Lawyers for the Profession®

The Lawyers' Lawyer Newsletter

Recent Developments in Risk Management

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Best Lawyers LAW FIRM OF THE YEAR U.S.News & World Report ETHICS AND PROFESSIONAL RESPONSIBILITY LAW 2014

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Employee Separation Agreements – Professional Discipline for Imposing Unethical Restrictions on Departing Lawyers

In re Truman, 7 N.E.3d 260 (Ind. 2014)

Risk Management Issue: Can firms limit the ability of an associate to solicit or to represent clients when the associate leaves the firm?

The Case: This decision involved a disciplinary proceeding that was brought against an attorney (Truman) who tried to enforce a separation agreement against his former associate. The attorney hired the associate to work for the firm in 2006 and the associate signed a separation agreement at that time.

The agreement provided that if the associate left the firm, the associate could not notify the firm's clients that the associate was going to leave, and it also prohibited the associate from soliciting or contacting firm clients after he left. The agreement further provided that if the associate left the firm and did take clients, then fees would be divided in a way that would provide a financial disincentive for the associate to continue to represent the former firm's clients.

In 2012, the associate informed Truman that he was leaving the firm. Truman insisted on enforcing the separation agreement and sent notices to the clients for whom the associate was working announcing the associate's departure. The notices did not indicate that the clients could continue to work with the associate if they chose to do so and did not provide these clients with the associate's contact information.

Despite the separation agreement, the associate sent notices to the clients explaining that they could choose to be represented by either the associate or the firm and these notices included the associate's contact information. Truman sued the associate to enforce the agreement and ultimately settled the dispute through mediation.

The dispute was reported to the Indiana Disciplinary Commission (the Commission), and charges were brought against Truman for violation of Indiana Professional Conduct Rule 5.6(a). That rule prohibits agreements restricting the ability of a lawyer to practice law after leaving a firm. The rule also prohibits a lawyer from encroaching upon the freedom of a client to choose a particular lawyer. The Commission and Truman reached an agreement for a public reprimand after Truman conceded that a violation had occurred and after he promised not to enforce any other separation agreements with other associates.

Risk Management Solution: Any agreement or other effort by a firm that limits an attorney's ability to practice law or which prevents a client from exercising the freedom to choose a lawyer will violate Rule of Professional Conduct 5.6. When an attorney leaves a law firm, all potentially affected clients must be given the opportunity to choose which lawyer will continue to represent them and these clients must be given information (such as the departing attorney's contact information) so that this choice can be realized by the affected clients. Law firms should consider reviewing all agreements with associates and counsel, as well as their partnership agreement, to make sure that they do not contravene this rule. In addition, except for a minority of states that permit reasonable restrictions in such agreements (such as California), courts routinely disregard rather than enforce such provisions on the same public policy grounds that underlie the ethical rule.

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

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Lawyers' Duties Upon Dissolution of Their Law Firm – What Reasonable Steps Should Lawyers Take to Avoid Foreseeable Prejudice to Clients When Law Firm's Dissolve

State Bar of California, Formal Opinion No. 2014-190

Risk Management Issue: What duties do attorneys affiliated with a dissolving law firm owe to a client of the firm if the attorneys will no longer be representing the client upon the firm's dissolution? How do the duties of attorneys differ based on their position at the firm and whether the attorneys have any connection with or knowledge of the client prior to the dissolution of the firm?

The Case: In California, Rule of Professional Conduct 3-700(A)(2), provides that members of the California state bar may not withdraw from an attorney-client representation until the member "has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client [and] allowing time for employment of other counsel[.]" The rule applies equally to associates and partners of law firms. A determination of what "reasonable steps" each attorney must take to avoid "reasonably foreseeable prejudice" is a highly fact-specific inquiry.

In the scenario considered by the State Bar of California, Standing Committee on Professional Responsibility and Conduct (the Committee), to address this Rule of Professional Conduct, a closely held corporation (Client), signed an engagement letter with a law firm (Old Firm) to retain its services in pursuing claims for breach of contract and fraud against a supplier. The engagement letter expressly stated that Client was retaining Old Firm, and that Partner A would be primarily responsible for the representation, and Associate would work on the matter. Over the next six months, Associate and Partner A worked on the matter, devoting well over 100 hours to learning relevant aspects of Client's business in order to prepare an appropriate complaint. No other attorneys at Old Firm were involved in the matter and both Associate and Partner A were aware that the applicable statute of limitations would soon expire on Client's claims and that a complaint had to be filed in the near future.

