Waving Good-bye to Business:

BUSINESS CONFLICTS VS. NON-WAIVABLE CONFLICTS

2017 Primerus
Joint Insurance Coverage & Bad Faith and Professional Liability Fall Seminar
I. Conflicts of Interest
II. Non-Waivable vs. Waivable Conflicts
III. Unreliable Defenses to Conflicts
IV. Conflict Cases
V. Conclusions and Recommendations
I. CONFLICTS OF INTEREST
ABA Model Rule 1.7(a)

“A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”
ABA Model Rule 1.7, Comment 6

“[S]imultaneous 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.”
II. NON-WAIVABLE VS. WAIVABLE CONFLICTS
ABA Model Rule 1.7(b)

“Notwithstanding the existence of a concurrent conflict of interest …, a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.”
ABA Model Rule 1.7, Comment 14

“Ordinarily, clients may consent to representation notwithstanding a conflict. However, … some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”
ABA Model Rule 1.7, Comment 15

“Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.”
III. UNRELIABLE DEFENSES TO CONFLICTS
ABA Model Rule 1.7, Comment 21

“A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer’s representation at any time. Whether revoking consent to the client’s own representation precludes the lawyer from continuing to represent other clients depends on the circumstances…”
III. UNRELIABLE DEFENSES TO CONFLICTS

ABA Model Rule 1.7, Comment 3

“…Ignorance caused by a failure to institute [reasonable procedures for identifying conflicts of interest] will not excuse a lawyer’s violation of this Rule.”
ABA Model Rule 1.7, Comment 6

“…[A] lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.”

“…[A] directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client….”

“The client … is likely to feel betrayed, and the resulting damage … is likely to impair the lawyer’s ability to represent the client effectively.”
Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client … in an unrelated matter does not create a conflict of interest.”

“A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case….”
III. UNRELIABLE DEFENSES TO CONFLICTS

Imputation of conflicts under ABA Model Rule 1.8(k)

“While lawyers are associated in a firm, a prohibition … that applies to any one of them shall apply to all of them.”
IV. CONFLICT CASES
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*Maling v. Finneg, Henderson, Farabow, Garrett & Dunner, LLP, et al*
42 N.E.3d 199, 200 (Mass. 2015)

“In this case we consider whether an actionable conflict of interest arises … when attorneys in different offices of the same law firm simultaneously represent business competitors in prosecuting patents on similar inventions, without informing them or obtaining their consent to the simultaneous representation.”
“In his complaint, Maling alleges in conclusory terms that Finnegan was unable to protect both his interests and Masunaga’s and ultimately chose to protect Masunaga at his expense in the patent prosecution process. In Maling’s view, Finnegan ‘pulled its punches’ and got more for Masunaga than for Maling before the USPTO.”
“This court has not defined a minimum protocol for carrying out a conflict check in the area of patent practice, or any other area of law. However, no matter how complex such a protocol might be, law firms run significant risks, financial and reputational, if they do not avail themselves of a robust conflict system adequate to the nature of their practice.”
“As Maling acknowledges, Finnegan was able to successfully obtain patents from the USPTO for both his device and Masunaga’s…. Maling and Masunaga were not competing for the same patent, but rather different patents for similar devices.”

“If the USPTO had called an interference proceeding to resolve conflicting claims in the Maling and Masunaga patent applications, or if Finnegan, acting as a reasonable patent attorney, believed such a proceeding was likely, the legal rights of the parties would have been in conflict, as only one inventor can prevail in an interference proceeding.”
“[W]e conclude that although subject matter conflicts in patent prosecutions often may present a number of potential legal, ethical, and practical problems for lawyers and their clients, they do not, standing alone, constitute an actionable conflict of interest that violates rule 1.7.”
“The issue in this case is whether a law firm can represent a plaintiff in a Title VII suit against a defendant Board of Education even though an associate at the law firm representing the plaintiff is currently the Vice President of the defendant Board...."
“The Board members gave Ferrigno their approval for Ferrigno to accept the position with the Morelli Firm, provided that she did not participate in Filippi’s case.”

“Plaintiff … does not believe that her attorneys have a conflict of interest in this case, and to the extent that there is such a conflict, she waives the conflict.…”

“Defendants contend that the conflict is non-waivable, or that, in the alternative, the Board has not adequately waived the conflict.”

*Filippi, 722 F. Supp.2d at 302 and 310*
“[P]laintiff contends that everyone working at the Morelli Firm is aware that Ferrigno is not to have any participation in, or knowledge about, Filippi’s case. Ferrigno does not have physical access to the files regarding plaintiff’s case. Ferrigno will not receive any part of plaintiff’s fees. Plaintiff argues that these screening procedures are sufficient to guard against the exchange of any confidential information that Ferrigno allegedly may possess.”
“Even the appearance of impropriety is of particular concern with regards to screening procedures in a small firm … which has only six lawyers [and] the appearance of impropriety due to concerns about the efficacy of screening procedures, is heightened. Thus, Ferrigno’s relationship with the Board and any concomitant conflict is imputed to the Morelli Firm, which represents plaintiff in this action.”
“After considering all the relevant factors, as well as the implemented screening procedures utilized by the Morelli Firm, this Court concludes that disqualification is necessary to prevent any actual or apparent conflict in loyalties based upon Ferrigno’s position as an associate at the Morelli Firm and as Vice President of the Board of Education.”
IV. CONFLICT CASES

*Filippi*, 722 F. Supp. 2d at 298 and 311-312

“...[T]he Court concludes that, because an attorney at the law firm representing plaintiff has an ongoing fiduciary duty to the named defendant Board in this action ..., there is a clear and unwaivable conflict....”

“The Court concludes that the Board’s purported oral consent to Ferrigno’s employment with the Morelli Firm is not sufficient to waive the conflict present here.”

“...[E]ven if the conflict could be waived, the Court is not satisfied that the Board provided informed, written consent to the instant conflict ..., and even if it did, it is revoking such consent, which it is entitled to do.”
V. CONCLUSIONS AND RECOMMENDATIONS
Panel Discussion

1. What could have been done at the beginning of the representation to avoid this situation?

2. What is your view of conflict waivers?

3. Do “business conflicts” raise red flags for you?
V. CONCLUSIONS AND RECOMMENDATIONS

Practical Tips

1. Consider the potential for down-the-road cross-claims.

2. Has a RoR been issued?

3. Who are all the clients’ insurers or potential insurers?

4. Notify all other potential carriers at the beginning.

5. When in doubt, get a written conflict waiver.
V. CONCLUSIONS AND RECOMMENDATIONS
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