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Recent Developments in Risk Management

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Joint Representation — Conflicts of Interest — Waiver

***Foltz v. Columbia Casualty Company,* 2016 WL 4734687 (W.D. Ok. 2016)**

Risk Management Issue: Can client A's waiver, given with informed consent, permitting lawyer to represent client A jointly with client B in the same matter be effective to permit lawyer's continued representation of client B in the future should lawyer no longer represent client A, where such continued representation will or may be adverse to now former client A?

The Case: Christopher Foltz (Foltz) and Ryan Cummings (Ryan) (collectively "Plaintiffs") were injured in an automobile accident with Zachary Owen (Owen), who had allegedly crossed the road's center line into Plaintiffs' lane. Foltz and Ryan suffered injuries and incurred substantial medical expenses.

Both Foltz and Ryan agreed to hire Tom Cummings as their attorney to seek compensation for their injuries and medical bills, and he subsequently filed a lawsuit against insurers Liberty Mutual Insurance Company, Columbia Insurance Company and Owen. Foltz is Ryan's stepfather; Tom Cummings is Ryan's natural father. In connection with their retention of Tom Cummings, Foltz and Ryan signed a waiver and retention agreement, which stated in pertinent part: "Chris (Foltz) and Ryan hereby waive any actual or potential conflict of interest which currently exists or may arise out of Tom Cummings' representation of both of them."

Shortly after the lawsuit was filed, Foltz fired Tom Cummings and hired a new lawyer to represent him. Afterwards, Tom Cummings filed a dismissal without prejudice only as to Foltz's claims. Foltz's new counsel then filed another lawsuit on his behalf, in which Columbia filed a counterclaim and third-party action against Foltz and Cummings, respectively, interpleading the policy proceeds into the Court's registry and remained in the action as a nominal party. Tom Cummings and his firm entered an appearance on Ryan's behalf and filed an answer to Columbia's third party action, as well as a cross claim against Owen.

Foltz filed a motion to disqualify Tom Cummings as counsel of record for Ryan. Foltz's motion contended Tom Cummings' ongoing representation of Ryan was materially adverse to Foltz and constituted a violation of Rules 1.7 and 1.9 of the Oklahoma Rules of Professional Conduct, thereby requiring his disqualification as counsel. Foltz argued that he had not given informed consent to Tom Cummings' continued representation of Ryan and his disqualification should be imputed to other members of Cummings' firm. Cummings, in response, argued that the joint-client privilege exception to the attorney-client privilege permitted his representation of Ryan, that Rule 1.9 was inapplicable to the case, and Foltz had given his informed consent to the continued representation of Ryan.

The court noted that Rule 1.7 of the Oklahoma Rules of Professional Conduct provides generally that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. Similarly, Rule 1.9 states

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For current comments on issues of professional ethics see our blog: www.lawyersfortheprofession.com.

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that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client. Both rules provide that the conflicts may be waived upon informed consent by the affected client.

Because it was indisputable that the matters were "substantially related", the dispositive issue was whether Foltz had waived the apparent conflict of interest arising from Tom Cummings' current representation of Ryan. The engagement agreement's waiver provision stated that both Foltz and Ryan "hereby waive any actual or potential conflict of interest which currently exists or may arise out of Tom Cummings' representation of both of them." Foltz contended this provision was inapplicable to the instant case, however, because it only provided consent for Tom Cummings to represent him and Ryan at the same time, not for Tom Cummings to represent Ryan in the future should he no longer represent Foltz.

The Court disagreed. Relying upon Oklahoma's statutory rules of contract construction, the Court did not construe the retention agreement and its waiver provision as narrowly as Foltz suggested. Foltz conceded that at the time Plaintiffs decided to hire Tom Cummings, both men "had competing interests for the same funds" at issue. With this recognition in mind, both plaintiffs agreed to waive any actual or future conflict of interest stemming from Tom Cummings' dual representation. The Court was satisfied that, with respect to Tom Cummings' current representation of Ryan, Foltz has given a knowing waiver, i.e., an "informed consent" to such representation under Rules 1.7 and 1.9.