Meanwhile, Associate learned that dissolution of Old Firm was imminent, Partner A was considering an offer from another firm (Mega Firm), and if she accepted, Partner A would likely not continue her representation of Client at Mega Firm. A few days later, Old Firm fell into disarray and Associate accepted an offer from a different firm (New Firm). Before they each departed Old Firm, Associate and Partner A took two different courses of action.

Although Associate did not ask Client if Client would like to be represented by New Firm, Associate wrote a memo to Partner A that provided a detailed outline of the status of work performed for Client and all upcoming dates, including the upcoming statute of limitations deadline. Associate saved the memo to Client's file and called Client to advise that she was leaving Old Firm and would no longer be working on the matter. Associate, concerned about Partner A's intentions regarding Client, also communicated with Partner B, a transactional lawyer specializing in mergers and acquisitions. Partner B assured Associate that he would alert the firm's executive committee to the issues raised by Associate with respect to Client.

In contrast, on her last day at the firm, Partner A merely emailed Client, advising that Old Firm had dissolved and she would not represent Client at Mega Firm. In the email, Partner A reminded Client that the statute of limitations deadline was approaching and warned Client to engage new counsel to protect its interests. Partner B also left the firm to start a solo practice but only after relaying the situation conveyed to him by Associate to the firm's dissolution committee.

The Committee found that Associate complied with 3-700(A)(2) by drafting a memorandum regarding the status of the case, speaking with Partners A and B about Client's case and the upcoming statute of limitations deadline and, after receiving assurances from Partner B that he would speak with the firm's executive committee, and determined that Associate's obligations had been fulfilled. The Committee noted that if Associate believed Client would still be prejudiced by Associate's departure — for example, if she believed that either Partner B or the firm would abdicate their responsibilities resulting in Client not filing the complaint on time, then she may need to take additional steps to comply with 3-700(A)(2).

In contrast, the Committee found that in light of Partner A's role in the matter and the risk of missing the statute of limitations if Client was unable to find new counsel who could sufficiently come up to speed to draft an appropriate complaint before the expiration of time, Partner A could not summarily terminate her relationship unless she has taken reasonable steps to avoid foreseeable prejudicial results to Client. The Committee noted that "[a]n attorney's change of employment does not by itself terminate an attorney-client relationship[, and the] attorney must continue to serve the client unless withdrawal is permitted by the provisions of rule 3-700." In this instance, factors to consider in determining whether prejudice is reasonably foreseeable include "how difficult it likely will be for Client to find new counsel — which will depend on . . . how complex the matter is, how much time Old Firm has already invested familiarizing itself with the facts and issues, whether Old Firm created documents that new counsel can utilize, how much time it will take new counsel to understand the case, and how much time remains before a complaint must be filed[.]" Ultimately, the Committee determined that by leaving Old Firm without taking "reasonable steps to avoid reasonably foreseeable prejudice to the rights of Client" before severing ties, Partner A violated 3-700(A)(2).

With respect to Partner B, since his practice involved mergers and acquisitions (an area of law irrelevant to Client's needs) and since he had never worked on Client's matter, the Committee found that his action of notifying Old Firm's dissolution committee of Client's statute of limitations issue was sufficient to comply with 3-700(A)(2).

Risk Management Solution: Upon dissolution of a law firm, it is incumbent on associates as well as partners to consider what reasonable steps must be taken to avoid reasonably foreseeable prejudice to the firm's clients. Depending on the circumstances, it may only be necessary for an associate to notify her superiors and obtain reassurance that steps will be taken to avoid potential prejudice to a client. However, a partner might have to continue work for a client if a time-sensitive issue like an upcoming deadline is imminent and it is unlikely a client will find a new attorney to satisfactorily represent the client's interest in a timely manner. All partners, including those who did not work for a particular client, owe duties to make sure that *all* current clients at the time of the firm's dissolution continue to be adequately and appropriately represented after the firm ceases to operate.

Conflict of Interest – Duties to Former Client – the Substantial Relationship Test – Implied Waiver of Right to Seek Disqualification of Counsel

***State v. 3M Co.,* No. A12-1856, A12-1867, 2014 BL 121512 (Minn. Apr. 30, 2014)**

Risk Management Issue: Can a lawyer or law firm rely on a former client's alleged implied waiver of a conflict of interest and of its right to seek disqualification of the law firm?

