CONFLICTS ISSUES FOR LARGE LAW FIRMS

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State Bar of Texas
9th ANNUAL
ADVANCED BUSINESS LAW COURSE
October 13-14, 2011
Dallas

CHAPTER 8

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Stacy Brainin has extensive experience in white collar criminal defense and government investigations, including representation of companies and individuals in both criminal and civil matters. Her practice also includes complex business litigation with an emphasis in health care and professional liability matters. She has defended cases alleging civil and criminal business fraud in state and federal courts throughout the country.

Stacy represents and advises health care providers in civil and criminal disputes with state and federal government agencies. She is experienced in handling internal investigations, compliance programs and legal audits.

Areas of Practice

- Litigation/Trial Practice
- Antitrust and Competition
- False Claims Act/Qui Tam
- White Collar Criminal Defense
- Health Care Fraud and Abuse
- Health Care
- Internal Corporate Investigations
- U.S. Criminal Investigations and Prosecutions
- Health Care Litigation
- Antitrust
- Government Investigations

Education

- J.D., University of Texas, 1984, *high honors*; Order of the Coif; Associate Editor of *Texas Law Review*
- B.A., University of Texas, 1981, *high honors*; Phi Beta Kappa

Bar Admissions

- Texas

Court Admissions

- U.S. Supreme Court
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Second Circuit
- U.S. District Court for the Northern District of Texas
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Southern District of Texas
- U.S. District Court for the Western District of Texas

Recent Publications

- "Where the Wild Things Are: An Update of Recent 'Ethical' Decisions," Co-author with John Middleton, 2010 Northern District of Texas Bankruptcy Bench/Bar Conference, May 14, 2010.
- "Internal Investigations In Health Care: Strategic and Ethical Considerations," Texas Health Law Conference, October 13, 2009.
- "Criminal and Civil Enforcement Actions for Fraud and Abuse: How to Effectively Investigate, Respond and Defend," University of Houston Health Law & Policy Institute's *Health Care Law,* July 2008.

Professional Recognition

- *Texas Super Lawyers* - Criminal Defense: White Collar (2003-2010)
- *Best Lawyers in America* — Antitrust Law (2005-2011)
- *Best Lawyers in Dallas* —White Collar; Antitrust Law (2011)

CHARLES SZALKOWSKI is a partner in the corporate department of Baker Botts L.L.P., where he helps lead the technology and emerging growth companies practice.

For more than 35 years, Mr. Szalkowski has represented public and venture-backed companies, and the investment bankers for, and investors in, those companies. He counsels private equity funds, hedge funds and institutional investors, including large insurance companies, universities and other endowments.

Mr. Szalkowski's clients come from such diverse fields as energy services, telecommunications, consumer and industrial products, software and many ventures whose businesses fall within the intellectual property sphere, including biotechnology, medical devices, Internet content and ecommerce.

Mr. Szalkowski has also represented many large and small clients in mergers and acquisitions (both public and private companies), and in joint ventures, partnerships and strategic alliances.

He also regularly advises a number of nonprofit organizations in connection with their legal affairs, including trade associations, universities, arts organizations, social service agencies and other charities.

In December 2005, Mr. Szalkowski was appointed general counsel of Baker Botts. In that position, he advises his partners and colleagues on professional, ethical and other matters.

J.D. Harvard Law School, 1975
M.B.A., Harvard Business School, 1975
B.S.Accounting, Rice University, 1971
B.A. economics and political science, Rice University, 1971

Winner of the Houston Bar Auxiliary Jaworski Award for outstanding public service, 2006

American Law Institute, elected member
State Bar of Texas, Business Law Section, former Chairman; Venture Capital Committee, cofounder
American Bar Association, Business Law Section, Committee on Federal Regulation of Securities
Houston Bar Association, Corporate Counsel Section, former Chairman
Texas Business Law Foundation, founding Director and former Chairman
BioHouston, former Advisory Board Chairman
DePelchin Children's Center, former Chairman of the Board of Directors
Harvard Business School Club of Houston, former member of Board of Directors
Harvard Law School Association of Texas, former President
Lone Star Flight Museum, Board of Directors
Methodist Children's Home, Board of Directors
Rice University, Board of Trustees

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BY STACY L. BRAININ

WHILE IT MAY BE THE CASE THAT LARGE LAW FIRMS are more frequently impacted by disparity among the various states' disciplinary rules, all lawyers have an interest in a well-reasoned body of rules which govern lawyer conduct. The profession as a whole has an interest in rules which are as uniform among the states as they can be. Such an approach is increasingly necessary as lawsuits and transactions for all lawyers are more and more interstate and global in nature. Texas may well have good reason to depart from the ABA promulgated Model Rules, but those departures should not be wholesale; instead, they should be based on cogent reasoning in each instance.

Day in and day out, lawyers and law firms confront conflict of interest issues more frequently than any other legal ethics issues, probably more frequently than all other issues combined. For large law firms with offices in different states, the lack of uniform professional conduct rules in the United States, where lawyers are regulated on a state-by-state basis poses serious problems in analyzing and resolving conflicts issues. More specifically, for large law firms with a significant presence in Texas, it is particularly difficult to navigate the conflicts minefield given the unique "Texas only" rules in the current version of the Texas Disciplinary Rules of Professional Conduct.

To highlight one of the more infamous "Texas only" conflicts rules, consider that in most of the United States, a lawyer may not sue a current client without that client's consent, even on an unrelated matter.

TEXAS ONLY CONFLICTS RULES DON'T MAKE SENSE

Lawyers in small firms, large firms and solo practitioners are often involved in transactions and litigation in other states. Texas lawyers and law firms also frequently cross state lines in furtherance of their clients' matters. That is true in depositions, trials, administrative and regulatory matters, and business transactions. That trend will likely continue in the future. Having to deal with rules that differ markedly from state to state is complicated and expensive, for both law firms and clients. Making the Texas rules more consistent with national standards would help to simplify these multijurisdictional legal matters and reduce costs for clients and law firms.