Accordingly, the Court denied Foltz's Motion to Disqualify.

Risk Management Solution: Generally the effectiveness of such conflict waivers is determined by the extent to which the client reasonably understands the risks that the waiver entails. The more comprehensive the disclosure and explanation of the types of conflicts that may arise, and the actual and reasonably foreseeable adverse consequences of those representations, the greater likelihood the client will have the requisite understanding. If the client consents to a particular conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. However, if the consent is general and open-ended, then the consent may be viewed as ineffective because it was not reasonably likely the client would have understood the risks involved. It's worth the extra time to have the required discussions and craft a thorough waiver provision.

Comment: In the editors' view the outcome here is surprising. More importantly, had the waiver expressly dealt with the parties' rights should either of them cease to be represented jointly (which is common in these situations), the former client would have had much weaker grounds for seeking to disqualify his now former counsel.

Impaired Lawyers — Partners' Reporting Responsibilities — Duty of Partners and Supervisory Lawyers in a Law Firm When a Lawyer in the Firm Suffers From Significant Impairment

Virginia Legal Ethics Opinion 1886

Risk Management Issue: What steps are required of a supervisory lawyer when she reasonably believes a lawyer under her supervision suffers from age-related or substance-induced impairment?

The Opinion: Lawyers suffer from depression, alcohol and other substance abuse at a rate 2 to 3 times the general population, and the most at-risk category are lawyers 30 and under. In addition, the average age of practicing lawyers continues to increase, a trend that will continue as many carry on practicing past what was historically typical retirement age. The Virginia State Bar Ethics Committee Opinion addressed the obligations of partners and supervisory attorneys to take precautionary measures before a lawyer's impairment, from whatever cause, results in serious misconduct or poses a material risk to clients or the public.

This Opinion is based on two hypothetical situations:

In the first, James, a managing partner in a law firm, hears from credible sources that a senior associate, Bill, has a serious substance abuse problem and has been appearing in court drunk and reeking of alcohol. James, too, observes that Bill exhibits what are traditionally believed to be the hallmarks of an abuse problem, which, when confronted, Bill denies.

James knows substance abuse can lead to problems for his clients, the least of which is unreturned phone calls and inadequate representation, the most serious, embezzlement of client funds. Must James report Bill's suspected substance abuse problem to the authorities?

According to the Opinion, not necessarily, provided that James has promptly taken reasonable steps to ensure Bill does not engage in any future conduct that breaches any duties owed to the firm's clients. This includes, for example, accommodating Bill's impairment by limiting his client contact and placing him in a supportive, research role, instead of permitting him to have primary responsibility for client matters, and encouraging Bill to seek counseling or therapy through the bar's confidential lawyer assistance program. Unless James knows of any past misconduct resulting from Bill's impairment, he is not required to report the impairment to the bar.

In the second hypothetical, Rachelle suspects her 60-year-old law firm partner, George, a prominent lawyer in the family law field, is suffering from age-related dementia. Recently Rachelle has observed and heard about some erratic and odd behavior in George.

Rachelle hesitates to "diagnose" George and risk ruining his reputation. Must she report her suspicions to the bar?

According to the Opinion, George doesn't need to be reported, absent any professional misconduct Rachelle knows about. Rachelle is required to make reasonable efforts to prevent George from violating his ethical obligations to his clients or violating any Rules of Professional Conduct. This would include, as an initial step, having a conversation with George about his condition and persuading him to seek evaluation and, if available, treatment.

Risk Management Solution: Law firms should have in place enforceable policies that require impaired lawyers to seek assistance. Supervisory lawyers should take measures to protect the clients' interests, such as removing an impaired lawyer from a case or closely supervising his or her role and obtaining professional assistance to assess, and where possible, remediate the underlying problem. If these reasonable measures are in place, the supervisory lawyer need not report an impaired lawyer to the bar, unless the impairment has resulted in misconduct violations the supervisory lawyer knows about or could reasonably have prevented.

