An Invitation to Malpractice

Ignoring conflict-of-interest rules can open Pandora’s box

BY HARRY H. SCHNEIDER JR.

Not that long ago, most professional liability errors were clear-cut cases of culpability—failing to commence a lawsuit within the statute of limitations, or drafting a will in violation of the rule against perpetuities. Not any more.

Malpractice today arises out of situations where the error can be subtle, and no more apparent in retrospect than when the advice was given. Increasingly, lawyers are being sued almost as insurers of the financial success of their clients’ business transactions, where the client—who has taken some business risk and lost—can demonstrate that the loss could have been avoided if the lawyer had provided different advice.

A key component of those claims is an allegation that the lawyer had a conflict of interest that impaired his or her ability to render objective advice. If proved, that allegation at once supplies the trier of fact with an explanation and motive for the lawyer’s failure to give legal advice that would have avoided the client’s problem. It also satisfies the breach of duty element of the malpractice claim. The client’s business loss then becomes the lawyer’s responsibility.

All too often, practitioners unwittingly invite these claims by failing to recognize the rules governing conflicts of interest. If not detected early and resolved properly, conflicts of interest can create liability where otherwise none would lie. A few practical tips:

Read the Rules. Most lawyers are not conversant with the conflict-of-interest rules in their jurisdictions. They assume that once they have implemented a conflicts-checking system, their problems are solved. Not true. The most elaborate conflicts check is simply a fancy name-matching device. There is no substitute for knowing the rules once a name is matched, and a conflict detected.

Spot-check Your System. Make sure your system works. Does it include all the necessary information to allow the conflict to be analyzed? In addition to client names and related parties, does it identify all other parties as adverse? Does it distinguish between closed matters and ongoing matters? Do you have a method to prevent a new client or a new matter from being opened until the conflicts check is completed?

Does your system allow for the introduction of new names that may be discovered after the initial conflicts check has been performed?

What Constitutes a Conflict?
The rules in most jurisdictions simply codify the general principle that a lawyer owes undivided loyalty to the client: A lawyer may not represent a client, absent informed consent, in any situation where the interest of anyone else interferes with the lawyer’s ability to provide objective representation.

Model Rule 1.7 establishes two general prohibitions. First, a lawyer may not simultaneously represent a client on a matter where the client’s interests are “adverse” to another existing client. Second, a lawyer may not represent a client in any situation where the lawyer’s abilities are “materially limited” by the lawyer’s responsibilities to third parties, another client, or where the lawyer’s own self-interest would conflict with the client’s.

What Is an Adverse Party?
The best practical definition of adverse party is “anyone other than your client who has anything to do with the subject matter of your client’s legal problem.” Resist the temptation to label other parties as “similarly situated,” and to interpret “adverse” to mean hostile. Anyone whose interests are other than identical with your client’s is adverse.

Isn’t There a Difference Between Contested Litigation Matters and Business Advice? No. Interested parties are adverse whether they sit on the opposite side of the courtroom or around the friendly side of the bargaining table. Lawyers who represent multiple clients until they square-off against each other are fooling themselves. The simultaneous representation of clients with non-identical interests in the same subject matter is just as prohibited before relations turn sour as it is afterward.

What Is a Material Limitation on the Lawyer’s Abilities? A material limitation is any circumstance external to the client’s situation and peculiar to the lawyer, that would tend to influence the lawyer’s advice in a manner that could affect the outcome of the client’s legal problem.

Can a Lawyer Represent Adverse Clients in Unrelated Matters? No. Under the rules, if you represent a client on a single matter, you cannot represent another client adverse to the first client on any matter. Accordingly, a lawyer could not represent the manufacturer of an exploding bottle in a product liability suit and at the same time represent a landowner selling property to the same bottle manufacturer.

Nor can your partner, even if he or she practices in a different office or in another jurisdiction. Rule 1.10 disqualifies all affiliated lawyers from doing what any one of them would be prohibited from doing.

How About Former Clients?
While Rule 1.7 strictly forbids contemporaneous representation of clients with conflicting interests, Rule 1.9 specifically permits the consecutive representations adverse to a former client so long as the subject matter is unrelated and the lawyer has not acquired confidences material to the subsequent representation.

Thus, the lawyer who has completed defending the bottle manufacturer in the product liability case is free to represent another client in a sale of real property to the same manufacturer. But the lawyer could not represent a subsequent client in a similar product liability case involving the manufacturer.

Can the Conflict Be Waived? Yes, but more on that next time.