A MONTH IN THE LIFE OF AN ETHICS PARTNER

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INTRODUCTION

Every law firm needs a designated ethics partner. If you are in solo practice, this means you, assisted by trusted lawyers/mentors in your community or out in the state. On the other hand, in a mid-sized firm, this work is centered on one partner generally consulting with other members of his/her firm, perhaps with an associate back up. A large multi-office firm might have an expanded committee as a resource when the ethics partner(s) needs additional help. Several of the members of the expanded committee might be particularly adroit at running physical and electronic ethical screens when circumstances call for one. One partner, generally based in the firm's home office, might serve as the firm's general counsel and take on the direct dealings with the firm's malpractice carrier and the firm's management. For all of us, it means getting those annual ethics credits, paying attention to the Kentucky Rules of Professional Conduct and the comments to them, seeking guidance from KBA Ethics opinions, and obtaining rulings from the KBA Ethics Hotline when still in doubt.

What follows are issues fielded over the course of a recent one-month period by a typical ethics partner (the author). This will give you an idea of ethical issues that confront all of us regardless of whether one practices in a large, mid-sized, or small firm or as a solo practitioner. There is no rhyme or reason to the issues covered below. It is a scattershot rendition, and yet a realistic one.

CONFLICTS

The bulk of questions arise from conflict issues for current clients and involve whether the conflict is indeed a conflict, and if so, whether it can be waived by both sides. Here is where we look to Rule 1.7, "Conflict of Interest: Current Clients." Is the conflict a concurrent one involving representation of one client directly adverse to another? Is there a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or the lawyer's personal interest? These are grey areas of concern. They are factually intensive. And yes, to a large extent, the cross examination of one's partners (or oneself if practicing solo) is critical. Rule 1.7 (b) provides the circumstances under which a lawyer may represent a client notwithstanding a concurrent conflict. Is the lawyer able to render competent and diligent representation to each affected client? Is the representation not prohibited by law? Does the representation not involve the assertion of a claim by one client against another client represented by the lawyer or the lawyer's firm in the same litigation? And has each client given informed consent, based on an explanation of the facts and ramifications, confirmed in writing?

A majority of state and federal courts hold that oral and written communications with a firm's ethics partner are privileged under the attorney client privilege and the work product doctrine. Frequently, the ethics partner should ask the affected lawyers to outline in writing the facts and circumstances about which they inquire, even if they've already explained it orally. Often the answers may be given orally in response to calls or meetings in the office, many of which arise in the context of real emergency. It is good practice, however, to give a written response or to keep notes and a record of the particular ruling. The ethics partner should get copies of the conflicts letters that go out and the signed returns. Frequently, the firm will have a template, and in some instances the ethics partner will actually do the first draft if that is more efficient. As to determinations, many are informal. Some, however, should be codified for future use if there are unusual issues involved, or where the conflicts arise among firm lawyers practicing in different practice areas or offices.

CORPORATE AFFILIATE CONFLICTS

What happens if one lawyer in the firm represents a corporation, while another is asked to represent a constituent or affiliated organization, such as a subsidiary, when the representation is adverse? See comment 34 "Organizational Clients" to KRCP 1.7. The bottom line is that such representation is not barred, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, or there is an understanding that the lawyer won't represent affiliates, or the lawyer's obligations to one other client could materially limit her representation of the other. This dilemma seems to arise with increasing frequency. The answer often lies in the degree of relationship and the amount of control exercised by one client over the other within the corporate umbrella.

JOINT REPRESENTATIONS AND WAIVERS

Over the years of a lawyer's practice, he or she may be called upon to represent more than one client in the same litigation. Conflicts can easily arise, many foreseeable and some not so. This can cause problems for the unwary. For example, a litigator represents a corporate client and during the course of the litigation is asked to defend an employee whose negligence contributed to the claim. A settlement conference looms on the horizon. The corporation makes it clear that it wants to settle, but the employee says she will not. This places the litigator in an insuperable position, especially if settling for the corporation will leave the employee dangling like a participle. A carefully crafted joint representation letter should make it clear in advance that if the corporation takes one position and the individual client another, the lawyer has the right to withdraw from representing the individual but to continue with the representation of the corporation. Absent such an agreed upon right to withdraw, the lawyer may find himself in the uncomfortable position of having to withdraw for both clients.

This problem is also particularly acute in representation of aggregate or class plaintiffs, as addressed in KRCP 1.7, Comments 29-33 "Special Considerations in Common Representation."

