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Risk Management Basics, Part 1: Conflict Checks

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In this column and the next two, we'll survey three pillars of law firm risk management. This month, we'll focus on conflict checks. Next month, we'll discuss engagement agreements. We'll conclude in January by looking at systematically closing files when a matter has been completed. Following the tenets involved will not eliminate all risk inherent in practicing law today. Conscientiously following the principles outlined, however, should reduce overall law firm risk.

With conflict checks, we'll look at four primary areas: (1) you need a system; (2) you need to use it; (3) you need to input complete information; and (4) you need to ask questions about the results. Each is deceptively simple. Yet, the Northwest examples we'll use as illustrations underscore both the regulatory and civil risk lawyers and their firms face if they don't follow these simple steps.

Systems

The Oregon Supreme Court in *In re Knappenberger*, 338 Or 341, 355-56, 108 P3d 1161 (2005), disciplined a lawyer for failing to detect a conflict. In doing so, the Supreme Court cautioned that lawyers in private practice need a conflict system:

> [H]e had no real procedure for checking for conflicts. … He kept a client address list[.] … [T]he accused checked his list or other files only

> when his memory alerted him to a potential problem. … In our view, a lawyer in the accused's situation may not rely solely on his or her memory to avoid prohibited conflicts of interest.

The Supreme Court in *Knappenberger* did not specify the kind of conflict system a law firm should have—other than it needs to be more than an old-fashioned "Rolodex" and the lawyer's own memory. The particular system a firm uses understandably will vary by firm size, practice and geographic scope. Most conflict systems are now software-based and are often built into billing or practice management software. The PLF has practical information on both procedures and systems on its web site.

Use

Actually using the firm's conflict system is equally critical. *Jones v. Rabanco*, 2006 WL 2237708 (WD Wash Aug 3, 2006) (unpublished), offers a telling example. A large firm took on a fast-developing case. As they charged into the lawsuit, the team of lawyers involved at the firm didn't run a conflict check. Unfortunately, they were suing a firm client. Disqualification followed, with the judge offering a memorable quote:

> The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level. (*Id*. at *1 n.1.)

It is often precisely when time is short due to the press of case events or client demands that firms need to ensure that appropriate conflict checks have been run. Again, procedures will vary by firm size, practice and locations. Those procedures, nonetheless, must ensure that conflict checks are run before matters are accepted and opened.

Complete Information

Even if a conflict check is timely run through a state-of-the-art system, the result will be inadequate if incomplete information was provided. *Atlantic Specialty Ins. v. Premera Blue Cross*, 2016 WL 1615430 (WD Wash Apr 22, 2016) (unpublished), offers another telling example. A large law firm's Portland office took on an insurance coverage case in federal court for an affiliate of a carrier. The carrier provided the firm with a list of its affiliates in a set of "corporate counsel guidelines" and reminded the firm that representation of any one member of its corporate family would be considered representation of the entire family. For whatever reason, the handling lawyer in Portland did not enter the additional names into the firm's conflict database. Later, a major client of the firm's Seattle office asked the firm to defend it in a coverage case in federal court there against another carrier. When the firm filed its notice of appearance in Seattle, the carrier in that case moved to disqualify the firm because it was a

member of the same corporate family being represented in Portland. Again, disqualification followed with another memorable quote from the judge:

> Similarly troubling to the Court was the fact that [Law Firm] could not advise the Court as to whether [Client] was identified as a firm client in [Law Firm's] conflicts check system. (*Id*. at *13.)

Particularly in an era when it is common for corporate clients to provide lists of affiliated entities to law firms and often to take the position that representation of one is representation of all, lawyers taking on new matters for their firms need to ensure that they input complete information into their conflict systems. Lacking that, even firms with otherwise excellent procedures will potentially be "flying blind."

Asking Questions

In evaluating conflict reports, lawyers also need to ask questions about the results. *In re Drake*, 18 DB Rptr 225 (Or 2004), involved a partner at a large firm who relied on another partner that earlier work for party adverse to a firm client had concluded. The firm, however, was still representing the adverse party. The Bar acknowledged that the lawyer acted in good faith, but imposed discipline for the conflict nonetheless. Although a harsh result, it serves as a pointed reminder that because discipline is imposed against individual lawyers rather than firms, lawyers need to ask questions if there is any ambiguity on a conflict report.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, risk management and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.