The Case: 3M Company (3M) manufactures fluorochemicals (F's). In 1992, 3M engaged a law firm (Law Firm) for advice regarding FDA petitions for FC-product approval. In 2000, 3M ceased manufacturing F's in the United States, but Law Firm continued to represent 3M until 2006. During this time, Law Firm represented 3M in both legal and regulatory matters regarding F's and obtained information from 3M relating to the health effects of exposure to F's.

In 2010, 3M again retained Law Firm for representation. Law Firm was engaged to represent 3M regarding a retiree-benefits matter that was unrelated to 3M's F's business. Law Firm completed the matter on September 27, 2010, and 3M formally sent an email terminating the representation on December 22, 2010.

On December 30, 2010, Law Firm began representing the State of Minnesota (State) for a natural resource damage (NRD) case against its former client, 3M. In the NRD case, the State alleged that 3M's production of F's polluted Minnesota waters and injured natural resources. Between December 30, 2010, and October 11, 2012, the parties produced massive amounts of discovery and Law Firm attorneys spent over 20,000 hours of attorney time on the NRD case and incurred between $2 million and $3 million in litigation expenses. The deadline for completing discovery in the NRD case was June 1, 2012. However, on March 26, 2012, outside counsel for 3M in the NRD case, sent a letter to Law Firm stating Law Firm had a conflict with the former client and subsequently demanded that Law Firm withdraw. Law Firm refused.

Conflicts of Interest, continued on back page

Between the dates of Law Firm's first appearance in the NRD case and 3M's demand for withdrawal, 3M's general counsel twice indicated in communications with Law Firm attorneys that he was aware Law Firm might have a conflict of interest in the NRD case. On April 30, 2012, 3M moved to disqualify Law Firm as counsel for the State, alleging that Rule 1.9(a) barred Law Firm from representing the state in the NRD case because the lawsuit was substantially related to Law Firm's prior representation of 3M. While this motion was pending, 3M brought a separate lawsuit against Law Firm for breach of fiduciary duty and breach of contract arising out of Law Firm's representation of the State in the NRD case.

On October 11, 2012, the trial court in the NRD case concluded that Law Firm violated Rule 1.9(a) and granted 3M's motion to disqualify Law Firm as counsel for the State. The court found that Law Firm's prior representation of 3M's F's business was substantially related to the NRD case. The court also determined that a client cannot impliedly waive the right to disqualify the opposing party's counsel based on a violation of Rule 1.9(a). Both parties appealed.

Initially, the Court of Appeals granted 3M's motion to dismiss Law Firm's appeal, finding Law Firm lacked standing to appeal because it had no legally protected right to continue representing the State. The Court of Appeals then affirmed the trial court's disqualification order, and concluded that Law Firm's representation of the State violated Rule 1.9(a). The court of appeals also observed that while Rule 1.9(a) allows for informed consent, it does not allow waiver of the right to disqualification of the opposing party. The Minnesota Supreme Court granted petitions for further review filed by the State and Law Firm.

Regarding the motion to dismiss, the Minnesota Supreme Court reversed the Court of Appeals and held that a law firm has standing to appeal a disqualification order as counsel on behalf of its client. The Supreme Court then remanded the case to the trial court to evaluate the evidence regarding whether the two matters are "substantially related." The Supreme Court also held that a party can impliedly waive its right to seek disqualification of opposing counsel for a Rule 1.9(a) conflict and it remanded the case for the trial court to determine whether 3M impliedly waived the right to disqualification. In reaching its decision, the Supreme Court stated that although waiver requires both knowledge of the right and intent to waive the right, the knowledge may be constructive and the intent to waive may be inferred from conduct. Certain factors the court examined included: (1) the length of the delay in bringing the motion to disqualify, (2) whether the movant was represented by counsel during the delay, and (3) the reason for the delay.

Risk Management Solution: This decision makes clear the importance of lawyers and law firms being diligent and expeditious if they wish to seek disqualification of former counsel based on conflicts of interest. Checking for conflicts is critical at the outset of any claim and continues to be important throughout the life of the case. Rule of Professional Conduct 1.9(a) in Minnesota (like most states) provides 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 interests of the former client unless the former client gives informed consent, confirmed in writing. Since Law Firm was likely aware of the potential conflict in this case, Law Firm took a risk in not seeking a waiver from 3M, in writing, rather than rely on what it believed was an implied waiver. Notably, where the Rules of Professional Conduct require waivers to be in writing, even if disqualification is not granted, this will not necessarily preclude other claims by the disgruntled client, including potential disciplinary proceedings.