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Peer to Peer 3

Conflicts, Waivers & Walls – Ethics Issues for the Real Estate Lawyer

John G. Cameron, Jr.
Partner
Dickinson Wright PLLC
200 Ottawa Ave., NW, Ste. 1000
Grand Rapids, MI 49503
jcameron@dickinsonwright.com

Nancy R. Little
Partner
McGuireWoods
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
nlittle@mcguirewoods.com

Summary: Conflicts can arise at any point in a legal representation, but can sometimes be hard to recognize. Although lawyers often handle the adversity with waivers or ethics screens, those solutions may not solve the problem for all conflicts. This interactive session will focus on the identification of conflicts, including those arising from non-legal activities, and the ways they can be resolved – Or not.

Hypotheticals¹

Conflicts Arising During an Engagement

Fact Pattern 1

You have represented the developer of a proposed shopping center for several years. The key zoning hearing will take place two weeks from now. One of your partners received a call this morning from a nearby landowner (whom your law firm represents on one unrelated matter). The landowner wanted to hire your firm to appear at the zoning hearing and oppose the development. Your partner knew enough to turn down the representation, but now you wonder what effect the landowner's actions will have on your long-standing representation of the developer.

Without the other landowner's consent, may you represent the developer at the upcoming zoning hearing?

Who is the Client: Associations

Fact Pattern 2

You have been asked to represent the regional office of NARDA (the North American Retail Dealers Association), which is based in your state's capital. This is a plum assignment, and you think it might give you a real marketing opportunity—because you will have the chance to “schmooze” many potential clients at regular meetings of the association. However, one of your partners worries that there might be a downside risk to representing the association, because it might prevent your firm from being adverse to members of the association.

If your law firm represents the association, may you take matters adverse to individual retail seller members of the association (without their consent)?

Who is the Client Within a Corporate Entity

Fact Pattern 3

As the General Counsel of your publicly traded REIT client, you naturally find yourself dealing with complicated situations. You just received a call from one of your client's directors, who serves on the Audit Committee. She has asked you to hire an outside law firm to assist the Audit Committee in conducting an internal corporate investigation into possible accounting irregularities. A prominent local lawyer comes immediately to mind, and

¹ The hypotheticals and analyses used in this presentation were based on and derived from materials prepared by Thomas E. Spahn, Partner, McGuireWoods LLP, “Basic Conflicts of Interest Rules: Key Issues, Hypotheticals and Analyses” (2018); “Conflicts Between Lawyers and Their Clients – Part I, Hypotheticals and Analyses” (2014); and “Law Firm Break Up, Hypotheticals and Analyses” (2015), and the presenters gratefully acknowledge their appreciation to Mr. Spahn.

within five minutes you have him on the phone. Before you can explain the situation in any detail, he asks you a simple question.

Who will be the outside law firm's client in this representation—

The board member who called you?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?

Who is the Client In a Closely Held Corporation

Fact Pattern 4

You have represented a closely held strip center developer for several years, dealing with each of the two owners and many of the corporation's employees. The two owners have been quarreling more vigorously than usual lately, and you wonder what that means for your representation.

If the two owners become acutely adverse, can you represent the corporation and one of the owners in litigation against the other owner?

Who is the Client in the Corporate Family: Outside Lawyers' Issues

Fact Pattern 5

You have been asked to bring a lawsuit against a Dallas-based corporation that owns shopping centers. Although your law firm's computerized conflicts search does not reveal any problems, one of your partners just called to tell you that she is handling a small amount of labor work for one of the proposed defendant's sister corporations that does not own or operate shopping centers. Your law firm does not represent the parent. The sister corporations are in different businesses, but both rely on the parent's law department for legal advice.

May you represent your client in the lawsuit against the Dallas-based shopping center owner (without its consent)?

Who is the Client in the Corporate Family: Issues for In House Lawyers

Fact Pattern 6

After about three years of practice, you decided to move in house with your largest client private equity firm. From your work with that client, the firm owns no property, but instead you know that it has several wholly owned subsidiaries and several partially owned subsidiaries. The subsidiaries include shopping center LLCs and a marine transportation company.

As an in house lawyer, will you be jointly representing the parent corporation (which employs you) and all of its subsidiaries?

Business Adversity

Fact Pattern 7

You have developed a statewide reputation for representing retailers in real estate leases. Your largest client is a retailer that sells clothing. You just received a call from your client's largest competitor. You are flattered that the competitor has called you, but you also worry that representing both retailers might create an inappropriate conflict of interest.

May you represent both retailers?

Opposite Sides of the Same Transaction

Fact Pattern 8

In a classic "good news bad news" telephone call, you just learned that your best client has found a buyer for the shopping center it has been trying to sell. The "bad news" is that one of your partners represents the buyer in

nearly all of its real estate matters. Your client has asked whether it is possible for your law firm to represent both the buyer and the seller in this real estate transaction.