Technology Security — Protecting Client Funds From Outside Interference

***Bile v. RPEMC*, 2016 WL 4487864 (E.D. Va., Aug. 24, 2016)**

Risk Management Issue: If a lawyer receives a suspicious email regarding the transmission of settlement funds, what steps should she take to protect herself, her client and any others with an interest in the funds?

The Case: *Bile* involved the settlement of an employment discrimination claim. *Bile v RREMC, LLC*, 2016 WL 4487864 (E.D. Va, Aug. 24, 2016). Six days after the settlement was reached plaintiff's counsel received an email that purportedly came from his client. Plaintiff's counsel noted, however, that the email had a domain extension ending with "aoi.com" rather than "aol.com." The email contained instructions to wire the settlement to a Barclay's account in the client's name in London. Plaintiff's counsel called his client and confirmed that the client had not sent the email. Plaintiff's counsel then simply deleted the phony email, but did not notify opposing counsel.

Several days later the lawyers discussed how to accomplish payment of the settlement. They agreed that the payment would be made by two checks, one in the amount of $63,000 and a second in the amount of $2,000, less withholding, sent via courier services to plaintiff at his home. Plaintiff's counsel agreed to send to defense counsel an email confirming plaintiff's home address — that confirmation email was sent from plaintiff's counsel's Yahoo.com email account.

Later the same day, defense counsel received another email, also from plaintiff's counsel's email account, this time directing that the settlement payment be wired to a Barclay's account (the same one identified in the first fraudulent email sent only to plaintiff's counsel). Believing that the email was genuine, defense counsel wired the settlement payment to the Barclay's account.

When the fraud was discovered, defense counsel made an unsuccessful attempt to recall the wire transfer. Plaintiff, who hadn't received the settlement payment, demanded that he be paid and refused to dismiss the lawsuit as agreed in the settlement. The defendant refused to make any further payment and demanded the lawsuit be dismissed pursuant to the settlement agreement. Eventually, the dispute was brought to the attention of the District Court. The Court conducted an evidentiary hearing to determine the reasonableness of each side's actions and who should bear the risk of loss.

The Court evaluated the actions of both lawyers under ordinary care principles guided by common-law contract principles and several rules from the Uniform Commercial Code. The Court fashioned a rule from these principles to the effect "that a blameless party is entitled to rely on reasonable representations, even when these reasonable representations are made by fraudsters." *Id.* at *8.

The Court ultimately concluded that the lawyer who was aware of the phony email appearing to be from the client should bear the risk of loss. In reaching that conclusion, the Court found that defense counsel had no reason to suspect the email asking the settlement be wired to an offshore account was fraudulent. *Id.* at *12. Additionally, the Court noted that both plaintiff's counsel and his client were aware that a malicious third party had targeted the settlement for a fraudulent transfer to an offshore account. *Id.* at *3. Finally, the Court found that both plaintiff's counsel and his client knew that the lawyer's email account was implicated in that fraudulent activity. *Id.* The District Court ultimately ruled:

> As technology evolves and fraudulent schemes evolve with it, the Court has no compunction in firmly stating a rule that: where an attorney has actual knowledge that a malicious third party is targeting one of his cases with fraudulent intent, the lawyer must either alert opposing counsel or must bear the losses to which his failure substantially contributed.

Id. at *13.

Risk Management Solution: While email has likely replaced the telephone as the primary mode of communication for many lawyers, this unfortunate circumstance could have been avoided had plaintiff's lawyer picked up the phone to call the defendant's lawyer about the spoofed client email, or had the defendant's lawyer called to ask about the change in the payment method from check to a wire transfer. Because of the immediacy of wire transfers, law firms may want to consider a policy or practice of calling to confirm the accuracy and validity of any wire transfer instructions before the wire is sent, and not rely on emails alone.