressed a similar issue in Philadelphia Bar Opinion 2009-02 (Philadelphia 2009-02). That opinion included an examination of the question of whether a lawyer could have a third party "friend" an unrepresented adverse witness to gain access to the third party's social network account, without revealing the lawyer's association with the third party or the purpose for "friending" the witness. Applying the Pennsylvania Rules of Professional Conduct, the Philadelphia Committee concluded that a lawyer would be engaging in "dishonesty, fraud, deceit or misrepresentation" in violation of Pa. R. Prof'l Conduct 8.4(c) and would violate Pa. R. Prof'l Conduct 4.1 by making a false statement of fact to a third person. The proposed conduct would also constitute a supervisory violation of Pa. R. Prof'l Conduct 5.3 by causing a third party to omit a material fact.

The NYSBACPE noted that in contrast to Philadelphia 2009-02, the New York lawyer would not be engaging in deception by accessing publicly available information through MySpace or Facebook. Accessing publicly available information, "is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factive, and that is plainly permitted."

In Formal Opinion 2010-2, The Association of the Bar of the City of New York Committee on Professional Ethics addressed the question of whether a lawyer, either directly or through an agent such as a private investigator, may contact an unrepresented person through a social networking website and request permission to access his or her webpage to obtain information for use in litigation. This opinion concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request."

Consistent with Philadelphia 2009-02, Formal Opinion 2010-2 notes that a lawyer or his or her agent may not engage in deceptive means such as creating a false Facebook profile to make a "friend request" for the purpose of gaining access to the witness's personal webpage. The committee commented that "[t]he

potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web" and that "the 'virtual' inquiries likely have a much greater chance of success than if the attorney or investigator made them in person and faced the prospect of follow-up questions regarding her identity and intentions."

Lawyers are cautioned that resorting to trickery to obtain information from social networking websites would violate N.Y. R. Prof'l Conduct 8.4(c), which provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation" and N.Y. R. Prof'l Conduct 4.1 which provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person." Formal Opinion 2010-2 cautions that a lawyer would also violate the New York Rules of Professional Conduct by employing an investigator to obtain access to social networking websites through false pretenses.

Risk Management Solution: Lawyers may ethically utilize publicly available information on social networking websites but must not obtain such information through deception. If the information sought is not publicly available, the attorney should utilize formal, traditional discovery methods to obtain access to social networking sites or their content. Lawyers should also consult the applicable jurisdiction's ethical rules to determine whether "friending" a party or witness may be considered "communicating" with that individual, in order to avoid violations of the ethical rules governing communications with adverse parties and unrepresented third parties.

Lawyer Advertising on the Internet—The Ethics of Lawyer Websites

ABA Standing Committee on Ethics and Professional Responsibility, Opinion 10-457 (Aug. 5, 2010)

Risk Management Issue: What are the parameters of the ethics rules governing the content and features of lawyers' websites?

The Opinion: In Opinion 10-457 the ABA Standing Committee on Ethics and Professional Responsibility considered the ethical rules implicated by lawyer websites. The opinion recognizes that websites can be a useful tool for the public and lawyers alike; specifically, they can "provide anyone with Internet access a wide array of information" while also offering "lawyers a twenty-four hour marketing tool[.]" However, the opinion warns that these benefits can diminish if the website visitor misunderstands or is misled by the website. The Standing Committee on Ethics and Professional Responsibility discussed four broad categories of website content that implicate ethical rules: (1) information about lawyers, their law firm or their clients; (2) information about the law; (3) website visitor inquiries; and (4) warnings, disclaimers and cautionary statements.

The opinion notes that websites containing a lawyer's biographical information, educational background, experience, area of practice or contact information, or providing information about a law firm such as history, experience, areas of practice, and general descriptions about prior engagements, all are considered "communication[s] about the lawyer or the lawyer's services" and are subject to the requirements of ABA Model Rules 7.1, 8.4(c), and 4.1(a), which prohibit false, fraudulent or misleading statements. This type of information should therefore be regularly updated to avoid misleading readers. Additionally, law firm websites that provide specific information identifying current or former clients are permissible, as long as the clients or former clients give informed consent.

Lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice; to avoid this misunderstanding, attorneys should therefore include statements "that characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice." Websites therefore should contain qualifying statements that minimize the risk that a prospective client will be misled.

With respect to website visitor inquiries, the opinion notes that ABA Model Rule 1.18(a) defines a "prospective client," protects confidentiality of prospective client communications, and recognizes several ways that attorneys may limit subsequent disqualification based on these prospective client disclosures when they decide not to undertake a matter. While the definition of discussion "generally contemplates two-way communication," when a lawyer website "specifically requests or invites submission of information concerning the possibility of forming a client-lawyer relationship with respect to a matter, a discussion, as that term is used in Rule 1.18 will result when a website visitor submits the requested information."

Risk Management Solution: In addition to adhering to the opinion's standards regarding disclaimers, lawyers should ensure that information contained on their websites is free from false, fraudulent or misleading statements by keeping such information accurate and updated. In addition, attorneys should be aware that a website-generated inquiry may constitute a communication from a prospective client and should therefore be mindful of their jurisdiction's version of ABA Model Rule 1.18 as to the implications and consequences of such communications and of the lawyer's or firm's responses.

Cautionary statements and warnings on a lawyer's website can effectively avoid a misunderstanding by a website visitor as to whether (or when): (1) a client-lawyer relationship has been or will be created; (2) the visitor's information will be kept confidential; (3) legal advice has been given; or (4) the attorney will or will not be precluded from representing an adverse party. However, limitations, conditions or disclaimers of lawyer obligations will be effective "only if reasonably understandable, properly placed, and not misleading."