JOINT DEFENSE AGREEMENTS

Joint defense agreements are used among plaintiffs in a multi-plaintiff case, among co-defendants in business or tort litigation, or among defendants in securities or white collar crime cases. They can be very useful in helping develop a case by way of exchanging information, building facts, sharing discovery responses, or strategizing a trial. They also should include waiver/non-disqualification provisions so that if a defendant leaves the litigation through settlement, or simply wants to opt out of the joint defense agreement, the other parties to the agreement will not be prejudiced. For example, a group of defendants in a trust dispute enter into a joint defense agreement in order to discuss litigation strategy, share documents, and divide up the labor on briefing. For one reason or another, one of the defendants opts out of the agreement. His counsel learned things in the meetings that were

subject to the attorney client privilege and the work product doctrines. His client wants to use them at trial against the other defendants in order to prevail on an apportionment instruction. Fortunately for those remaining in the joint defense arrangement, the client leaving the joint defense agreed to the privilege as part of the joint defense agreement and won't be able to use the documents. The other defendants remaining in the agreement consider moving to disqualify the departing counsel from representing his client because they claim he is conflicted based on what he learned while under the tent. In the absence of a provision in the agreement waiving such a future conflict, they may be on solid ground. These are simply examples of why joint defense agreements, while sometimes useful, need to be carefully considered and written with the future twists and turns of litigation in mind.

DUTIES TO PROSPECTIVE CLIENT

KRCP 1.18 "Duties to Prospective Client" can be a trap for the unwary. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client, regardless of whether a relationship ensues. Consequently, the confidentiality provisions of KRCP 1.6 "Confidentiality of Information" apply, and must be adhered to scrupulously. Additionally, subsections (c) and (d) deal with the issue of whether if the attorney-client relationship is not consummated, another lawyer in the firm can represent a client with interests which are clearly adverse. The answer distills down to whether the lawyer being interviewed by the prospective client received disqualifying information, as defined in the rule. To protect himself and his firm, the lawyer should first run a conflicts check before interviewing the prospective client or even obtaining any information in the initial call other than what is necessary to run the conflicts check. The last thing in the world that he wants to confront is a disqualification motion of his firm brought by the prospective client because of his representation of an existing client in the same matter. Additionally, in the meeting it is important to set guidelines/parameters and learn only enough to determine whether to represent the potential client. If there is a conflict that prevents him from representing the prospective client, a timely physical and electronic screen is in order. Nor is he permitted to be apportioned any part of the fee in the event the firm takes representation of another client under these circumstances.

DUTIES TO FORMER CLIENTS

First, is the client a former client as defined in KRCP 1.9 "Duties to Former Clients?" This is why a disengagement letter is frequently as important as an engagement letter. While an engagement letter sets forth the parameters of the engagement, the disengagement letter frees the lawyer from a continuing obligation once the matter is completed. For example, a will is written containing a generation skipping trust. No disengagement letter is sent to the elderly client. Over the years, Congress changes the GST exemption in such a manner that the testator's intent may suddenly have been wiped out by the increased exemption, so that suddenly one group of beneficiaries is cut out in favor of a younger generation. While this example is extreme, it could happen. In the absence of a disengagement letter, does the lawyer have a continuing obligation to contact the elderly client and advise him of the effect of the changes? More than likely, the answer is yes.

Second, in the event a conflict arises for a new client with reference to something that was handled for a former client by another member of the firm, two issues arise. Is the matter "the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client?" If so, will the former client sign a written waiver? Under those circumstances a waiver is mandatory. The more difficult issue is whether it is a substantially related representation. The determination is factually intensive. If it is not substantially related, then no waiver letter is necessary. Under all circumstances, of course, the duty of confidentiality enunciated in KRCP 1.6 applies.

LATERALS, MERGERS AND IMPUTATION OF CONFLICTS

A significant proportion of an ethics partner's time is spent reviewing the work of lawyers or groups of lawyers considering joining her firm. She should do very thorough conflicts checks in advance of making a decision; however, very thorough checks can't be done by computer alone – although it is essential. A great deal of conversation in the form of poking and probing needs to take place – not just for actual or potential client conflicts, but also for the more esoteric issues conflicts. For example, has the lawyer or the group represented clients traditionally hostile to a firm's existing clients, or argued key issues that are antithetical to issues currently being handled by the firm? Under KRCP 1.10 "Imputation of Conflicts of Interest: General Rule," conflicts are imputed to an entire firm. The avoidance of conflicts is key. Clients hate disqualification motions. So do the lawyers currently handling a matter.

DISQUALIFICATION MOTIONS

The first question that arises when confronting a disqualification motion is whether it is a mere litigation tactic. If that is the case, and if there is a genuine absence of a conflict or even a grey area that weighs against disqualification, trial courts generally are loath to grant such motions on the presumption that a client is entitled to choose and keep its own counsel. Defenses typically include absence of a conflict and waiver. It is common to see disqualification motions filed after discovery in a case that has been well under way, and even while substantive motions are under review. About all one can do is address the issues raised methodically, carefully and calmly and hope that the court understands. There are times when disqualification motions are necessary, but they are not something in which a lawyer striving to be great should specialize.

