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Recent Developments in Risk Management

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Prospective Clients – Avoiding Communication of Confidential Information Except as Needed to Check for Conflicts of Interest

***Mt. Hebron Dist. Missionary Baptist Assoc. of Al., Inc. v. Sentinel Ins. Co.*, 2017 U.S. Dist. LEXIS 144510; 2017 WL 3928269, Mid. Dist. Alabama (Sept. 17, 2017)**

Risk Management Issues: When meeting with a potential client, how much information can a lawyer obtain without risking later conflicts of interest and disqualification? Before meeting with prospective clients, what are lawyers' duties to alert the prospective clients about possible conflicts of interest?

The Case: This case arose from a dispute over the proper recipient of the proceeds of an insurance policy. The two parties fighting over the money (Alexander and Mt. Hebron) were also fighting about whether Attorney Kenneth Funderburk could represent Mt. Hebron. Alexander argued that he had consulted with Funderburk about the issues in the litigation, and moved to disqualify Funderburk when he appeared on behalf of Mt. Hebron.

Funderburk had represented Mt. Hebron in past matters, although it was not a current client at the time Alexander first contacted Funderburk. Prior to meeting with Alexander, Funderburk was aware that Alexander was a member of the Board of Mt. Hebron, and that Alexander was seeking his advice relating to a disagreement with the other members of the Board.

Alexander and Funderburk met at Funderburk's office at least twice, and Alexander paid for both meetings. In addition, Alexander left a number of documents with Funderburk, all relevant to the dispute between Mt. Hebron and Alexander. Alexander and Funderburk disputed what was discussed at the meetings and the motivation for taking the meetings, but Alexander testified that he assumed he could speak honestly and freely with Funderburk and that his communications would be kept in confidence – he would not have consulted Funderburk on these issues if he had known that Funderburk would represent Mt. Hebron in the lawsuit.

The court reasoned that an attorney-client relationship may exist long before a client formally retains his chosen attorney, and in fact, a fiduciary relationship extends to a good-faith preliminary consultation by a prospective client, even if the lawyer is not hired. Importantly, the test for determining the existence of this fiduciary relationship is subjective and relies entirely on the client's reasonable belief that he is consulting a lawyer in order to seek professional legal advice. The court concluded that Alexander's subjective belief that his communications were confidential was reasonable. The court went on to find that the matters were "substantially related" and disqualified Funderburk.

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Most damning for the lawyer (and his would-be client Mt. Hebron) was that, despite knowing of his past representation of Mt. Hebron, Funderburk did nothing to alert Alexander to the potential conflict. The court determined that the dispute was entirely preventable: the lawyer was in the best position to avoid conflicts with potential as well as existing clients. Yet the lawyer took no meaningful steps to limit the scope of the consultations with Alexander before ascertaining whether a conflict might exist, nor did the lawyer employ appropriate screening processes that might have avoided the conflict.

When Alexander asked for advice on a dispute with Mt. Hebron and its board of directors, the prudent response would have been to inform Alexander of Funderburk's prior representation of Mt. Hebron. Instead, Funderburk finished that meeting, cashed the check for his time, allowed a second meeting a few weeks later, and waited until the end of the second meeting to raise the issue in any way.

Comment: Model Rule 1.18 governs lawyers' duties to prospective clients. Under the rule, any person who consults with a lawyer about the possibility of becoming a client is a prospective client, and information learned in that consultation – even if no retention ensues – must be treated as if it came from a former client under Model Rule 1.9 (former clients). In addition, 1.18 prohibits a lawyer from representing a client adverse to a prospective client in a substantially related matter (and imputes the disqualification to the lawyer's firm, if no consent is obtained) if the lawyer received information that could be significantly harmful to the prospective client, except that, representation is permissible where the lawyer attempted to avoid learning more information than was reasonably necessary to decide whether to proceed with the representation; the lawyer is screened from participation in the matter and receives no part of the fee; and the prospective client is notified in writing. See a similar case discussed in the Lawyers' Lawyer September 2017 issue, *Kidd v. Kidd*, 219 So. 3d 1021 (Fla. Dist. Ct. App. 2017).

