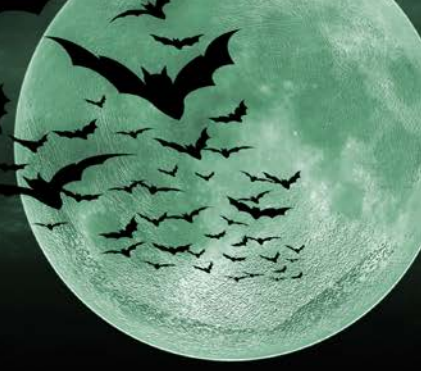
Halloween Issue
October 2015

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management



TRICK OR TREAT!

The editors of the Halloween edition of the *Lawyers' Lawyer Newsletter* invite you to enjoy frightening tales of a lawyer's thrilling escape thanks to a well-drafted future conflict waiver; the desperate and sometimes failed struggle for freedom when a client doesn't pay the bill; and the often gruesome results of trial taint. We hope these horror stories will frighten and delight just in time for All Hallows' Eve.

Trick or Treat Editor's Note: This case is a treat for lawyers who carefully consider and thoughtfully draft engagement agreements and waivers of future conflicts.

Waiver of Conflict of Interest — Attorney Disqualification

***Grovick Props., LLC v. 83-10 Astoria Boulevard, LLC*, 2014 NY Slip Op 05627**
(App. Div., 2d Dep't. Aug. 6, 2014)

Risk Management Issue: What amount of detail must be included in a waiver of a future conflict of interest for it to be binding on the client and enforceable by the attorney?

The case: Plaintiff, Grovick Properties. LLC (Grovic), purchased commercial property from defendant 83-10 Astoria Boulevard, LLC (Astori). The law firm of Ruskin Moscou Faltischek, P.C. (RM), though attorney Jon Schuyler Brooks (Brooks), represented Grovick on the purchase of the property. At the closing, Grovick and Astoria learned that the state of New York wanted to place an environmental lien upon the property resulting from the costs of remedial efforts in abating the discharge of petroleum. The state threatened to seek reimbursement from plaintiff of those costs if the parties closed title prior to the lien being filed. Astoria and Grovick subsequently entered into an escrow agreement, whereby Astoria placed $500,000 in escrow, to protect plaintiff against any action by the state.

Thereafter, Astoria retained Brooks and RMF to represent it in connection with certain claims made by the state for reimbursement of the cleanup and removal costs. Astoria signed a conflict of interest waiver that stated, in part, that Brooks and RMF continued to represent Grovick with regard to the transaction between Astoria and Grovick. The waiver also stated:

> Furthermore, in the event Astoria at any time for any reason elects to discontinue its engagement of this firm, or should an adverse relationship arise between ASTORIA and GROVICK, you acknowledge and agree that we may continue without restriction to represent GROVICK and its principals in any and all matters, including those that arise from or relate to the [property].

The state then filed a cost-recovery action against Astoria seeking clean-up costs. Brooks continued to represent Astoria in the claims by the state. In 2010, Astoria terminated Brooks' representation, and approximately one month later, Brooks sought the release of the escrow funds. Astoria and the state objected to such release, and Grovick

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Hinshaw & Culbertson LLP
222 North LaSalle Street
Suite 300, Chicago, IL 60601
312-704-3000
www.hinshawlaw.com

Editors: Anthony E. Davis and Noah D. Fiedler

Contributors: Katherine G. Schnake and Matthew Watson

Former Hinshaw attorney William M. Lopez also contributed to this publication

commenced the instant action to recover its costs for removing the petroleum contamination. Despite signing the conflict of interest waiver, Astoria moved to disqualify Brooks and his subsequent law firm.

The New York Appellate Division, Second Department, reversed the lower court's ruling, which had granted the motion to disqualify. The appellate court ruled that Astoria had specifically waived any conflict of interest that could have arisen from Brooks' representation of Grovick. The court further ruled, "[t]he waiver fully informed the Astoria defendants of the potential conflict of interest and, by executing the waiver, the Astoria defendants consented to have Brooks represent them notwithstanding that conflict."

