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**Words Matter:
Corporate Affiliate Conflicts and Disqualification**

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Analyzing whether a law firm’s representation of a corporate affiliate creates a potentially disqualifying conflict with other members of the affiliate’s “corporate family” is a difficult exercise even for seasoned law firm general counsel. On one hand, Comment 34 to ABA Model Rule of Professional Conduct 1.7 notes that “[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.” On the other, ABA Formal Opinion 95-390 (1995) counsels that, absent a definitive agreement between the firm and its client, the answer will depend largely on the extent to which the entities involved share common operational and legal affairs management.

The risk to law firms if they do not proactively attempt to define—and limit—the clients involved is that courts may do it for them in the context of a disqualification motion in a matter a firm is handling against a client’s corporate affiliate. To lessen this ambiguity in an environment where corporations frequently have a wide array of affiliates, law firms should focus on two key documents: their own engagement agreements; and outside counsel guidelines provided by corporate clients.

Engagement Agreements

Engagement agreements play many useful roles in law firm risk management. One of the most central is defining who is—and, in some instances, who is not—a firm’s client. ABA Formal Opinion 95-390 puts it this way (at 2): “Clearly, the best solution to the problems that may arise by reason of clients’ corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer’s clients, or are to be so treated for conflicts purposes.” This gets at the nub of how many states analyze whether an attorney-client relationship exists: a putative client must subjectively believe that a lawyer represents the client and that subjective belief must be objectively reasonable under the circumstances. Having defined the client in an engagement agreement and limited the representation to that specific entity, it will be difficult for a corporate “relative” to claim that the firm is representing it, too. In *E2Interactive, Inc. v. Blackhawk Network, Inc.*, 2010 WL 1981640 at *5 (W.D. Wis. May 17, 2010) (unpublished), for example, the court denied a disqualification motion by an affiliate because the law firm’s engagement agreement with the corporate parent was limited to the parent and expressly excluded subsidiaries.

To be most useful, engagement agreements should be carefully crafted in three particular respects. First, firm templates should be worded to exclude affiliate representation unless there is a specific agreement otherwise. In *Avocent Redmond Corp. v. Rose Electronics*, 491 F. Supp.2d 1000, 1005 (W.D. Wash. 2007), for example, a law firm’s defense to a disqualification motion by an affiliate was undercut by the firm’s own engagement agreement template that included the phrase “and its affiliates” in its description of the client. Second, firm templates should be closely evaluated to eliminate ambiguity—which will be construed against the drafter. In *Mylan, Inc. v. Kirkland & Ellis LLP*, 2015 WL 12733414 at *22 (W.D. Pa. June 9, 2015) (unpublished), a magistrate in recommending an injunction against a law firm stemming from a corporate affiliate conflict noted that the engagement agreement concerned was ambiguous about whether the firm had also taken on affiliates. Third, engagement agreements should be modified as necessary if the firm takes on other related entities as time passes. In *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 105 F. Supp.3d 1100, 1114 (E.D. Cal. 2015), for example, the court in disqualifying a law firm for an affiliate conflict noted that although the firm had an initial engagement agreement that carefully limited representation to a specific entity, the firm never modified the agreement as its relationship later expanded to include other members of the corporate family.

Outside Counsel Guidelines

Outside counsel guidelines that are now routinely provided by corporate clients warrant close review for two reasons. First, guidelines frequently contain stock statements including affiliates within the firm's representation. Firms need to evaluate whether the particular economic relationship is such that they will accept or push back on such broad descriptions. In *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (W.D. Wash. April 22, 2016) (unpublished), for example, a firm was disqualified for opposing an affiliate of a client that had broadly defined its corporate family in a set of guidelines. Second, even if a firm accepts the client's broad definition, it is critical to include the names of the affiliates involved in the firm's conflict system because affiliates do not necessarily share the corporate family name. New York City Bar Association Formal Opinion 2007-3 (2007) also suggests that in this scenario the law firm may at least wish to explore an advance waiver with the client addressing affiliates for which the firm is not actually doing any work.

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