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ALM

It's Dangerous to Have Crooked Clients

If you're uncomfortable, ask tough questions. And don't wait too long to trust your instincts and bail.

Statistics on law-firm liabilities demonstrate an eye-opening truth: The largest jury verdicts against law firms consistently come from cases in which the firm's client was found to have committed a fraudulent or criminal act.

Aon Risk Services, which insures many large law firms around the country and monitors trends in risk management, recently reported that since the mid-1980s, there have been 43 publicly reported verdicts or settlements of $20 million or more against law firms. Of these 43 verdicts and settlements, in 31 of them (72 percent) the primary cause for the suit was "attributable to dishonest clients." For the 10 verdicts and settlements in the range of $3 million to $19 million, three came about because of dishonest clients.

By Arthur D. Burger

Ethics

Take a moment to let this simple truth sink in—it's dangerous to have crooked clients. I'm not speaking here of clients who are powerless, unpopular, or ostracized and deserve representation, but of those who cynically abuse and manipulate the efforts of their counsel for personal gain.

Firms should consider this fact before taking on a new client, and do basic research on prospective new clients. Usually, however, a firm will not have any basis to suspect that clients are crooked until after they have undertaken the representation. While it's harder to terminate an attorney-client relationship than to avoid forming one, a firm that finds itself with a client whom they suspect is engaged in illegal or fraudulent conduct should consider withdrawing.

Feel Uncomfortable?

Most of the time in the real world, a lawyer will not know with certainty that the client has improper intentions or has engaged in anything illegal. But often a lawyer sees enough to feel uncomfortable about the client or the client's case. Here, too, it may be wise for a lawyer to trust his instincts and bail out while he can. Here are two examples.

- Devarieste Curry, a D.C. solo practitioner who knows a good deal about ethics, described the following situation: "In one case, during a conference with government lawyers and the opposing party, the client was evasive, had poor recall, and made questionable statements. After the conference, he pointedly told me he would say anything I wanted him to say. On further questioning, it was clear he intended to commit fraud and wanted me to be complicitous. I withdrew from the case within the guidelines of the rules."
- Hamilton "Phil" Fox III, of Sutherland Asbill & Brennan in Washington, D.C., also a knowledgeable practitioner, provided this example: "We filed a case on behalf of a client arising out of a business transaction. After we got into discovery, we came to believe that the product that was at the heart of this dispute was a sham. This led us to conclude that we could not win and that there were no damages. We told the client that we had no faith in the case and that we did not think it could win. We offered to forgo any outstanding fees if new counsel replaced us. New counsel did replace us and ultimately lost the case."

A lawyer or law firm in this position faces difficult choices and must carefully consider their legal and ethical obligations. However, a lawyer does not have the luxury of allowing the situation to drag on. He has to decide whether to stay in or get out. A lawyer in the midst of considering withdrawal may find that he has difficulty exercising full diligence, which itself could lead to a conflict of interest for the lawyer. In fact, "playing Hamlet" for very long can be the worst of all options.

The ethical principles for a lawyer's withdrawal from a case in D.C. can be found in D.C. Rule 1.16. Under that rule, there are three circumstances in which a lawyer must withdraw: if he becomes disabled, if he is fired by the client, or if the lawyer is unable to go forward with the representation without violating his ethical obligations. In these circumstances, the lawyer's decision is made for him (subject, of course, to leave of court if the case is in litigation).

Outside of those circumstances, there are a variety of circum-

stances in Rule 1.16(b) under which it is permissible, but not required, that a lawyer withdraw. The broadest of these is wherever the "withdrawal can be accomplished without material adverse effects on the interests of the client."

Of course, the impact of "adverse effects" depends on the circumstances. A client, for example, is likely to be harmed if his counsel withdraws on the eve of trial, but is unlikely to be harmed if the withdrawal comes near the outset of the case. Often the question of adverse effect will turn on whether substantial legal fees will be required for a new lawyer to start over in taking over the case. A complex case is more likely to involve a higher learning curve than a routine one.

Accordingly, if the client owes the withdrawing lawyer substantial fees for work already performed, a lawyer might want to consider forgetting those fees. As Phil Fox says, "It's much easier to get rid of a client if you eat the outstanding bill."

Other grounds in Rule 1.16 justifying a lawyer's withdrawal include specific circumstances in which the client has engaged or persists in engaging in conduct that is criminal or fraudulent, or, more generally, where the lawyer reasonably believes that a tribunal would find "good cause" for the withdrawal.

If a matter is already in litigation, then filing a motion to withdraw must comply with the rules of procedure of the tribunal. Here, it is critical that such a motion reveal as little as possible (in effect, nothing) about client confidences and most importantly should not state, or even hint at, the lawyer's knowledge of the client's wrongful conduct. A lawyer may be disciplined under D.C. Rule 1.6 for revealing client confidences, even if the withdrawal is otherwise justified.

All or Nothing

Also, don't forget that a lawyer has an unceasing obligation to zealously protect the client's interests until the very moment of withdrawal. There is no period, prior to withdrawal, in which that obligation is relaxed. It's all or nothing. I emphasized the importance of maintaining diligent representation of clients when client wrongdoing is suspected in "In the Face of Client Wrongdoing," *Legal Times,* Oct. 17, 2005. Moreover, sometimes a lawyer can use the threat of withdrawal to convince a client to modify his behavior, and thereby avoid the need to withdraw. This is the best outcome of all because the lawyer has averted illegal conduct.

And then there is one more step. A lawyer who has withdrawn but who might have made a representation to others based on a client's false information must consider whether he has an obligation to disaffirm any such representation or affirmation of a document. That concept, which is nothing new, is often referred to as a "noisy withdrawal."

What is new, however, under the recently approved amendments to the D.C. ethics rules, are occasions in which a withdrawing lawyer must disclose the client's confidences. The amendments include significant expansion of the exceptions to attorney-client confidentiality. The recently amended official Comment to Rule 4.1 contains the following rather ominous advice: "In extreme cases, substantive law may require a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing such client information, then . . . the lawyer is required to do so, unless disclosure is prohibited by Rule 1.6."

When a prudent lawyer becomes uncomfortable about the propriety of a client's conduct or his intentions, and those concerns cannot be readily resolved, the lawyer should consider withdrawal. This option becomes more difficult, however, if the lawyer waits too long. Sometimes the wisest course is to just trust your instincts and bail.

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