Risk Management Solution: The courts place on lawyers the entire responsibility for understanding and applying the rules governing conflicts. To avoid the situation that arose here, firms need to require lawyers meeting with prospective clients to try to prevent the prospective clients from sharing confidential information during the initial consultation. Equally important, before meeting prospective clients it is prudent to ask about the identity of the other parties in the matter which is the purpose of the consultation so that a conflicts check can be done before the consultation. To that end, the lawyer should limit the amount of information asked for and provided to what is necessary to conduct the conflicts check. Establishing appropriate and consistent procedures before lawyers meet with prospective clients benefits everyone involved in the transaction – the potential client, the existing client (if any), and the firm itself.

Attorney-Client Relationship – Termination of Representation – Implications of Assisting Successor Counsel

***Cesso v. Todd*, 82 N.E.3d 1074 (Mass. App. 2017)**

Risk Management Issue: What are the risks of continuing liability if a lawyer withdraws from representation of a client, but continues to work with successor counsel and the client on the matter?

The Opinion: Thomas Cesso met with Attorney Gary Owen Todd to discuss the possibility of Todd taking over the representation of Cesso in a divorce action. Todd introduced Cesso to another attorney at Todd's firm, John Quigley, who would assist in the representation. Shortly after Cesso's prior attorney withdrew, Cesso requested a representation agreement from Todd and Quigley, who then filed appearances in the divorce action.

Within the month, Quigley left Todd's firm to start his own firm, and Todd and his firm filed a notice of withdrawal of appearance in the divorce action. Todd sent Cesso a letter that informed Cesso of Quigley's departure from Todd's firm, and stated that "[a]ltough Quigley and I will continue to work together and consult on your case, your hard files will need to be transferred to Quigley's office in Newburyport." The letter was hand delivered to Cesso, who signed it, agreeing to the transfer the file to Quigley.

After notice of withdrawal was filed, Cesso had no verbal communication with Todd and Todd did not bill Cesso. Todd sent a final bill with entries only through the date of the notice withdrawal, but the bill included form language stating that any unused retainer would be applied to future fees.

Cesso emailed Quigley several times after Todd withdrew, copying Todd. Cesso requested that Todd appear with Quigley at hearings, requested a conference call with both attorneys to discuss strategy, and also questioned what the roles were between Quigley and Todd. Todd never responded to these emails or spoke to Cesso.

Todd did not appear at the trial, and Cesso emailed Todd directing that any unused retainer be sent to Quigley. After the divorce concluded, Cesso filed suit against Quigley and his new firm for legal malpractice, and later added claims of legal malpractice and misrepresentation against Todd.

The lower court granted summary judgment in favor of Todd, and Cesso appealed. Todd argued that there was no legal malpractice because there was no attorney-client relationship after Todd withdrew from the action. The appellate court disagreed, reasoning that an attorney-client relationship can be based on an express contract or be implied-in-fact. It also noted that an attorney-client relationship is implied (1) when a person seeks advice, (2) the advice relates to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly gives advice or assistance. Express or implied advice can be established by demonstrating that the person seeking legal services relies on the attorney and the attorney, who is aware of the reliance, does nothing to repudiate the client's reliance.

The appellate court looked past Todd's formal withdrawal of his appearance and concentrated on the facts that demonstrated that a reasonable person would think Todd was still working on the case: the client copied Todd on emails; Todd provided a final bill stating that any amount left in his retainer would be applied to future costs; all while Todd took no action to negate Cesso's belief that Todd was working on his case, albeit in the background.

The court determined that the attorney-client relationship ended between Todd and Cesso only when Cesso asked Todd to forward any unused retainer to Quigley. On that basis, the appellate court reversed the lower court, holding that a reasonable trier of fact could conclude that the attorney-client relationship continued after Todd formally withdrew.

Risk Management Solution: Continued contact with a client regarding a matter after the representation has concluded can create an ongoing implied attorney-client relationship. In order to avoid this outcome, it is essential to clearly and unequivocally withdraw from any attorney-client relationship and representation and have no further involvement except to assist successor counsel in the orderly transfer of files. The letter informing the client of the withdrawal should use language that explains unequivocally to the client that the lawyer is no longer representing the client. If a former client takes actions consistent with continued representation, it is the lawyer's responsibility to disabuse the client of the mistaken notion that the relationship continues. Plain speaking can make the difference between a successful dispositive motion and an expensive settlement in a legal malpractice claim.