May your law firm represent both the buyer and the seller in a real estate transaction?

Former Clients: When Does the Relationship End

Fact Pattern 9

About six months ago, a retailer asked you to prepare an offer for an outparcel she was interested in purchasing. She gave you the figure to include in the offer, and you prepared and sent her a standard offer for her review. You have not heard from her since you sent her the draft offer, and you have no idea whether she ever presented it to the seller. This morning, you received a call from a company who wants you to pursue a trademark infringement action against the retailer (based on some phrases that the retailer uses in her marketing).

Without the retailer's consent, can you represent the company in the trademark action against the retailer?

Does Duration of Relationship Matter?

Fact Pattern 10

A former client just filed a motion to disqualify your firm from handling a matter adverse to it. You check time records, and discover that about a year ago, one of your partners spent less than two hours working for that client during the very brief time that your firm worked for it.

Without the former client's consent, can you take a matter adverse to the former client your firm represented for less than two hours?

"Substantial Relationship" Issues

Fact Pattern 11

Several months ago you began to represent a bank in foreclosing on a shopping center in another state. Your bank client had loaned the shopping center owner several million dollars five years ago, but it defaulted. Your conflicts check had showed that your firm had previously represented the shopping center owner (the matter was called "General Business"), but the matter was closed over 15 years ago. Your firm had not done any work for the owner since then, and the partners who formerly represented the owner could not recall any of the details of their work for it.

You just received a letter from your state bar, reporting that the shopping center owner has filed an ethics charge against you. As you hurriedly read the charge, you learn for the first time that 15 years ago your law firm represented the owner in buying the exact shopping center that is the subject of the foreclosure action you are handling for your bank client. As you do some more checking, you discover that some of the closing documents for the purchase actually contain your partners' signatures as witnesses. The shopping center owner alleges that it is a blatant conflict of interest for you to foreclose on the very same property that your partners assisted him in buying.

Does your representation of the bank in the foreclosure matter violate the ethics rules?

"Playbook" Information

Fact Pattern 12

You formerly represented a REIT on several (but not all) of its legal matters. Over the course of that representation, you learned quite a bit about the REIT's preferred approach to settlement discussions and negotiation strategies, corporate executives' willingness or unwillingness to be deposed by an adversary, etc. About six months after your representation of the company ended, you received a call from another company that wants you to handle a breach of contract action against your former client on a matter not related to your former engagement. When your former client learns of this possibility, its president calls you to complain, arguing that you are prohibited from taking the matter because of the "intimate" knowledge you acquired while representing the company.

Is the type of knowledge you acquired while representing the company sufficient to prevent you from taking the breach of contract matter without its consent?

Revocability of Consents

Fact Pattern 13

Before commencing lease negotiations on behalf of one of your clients where your firm represents the opposite party on unrelated matters, you obtained both clients' consent. The negotiations have now turned more acrimonious than expected, and the client who is opposite you just sent you a letter revoking its consent—and insisting that you withdraw from the negotiations.

Must you withdraw from the representation?

Prospective Consents

Fact Pattern 14

Your firm generally represents shopping center developers. A general contractor recently called one of your partners to see if she was available to handle some labor problems that the general contractor was facing. Your conflicts check reveals that you are not actively adverse to that general contractor, but you know that some of your developer clients deal with this general contractor, and you do not want to jeopardize your firm's opportunity to represent your large developer clients if they ever become adverse to this general contractor.

May you obtain a prospective consent from the general contractor that will allow you to represent your developer clients adverse to it in the future?

Temporary Lawyers

Fact Pattern 15

Your firm has several large lease review projects that you expect to last for several years. You want to avoid adding to your permanent roster of lawyers, so you are looking into various categories of lawyers that might be able to assist you in these projects. You have asked your firm's ethics partner about the conflicts of interest ramifications of hiring such lawyers, many of whom have worked on numerous projects for other law firms.

- (a) Will your firm have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on one large matter involved review and summary of hundreds of existing leases?
- (b) Will your firm have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on privilege review projects, without access to your firm's computer network and the files of other clients?

Doing Business with Clients

Fact Pattern 16

You represent the owner of a small suburban office building in her labor and employment matters (mostly relating to the small clerical staff she employs). You do not perform any real estate work for the owner. Your firm wants to open up a "satellite office" in the suburbs, and you just told your managing partner that the firm should consider leasing space from your client.

- (a) May you lease office space from your client?
- (b) Must your client be separately represented in the lease negotiations?
- (c) Must you make any disclosures to your client or receive any consents from your client before entering into the lease?