CONFIDENTIALITY AND ETHICAL SCREENS

Ethical screens should be deployed with a high degree of frequency, and used in areas of doubt, even if the clients have not insisted upon them. The confidentiality of information provided by a client is sacrosanct. There are exceptions outlined in KRCP 1.6 (1)-(4) "Confidentiality of Information" pertaining to the prevention of certain death or substantial bodily harm (see also KRCP 1.14 Clients with Diminished Capacity); to obtain legal advice about a lawyer's compliance with the Rules of Professional Conduct; to establish a claim or defense to a criminal charge or a civil claim against the lawyer in which the client is involved; or to comply with other law or court order. The comments flesh these exceptions out.

Frequently screens are utilized to preserve confidentiality in the event of a conflict that has been waived by both clients, either if circumstances require, if the clients – after being informed – request, or if it simply makes sense as a precaution – regardless of whether the clients request it. Screens are both physical and electronic. The lawyers and staff involved should be instructed in writing not to discuss. Screens are used with both current client conflicts, as well as with past clients where there is a danger that confidential communications in a

waived but substantially related matter could be communicated. The imprimatur for such screens is provided in Comments 14-15 "Acting Competently to Preserve Confidentiality" to KRCP 1.6 "Confidentiality of Information." Screens are frequently used with client consent when a lateral partner or associate enters the firm. KRCP 1.10 (d) "Imputation of Conflicts of Interest: General Rule" and Comment (7).

DECLINING OR TERMINATING REPRESENTATION

All lawyers love to be loved. There are very few lawyers particularly adroit about screening out problem clients until he or she gets burned by one. Most individual practitioners and firms over the years have gotten progressively more careful about screening potential new clients, and most of the larger ones have gone to second-partner and practice group reviews. These precautionary efforts notwithstanding, occasionally withdrawal is necessary either because of a client's lack of cooperation that renders the representation unreasonably difficult for the lawyer; failure to pay a fee; asking the lawyer to further work that is ostensibly criminal or fraudulent; or insisting on a course of conduct that a lawyer finds repugnant.

Imagine oneself as a lawyer fresh out of law school, in solo practice, with a client requesting the impossible, stiffing the young lawyer with non-payment, or trying to use the young lawyer to further a repugnant scheme. The young lawyer will need to take a long view as to his or her reputation and career, as painful as it may be to divorce a client. The applicable rule is KRCP 1.16 "Declining or Terminating Representation." The rule itemizes many circumstances allowing a lawyer to withdraw from a representation. Among them are withdrawing if the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or using the lawyer's services to perpetrate a crime or fraud; or insisting on an action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement. The lawyer should pay close attention to subsection (d) on steps to be taken for the client's protection when terminating the representation. Withdrawals should be in the form of very carefully drafted letters, with ample notice to the client and appropriate motions with the tribunal.

THREATENING BAR COMPLAINTS/REPORTING UNETHICAL CONDUCT

The client calls, greatly angered by some action taken by the adverse party or his lawyer during the course of litigation. She wants her lawyer to go for broke and complain to the Kentucky Bar Association. She should pay close attention to 3.4(f), which says that a lawyer shall not present or threaten disciplinary charges solely to obtain an advantage in any civil or criminal matter. This does not mean she can't. However, it is a huge red flag. The lawyer should almost invariably counsel clients not to do so. Note that this rule interplays with KRCP 8.3, "Reporting Professional Misconduct." If a lawyer knows that there is a violation of the Rules of Professional Conduct that "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," he or she must inform the KBA's bar counsel. Note that the reporting requirement is mandatory. Note as well, however, that the bar for reporting is extremely high. Optimally, the lawyer can have a long and fulfilling practice without ever having to invoke this rule against an opponent; however, the mandatory nature of the rule is essential for the protection of the public and the profession.

CONCLUSION: PROFESSIONAL INDEPENDENCE

In an article written in 1997 for the KBA, this author devoted substantial attention to our independence as lawyers. To paraphrase:

The preservation of one's professional independent judgment is vital to a successful and enjoyable law practice. Our daily professional decisions are quite real and it is through these decisions that we build a lifelong sense of professional integrity. We must never forget, for example, that we have the right to choose our clients. We also have the right and the professional responsibility to tell clients what they need, but may not want, to hear. If necessary we have the right, in certain instances, to withdraw from a case if our counsel has not been followed – or even risk being fired by the client in question in the event our advice is unpopular.

These thoughts still ring true. Every time an ethics partner receives a request for guidance on an ethical dilemma, or through simply serving as a sounding board from lawyers inside his or her firm or outside of it, the seriousness of what we do as lawyers is evident. These questions reflect an underlying sense that all lawyers are trying, quite simply, to get it right. We are professionals exercising careful, considered, independent judgment, and this mindset forces us over and over again to return to the Kentucky Rules of Professional Conduct for guidance. Those rules contain a profound degree of wisdom, safety and comfort. B B

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The author had the privilege of serving as president of the Kentucky Bar Association in 1998-99. In the Summer 1997 edition of Kentucky Bench & Bar, while serving as president-elect, he wrote an article entitled "In Search of Professional Integrity." In the instant article he applies several of the Kentucky Rules of Professional Conduct to practical considerations gained from over 17 years in the ethics partner role, distinct from but related to the aspirations voiced in the 1997 article.