Conflict of Interest – Termination of the Attorney-Client Relationship – Avoiding the "Hot Potato" Rule – Former Client Conflicts

***Regal Cinemas v. Shops at Summerlin*, 2017 U.S. Dist. LEXIS 149497 (E.D. Cal. Sept. 13, 2017)**

Risk Management Issue: How can firms, through the proper structuring of engagement agreements and termination letters, protect their ability to take on new clients in matters related to the representation of former clients?

The Case: Regal Cinemas, Inc. (the "Plaintiff") sued Shops at Summerlin North, LP, Elk Grove Town Center, LP and the Howard Hughes Corp. ("HHC") (collectively, the "Defendants") for breach of contract and related claims. The Defendants moved to disqualify Plaintiff's counsel (the "Firm") on the basis that the Firm had terminated its representation of HHC for the purpose of engaging Regal Cinemas as a client in the litigation.

In California, like every state except Texas, the Rules of Professional Conduct prohibit an attorney from representing a new client where the new client's interests are adverse to the interests of a current client, even in unrelated matters. By contrast, an attorney may represent a client against a former client except where the subject of the new matter is the same as, or substantially related to, the subject of the previous matter. Thus, the issue was whether HHC was the Firm's current or former client at the time the Firm sought to represent the Plaintiff.

According to the Defendants, HHC and the Firm entered an "ongoing" attorney-client relationship pursuant to an engagement letter executed in 2015 and the Firm provided legal advice to HHC as late as June 2016. In October 2016, the Firm informed HHC that it had hired a new partner who represented a client (the Plaintiff) that intended to sue HHC. The Firm asked HHC for a conflict waiver, which HHC declined to provide. Shortly thereafter, the Firm sent a letter to HHC terminating the attorney-client relationship "effective immediately," and filed the litigation on behalf of the Plaintiff. The Defendants argued that the Firm could not engage in a "classic hot potato maneuver" in order to avoid the rule against concurrent representations by terminating an existing client for the purpose of taking on a representation adverse to that client.

In response, the Plaintiff argued that the Firm's attorney-client relationship with HHC was not ongoing because the matter that was the subject of the 2015 engagement letter concluded in January 2016 and that the legal advice that the Firm provided to HHC in June 2016 was nothing more than follow up. As evidence that the 2015 engagement was discreet, the Plaintiff pointed to the 2015 engagement letter, which stated that the Firm would perform additional legal services as the parties "may agree upon from time to time." The Plaintiff further argued that the termination letter was directed to HHC as a former client and was only sent out of an abundance of caution.

Although the Firm announced its new attorney-client relationship with the Plaintiff on the same day that the Firm sent HHC the termination letter, the court determined it was reasonable that the Firm sent the termination letter out of an abundance of caution and that the "effective immediately" language was boilerplate from a prior termination letter. The court agreed that the engagement letter language that the parties would agree to additional work from "time to time" indicated that 2015 representation was discreet and not ongoing. Finally, the court ruled that the June 2016 follow-up communications that the Firm had with HHC regarding the concluded matter did not mean that the matter was ongoing. On this basis, the court ruled that (1) HHC was a former client and (2) the subject matter of the litigation did not substantially relate to the subject matter of the Firm's representation of HHC.

Risk Management Solution: This case illustrates the dual importance of clearly articulating the scope of a representation in an engagement letter and timely drafting and sending termination letters closing the file and ending the representation. If a firm intends a representation to be limited to a discreet matter, the engagement letter should specifically define the parameters of that matter and indicate that additional representations outside the scope of the engagement will be covered by separate engagement letters. Where, out of an abundance of caution, a firm elects to send a termination letter some time after the representation has concluded, the letter should state that the representation ended at the completion of the matter and that the letter is intended only to confirm the prior termination. If it becomes necessary to end the ongoing representation, the termination letter should specifically indicate when the relationship terminates (e.g., "effective immediately"). In all cases, whether the attorney-client relationship is structured as a series of discreet representations or as a single ongoing representation, firms should tailor their engagement letters and termination letters to the particular representation at hand. It is also critical that confirmation of termination be completed before the commencement of representation in a matter adverse to the now former client. Failure to do so could lead to disqualification. See, e.g., *McClain v Allstate Prop. & Cas. Ins. Co.*, Case No. 3:16CV843-TSL-RHW (S.D.Miss. Northern Div., April 25, 2017)(lawyer disqualified when termination letter sent one day after execution of engagement agreement with new client).