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Week of **May 4, 2010**

Can Playing Both Sides Put You in the Middle?

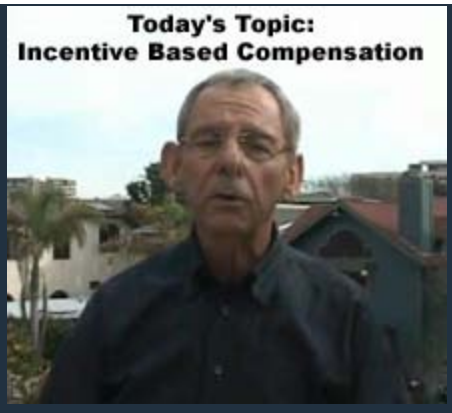
There's an old joke about the client who hired a one-armed lawyer, because he wanted advice from a counselor who wouldn't say, "On the other hand..." The analogy comes to mind when assessing whether lawyers can effectively and ethically represent opposite types of clients - for example, insurance carriers and insurance coverage plaintiffs. The ABA's Rule of Professional Conduct 1.7 certainly gives a "two-handed" answer. On the one hand, the Rule sensibly says that a lawyer cannot represent two parties who are directly adverse in the same matter; it also bars representation "when 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." Yet on the other hand the Rule says that a lawyer may represent clients whose interests are opposite if the lawyer "will be able to provide competent and diligent representation to each affected client."

Given that this stipulation opens the door to representing opposite types of clients, the consideration for the lawyer becomes a practical one. In our analogy above, would an insurance carrier get upset if they knew that their coverage defense lawyer was also representing plaintiffs in coverage matters against other carriers? If so, the plaintiff business may not be worth it. "On the other hand," a plaintiff lawyer might well find substantial advantages in undertaking defense work. Such work would even out cash flow and keep the lawyer from being dependent on one type of client. The example of the Heller Ehrman firm, which failed several years ago, is instructive: the firm primarily handled litigation defense, and when a number of large cases suddenly settled there was no new business in the pipeline to replace it.

There is also the consideration of whether certain

types of work in opposition will create financial problems for the firm. Plaintiff cases are often taken on a contingency basis, for example, while defense work is typically done at an hourly rate. Corporate defense firms that enter into contingency arrangements have found that they face increased problems from their use. Some of these problems crop up while the contingency matter is open and there must be compensation for lawyers who bring no money into the firm and, in fact, are responsible for cash outflow in the form of their compensation and expenses advanced to sustain the lawsuit. Then, if the firm is successful and the contingency money flows in, conflicts arise over who gets what. How much should the lawyers working on the matter receive? Isn't the matter the "property" of the firm? Didn't the firm advance the costs, not the lawyers? What is fair?

Such issues show that any decision to take on clients from opposing perspectives should be well thought out. Firms that consider all business to be good business, without regard to thinking through the consequences, might find that taking fees from too many sides puts the firm squarely in the middle.



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Personal Commentary

I was reminded just the other day of a cardinal rule of professional service business: **Ask for referrals.**

And, in my case, I realized I hadn't followed my own advice. Thus, if you know someone who would benefit from coaching him/herself to a greater level of success, I would deem it a great favor if you would do one of the following:
i) Tell him/her about me and provide my contact information;
ii) Give me the name and contact information and I'll personally contact the attorney; or
iii) Let's arrange a conference call among you, me and the suggested lawyer.

Thank you for your support. I value our connection.

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