Risk Management Solution: Because the conflict of interest waiver at issue in this case was clear and concise and it identified for Astoria, with specificity, the possible future conflict of interest, it was ultimately upheld. When drafting such waivers, it is imperative to thoughtfully articulate the language in the waiver and identify in as much detail as possible any possible future conflicts of interest that will be waived.

Trick or Treat Editor's Note: A lawyer's worst two-part nightmare — the client who doesn't pay and the court which doesn't permit withdrawal. That's an expensive trick.

Withdrawal of Attorneys — Engagement Letters

***Robbins v. Legacy Health Sys., Inc.,* 177 Wash. App. 299 (2d Div. 2013)**

Risk Management Issue: May a lawyer withdraw from a matter when the client is unwilling to pay the costs associated with the engagement?

The Case: In late 2008, plaintiffs hired attorney Mary Schultz (Schultz) to represent them in the prosecution of a medical malpractice case. As part of the engagement, plaintiffs agreed that they would be responsible for the costs associated with the litigation, and authorized Schultz to advance the costs with the express requirement, in the representation agreement, that these costs be reimbursed.

At the start of the litigation, plaintiffs paid $52,000 in costs, and by January 2012, Schultz had advanced them an additional $34,000. However, Schultz advised plaintiffs that the case would not move forward unless they complied with the fee agreement and reimbursed her for those costs. After repeated attempts to collect payment, Schultz filed a notice of withdrawal on April 4, 2012.

Shortly after the notice of withdrawal was filed, two of the medical defendants moved for summary judgment, and plaintiffs filed their objection to Schultz's withdrawal based on that ground. At the hearing on the withdrawal motion, Schultz asked the court for permission to withdraw, but the court denied her request. Instead, the court ordered that Schultz stay in the case at least through summary judgment, even though the medical defendants agreed to strike their motions until the representation issue was resolved. The court added that it would release Schultz after she helped plaintiffs find a new attorney, but refused to address Schultz's concerns about who would pay for the costs of the continued representation. Schultz appealed.

A few months later, plaintiffs retained a new attorney, withdrew their objection to Schultz's motion to withdraw, and subsequently moved to vacate the June 2012 order and to discharge Schultz. Schultz opposed plaintiffs' motion, arguing that the trial court should grant her motion to withdraw as of June 2012 (when she initial made the motion), instead of the March 2013 hearing date on plaintiffs' motion.

The Washington Court of Appeals held that the trial court abused its discretion by refusing Schultz's motion to withdraw. Specifically, the court explained that requiring Schultz to continue representing plaintiffs resulted in an unreasonable financial burden on her, and plaintiffs rendered Schultz's representation unreasonably difficult given their dispute over fees and costs. In addition, the court made it clear that this was not a case where counsel attempted to withdraw at the eleventh hour, but rather gave her clients ample notice and time to find a new attorney as the issue of the costs and the need to find a new lawyer had been ongoing for years prior to the original motion to withdraw. Ultimately, the court decided that Schultz's withdrawal would not have materially affected plaintiffs, especially given that defendants' motions for summary judgment had been withdrawn by their counsel.

Accordingly, the appellate court directed the trial court to enter an order granting Schultz's motion to withdraw as of the original hearing date, as well as an award of costs.

Risk Management Solution: *Robbins* reaffirms an attorney's right to withdraw from a matter when the client fails to reimburse him or her for costs, if that withdrawal will not prejudice the client's case, based upon substantial hardship of the lawyer if forced to continue representation, as provided in most states' versions of the Model Rules of Professional Conduct 1.16.

This case also underscores the need for clearly worded engagement letters that delineate the roles and responsibilities of both the attorney and the client — especially when it comes to payment of fees, costs and other expenses. Engagement letters should also set forth the circumstances permitting the lawyer to withdraw from the representation, consistent with the application of the rules of professional conduct. Confirming the client's ability to pay for these expenses before taking on the engagement is also advisable — especially when the costs are expected to be substantial and to increase as the representation continues.

