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## **Beyond Bar Discipline: Why Conflicts Matter**

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As professionals, lawyers have long had a duty to follow the Rules of Professional Conduct. Moreover, there have long been disciplinary consequences for failing to do so. Without diminishing their role as either an ethical compass or a regulatory code, the professional rules—especially those relating to conflicts—have also increasingly become a critical element in the substantive law of legal malpractice, lawyer breach of fiduciary duty, fee forfeiture, disqualification and lawyer-related consumer protection act claims. In short, conflicts today matter in a very practical way.

In this column, we'll look at case law nationally highlighting the practical importance of the conflict rules beyond the disciplinary setting. The cases discussed are meant to be illustrative rather than encyclopedic. But in an era when lawyers are being sued more often and in a wider range of practice settings than in years past, they provide cautionary tales of the financial consequences to law firms of conflicts.

***Legal Malpractice.*** The Preamble to the ABA's influential Model Rules of Professional Conduct states that a violation of the RPCs should not, in and of itself, give rise to a corresponding civil claim against the lawyer involved. At the same time, conflicts can have two important roles in a malpractice case. The first

is legal: a conflict can be evidence of a lawyer's negligence in breaching the standard of care. The second is strategic: a conflict opens the door to a jury argument that any harm to the client was motivated by the lawyer's self-interest rather than by merely simple negligence. That can inject a potentially explosive element into the jury trial of a legal malpractice case and along with it at least the potential for punitive damages (see, e.g., *Cummings v. Sea Lion Corp.*, 924 P.2d 1011 (Alaska 1996) (upholding a punitive damage award in a legal malpractice case laced with conflicts)).

***Breach of Fiduciary Duty.*** The ABA Model Rules also note that the professional rules on conflicts reflect the underlying fiduciary duty of loyalty. As Comment 1 to ABA Model Rule 1.7 puts it: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." A violation of the professional rules on conflicts, therefore, translates quite directly into a breach of the fiduciary duty of loyalty. A current or former client pursuing a claim against a lawyer or law firm will still need to prove causation and damages. The specter of a conflict, however, will provide a skilled opponent with a powerful tool to use with a jury. Although juries might have difficulty grasping the nuances of complex securities or tax law, they readily understand the fundamental duty of loyalty. Moreover, the sweep of breach of fiduciary duty claims can be quite broad, extending to both current clients (see, e.g., *Eriks v. Denver*, 824 P.2d 1207

(Wash. 1992)) and former clients (*see, e.g., Milbank Tweed Hadley & McCloy v. Boon*, 13 F.3d 537 (2nd Cir. 1994)).

**Fee Forfeiture.** A lawyer's breach of fiduciary duty can result in forfeiture of all or a part of the lawyer's fees. States vary in their approach on whether a lawyer's breach of fiduciary duty will render all fees unrecoverable or whether the lawyer may still be entitled to limited quantum meruit recovery even if the lawyer's fee agreement was rendered void by virtue of the breach. Fee forfeiture, however, can be used as both a sword to seek the return of fees already paid and as a shield to avoid collection efforts. *See, e.g., In re Jore Corp.*, 298 B.R. 703 (Bkrtcy. D. Mont. 2003) (illustrating both).

**Disqualification.** Although court decisions provide the procedural law of disqualification, the professional rules effectively supply the substantive law. Courts look to primarily the rules governing current client conflicts (*see, e.g., Image Technical Service, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354 (9th Cir. 1998)) and former client conflicts (*see, e.g., SuperGuide Corp. v. DirecTV*, 141 F.Supp.2d 616 (W.D.N.C. 2001)) in determining whether a lawyer or law firm should be disqualified.

**Consumer Protection Act Claims.** Most states have adopted consumer protection acts, most of which make unlawful a variety of deceptive practices in consumer trade or commerce. Some provide both attorney fees and treble damages to a prevailing claimant. Many states have held that legal services are

not subject to consumer protection acts, but a distinct minority have and still others have not yet considered the question. The Pennsylvania Supreme Court's decision in *Beyers v. Richmond*, 937 A.2d 1082 (Pa. 2007), does an excellent job of summarizing these varying results around the country. Most of the states that do allow consumer protection act claims against lawyers limit them to the business aspects of law practice—including the acquisition of clients and billing for services. Those states, in turn, generally allow consumer protection act claims to go forward against lawyers when the client (current or former) contends that the lawyer acted deceptively (and therefore in violation of the statute) by failing to disclose conflicts in order to gain the client's work.

**Summing Up.** Conflicts are no longer the sole province of bar discipline. The professional rules on conflicts effectively form a critical element of the substantive law for lawyer civil liability on a spectrum running from legal malpractice to fee forfeiture. Or, put simply, conflicts today matter in a very practical way.

## **ABOUT THE AUTHOR**

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