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Risky Business...Representing Multiple Interests

by Richard A. Zitrin

A San Francisco Attorney represents the driver-husband and passenger-wife in a simple auto accident. Now the couple is divorcing, and it's not amicable. A small Los Angeles law firm has represented an International Union and several of its Southern California locals for years; now there's a dispute between the International and one of the locals that may lead to litigation. A Riverside lawyer negotiates a contract for the sale of a business between two of his biggest clients; a year later they're accusing each other of negotiating in bad faith.

By the time these lawyers — composites based on real cases — sought help out of their conflict of interest dilemmas, it was too late.

Indeed, where a lawyer's loyalty to a particular client is any way impaired by that attorney's other loyalties or interests, withdrawal — and the loss of a valued client — may be the least that can happen. At worst is the possibility a malpractice lawsuit or even potential discipline under rule 3-310 of the California Rules of Professional Conduct.

Recognizing the Problem

The everyday practice of most firms, large and small, is replete with potential conflicts of interest. Careful practitioners must learn to spot these situations and anticipate potential problems before they occur. I advise lawyers who consult me to follow these rules:

First, think not of conflicts of interest, but of *potential* conflicts. Look at any representation situation from the point of view that there is — or could be — a conflict of interest, rather than from the perspective that there's not.

Second, think beyond "conflicts;" think in terms of *"impaired loyalty."* This phrase, taken from rule 1.7 of the American Bar Association Model Rules of Professional Conduct, suggests the lawyer ask not "do I have a conflict of interest?" or even "do I have a potential conflict?" The question becomes, "Is there *any* way — through my representation or *anything else* — in which my loyalty to Client may be impaired?"

Third, remember that, although in perhaps 99 to 100 cases a conflict will never ripen, it is impossible to predict with certainty *which* case is the 100th. The only way to protect the interests of all clients — and the law firm itself — is if preventive measures are undertaken at the inception of representation, and in *all* 100 cases.

Solving the Problem

There are many situations in which multiple clients not only can but should have the same lawyer. See rule 3-310 of the California Rules of Professional Conduct, Discussion. But situations where the lawyer's ability to represent a client is impaired should trigger a full explanation to the client(s). A disclosure of divided loyalties will rarely, if ever, be meaningful if it merely recites the existence of the problem. At a minimum, the lawyer must also advise the client of "the actual and reasonably foreseeable adverse consequences. (Rule 3-310(A)(1), California Rules of Professional Conduct.) But for the best protection of both the clients and the law firm, I advise lawyers to take a more complete approach:

1. memorialize all communications, not just the clients' consents;
2. specifically address what happens to attorney-client confidences in the multiple representation situation;
3. spell out specific ramifications of multiple representation in an if/then format; and
4. specifically address the ground rules of what will happen in the event a conflict arises, including withdrawal.

O ne point — too often overlooked — which should always be a part of any disclosure is how client confidentiality will be treated. Clients have come to expect that lawyers will strictly protect every confidence, and they will still expect it, even if they are co-plaintiffs in a personal injury case, or both sides in a contact negotiations, or the parties to an "uncontested" dissolution. But allowing such parties to tell their mutual lawyer anything which can be held in confidence vis-à-vis the other party inevitably asks for trouble. It is almost impossible to maintain, for example, "his" secrets as against "her," and "hers" as against "him," with the parties feeling mistrust, knowing that the lawyer may know something they don't. This may doom efforts to cooperate before they've begun. The best solution is to agree — in advance — that, among multiple clients, there shall be no confidences. Should the client insist on blurting out a "confidence," however, the lawyer may be required to withdraw.

Explaining the multiple representation from an "if this happens, then here's what happens next" point of view may make the ramifications clearer to the client. The if/then approach is also valuable in explaining confidences, and in delineating when the lawyer must withdraw from representation.

One final point: Client consent can't cure conflicts in every — or even most — situations. The lawyer should adopt the standards suggested by rule 1.7 of the American Bar Association Model Rules of Professional Conduct: Agree to conflict waivers only where the clients' consents, viewed objectively, are reasonable; and make certain no consent is obtained where the lawyer is unable to make full disclosure.

These suggestions for preventive, anticipatory communications are neither new, nor particularly sophisticated, nor difficult to carry out. But the dangers of ignoring such communications can be severe. The rewards are ample: clients who are more efficiently served with quality legal help, and lawyers who are free to serve the needs of all their clients without fear of the consequences.

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