Trick or Treat Editor's Note: Just when you thought you were out, you get pulled back in. The trick with ethical screens often arises when they are erected. He who hesitates is lost.

Conflict of Interest — Disqualification — The Importance of Timely Ethical Screening *Before* Undertaking the Representation

***Signature MD, Inc. v. MDVIP, Inc.*, Case No. CV 14-5453 (C.D. Cal. Jan. 20, 2015)**

Risk Management Issue: A new matter comes in requiring immediate attention, but a conflict check reveals a prior representation of the adverse party. To the extent that screening may avoid or reduce the risk of disqualification, how quickly must a law firm implement the ethical screen?

The Case: Plaintiff health concierge service sued its competitor for antitrust violations, contending that defendant utilized anti-competitive tactics and agreements to preclude competition. Defendant moved to disqualify plaintiff's counsel, an AmLaw 200 firm, on the basis that it previously represented defendant from 2008 to 2012. Judge Dolly M. Gee

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of the U.S. District Court for the Central District of California granted the motion, finding that: (1) there was a substantial relationship between the subject of the firm's current and former representations, and (2) the firm failed to establish that an effective ethical screen was implemented.

Plaintiff's antitrust allegations included, among other things, defendant's use of exclusive dealing agreements with physicians to lock competitors out of the concierge medicine membership program market. The court found that there was a substantial relationship between the firm's current representation of plaintiff and prior representation of defendant — in a suit for misappropriation of trade secrets by a group medical practice — because both suits focused on defendant's "practices of recruiting and engaging physicians in its concierge . . . program." Accordingly, a rebuttable presumption arose that the "tainted" attorneys within the firm shared privileged and confidential information with the attorneys working on the new file. It is unclear from the court's order, but it appears that the tainted attorneys worked out of a separate regional office. The burden then shifted to the firm to establish that an ethical screen had been implemented.

Citing well-established law in California, the court noted that an effective ethical screen must be timely, meaning it "should be implemented *before* undertaking the challenged representation or hiring the tainted individual." The evidence established that the screen was implemented two days after the firm was retained by plaintiff. The court acknowledged that two days is a short time period, but emphasized there was no evidence that preventative measures were in place to prevent disclosure of privileged information during that time. Declarations stating that there was no such disclosure and that the tainted attorneys did not work on the case would not have helped the firm absent timely implementation of an ethical screen.

Risk Management Solution: This ruling emphasizes the importance of implementing an ethical screen *before* undertaking the potentially problematic representation. In this case, the court required strict compliance with the rule even though the current and prior matter seemed only loosely related and the potentially tainted attorneys worked out of a different office. American Bar Association Model Rule 1.10(a)(2), adopted by some states, provides a useful checklist for firms seeking to remain as counsel, including: (1) timely screening of the disqualified lawyer; (2) no apportionment of the fee from the representation to the disqualified lawyer; (3) prompt written notice to any affected former client describing the screening procedures, noting that review is available, providing a statement of the screened lawyer's rule compliance, and offering an agreement that the firm will promptly respond to written inquiries or objections; and (4) further compliance certifications at "reasonable" intervals and upon termination of the screening procedures. Because rules vary between jurisdictions, it is essential to consult all potentially relevant rules. Note that even in jurisdictions that have declined to adopt a screening rule like Rule 1.10(a)(2), many courts will decline to disqualify law firms that have put timely and effective screens in place, even if conflicts exist, as long as the courts are satisfied that no "trial taint" results from the conflict. *See, e.g., AIG, Inc. v. Bank of America Corp.,* 827 F. Supp. 2d 341 (S.D.N.Y. 2011); *Arista Records LLC v. Lime Group LLC,* 2011 WL 672254 (S.D.N.Y. 2011). Other case law considering screening procedures has been previously discussed in the April 2014 and January 2011 editions of *The Lawyers' Lawyer.*