In fact, the current trend is for states to move away from localized ethics rules and make their ethical standards more consistent with national standards as set forth in the ABA Model Rules. For example, the State Bar of California is currently in the final stages of revising its ethics rules to be more consistent with the ABA Model Rules. While few states adopt every Model Rule, adopting rules that increase national consistency and facilitate multijurisdictional practice is desirable. That is the national trend, and it is a trend that Texas should join.

With that background and in the context of the recently rejected changes to the Texas rules, my firm joined several large Texas-based firms in submitting proposed rules 1.06 (Conflicts of Interest: Current Clients), 1.07 (Imputation of Conflicts: General Rule) and 1.09 (Conflicts of Interest: Former Clients) which closely tracked ABA Model Rules 1.7, 1.10 and 1.9 respectively, together with proposed definitions of "confirmed in writing" and "informed consent" and suggested comments to Rule 1.06 to address the special considerations in representing multiple clients. These proposed rules addressed some of the areas where uniformity among the states' professional rules would be beneficial to most attorneys and their clients.

For example, to highlight one of the more infamous "Texas only" conflicts rules, consider that in most of the United States, a lawyer may not sue a current client without that client's consent, even on an unrelated matter. Texas Rule 1.06 is unique among state professional conduct rules because it explicitly allows a lawyer to be adverse to a current client in an unrelated matter without consent. The Texas Rule is clearly more permissive and would seem to benefit Texas lawyers but in practice, it makes conflicts analysis more complicated. The

Fifth Circuit has held that lawyers appearing in Texas federal courts should comply with the Model Rules and ordered that a lawyer suing an existing client in Texas federal court on an unrelated matter violates a duty of loyalty and should be disqualified.[1] At least one Texas appellate court judge has opined that the rule should be the same in Texas state courts.[2] Given that the practices of most law firms often cross state lines and involve matters that might end up in federal court, consistency requires adherence to the stricter national standards regardless of the unique Texas rule. Bringing the Texas rule in line with the national and federal standards would avoid any unnecessary confusion and potentially costly disqualification proceedings.

LATERAL SCREENING PROTECTS CLIENTS AND ALLOWS APPROPRIATE LAWYER MOBILITY

Large law firms have long lobbied for a lateral screening rule like ABA Model Rule 1.10 that provides an alternative to imputed disqualification of an entire firm. Given the ever increasing frequency of lateral movement among firms and across jurisdictions, the adoption of reasonable lateral screening rules make sense in today's legal market.[3] Without such rules, potential conflicts of interest unreasonably restrict the employment options of lawyers attempting to move between law firms and limit the ability of law firms and clients to hire the lawyers of their choice. The lack of lateral screening rules effectively prohibits lawyers from joining certain firms due to the imputation of lawyer knowledge regardless of whether or not effective measures have been taken to protect the confidences of clients, all without any commensurate benefit to clients. State adoption of lateral screening rules such as ABA Model Rule 1.10 is necessary to avoid these pitfalls and unnecessary strictures.

ABA Model Rule 1.10 allows a lateral lawyer's new firm to avoid disqualification by imputation due to the lateral lawyer's association with a prior firm so long as the lateral is timely "screened." The rule also requires notice of the potential conflict to affected clients, a description of the screening procedures used (including prompt responses to objections from any affected client), review before a tribunal if requested, and periodic certifications if requested. The uniform adoption of this rule by states, including Texas, would ease the current burdens on lawyer mobility by permitting greater flexibility of movement between firms and promote the freedom of law firms and clients to engage the lawyers of their choice while maintaining the confidences of former and current clients.[4]

ADVANCE CONFLICTS WAIVERS SHOULD BE PERMITTED FOR LAW FIRMS AND SOPHISTICATED CLIENTS

Clients more and more seek to use different law firms based on particular expertise in a variety of areas of practice. As law firms and clients grow in size, so does the likelihood of firms taking on new clients who are or may become adverse to former or current firm clients on wholly unrelated matters.[5] Advance waivers of these conflicts of interest make sense for law firms and sophisticated clients, as they avoid the inevitable delay in taking on new representations until conflicts are resolved. As long as client information is protected, neither the law firm nor the client is adversely impacted by an advance waiver. As with any concurrent representation of adverse parties, even that which is prospective, client confidentiality is of paramount concern. All law firms should have procedures in place for protecting confidentiality and explaining the process when requesting an advance waiver. Advanced technological capabilities of law firms and the tools available for protecting client confidential information provide additional support for the use of advance waivers by law firms and sophisticated clients.

PROSPECTIVE CLIENT/BEAUTY CONTESTS/ SCREENING TO PREVENT DISQUALIFICATION

It has become common for prospective clients to interview multiple law firms prior to hiring counsel for a new matter. Those interviewees should have a screening mechanism available to them to avoid disqualification in the event they are ultimately not retained and end up adverse with regard to the subject of the interview. Model Rule 1.18 delineates a lawyer's ethical obligations to prospective clients who do not become clients. The rule clarifies that a lawyer is obligated to protect confidences from prospective clients,[6] and that information received during pre-engagement consultations can be a basis for disqualification.

Significantly, however, Model Rule 1.18(d) permits the disqualified lawyer's firm to avoid disqualification from related matters for other clients if: (a) the personally disqualified lawyer takes reasonable steps to minimize the amount of confidential information received from the prospective client; (2) the personally disqualified lawyer is screened from any related matter and receives no part of the fee from such matter; and (3) the former prospective client is notified of the screen in writing.

Among the recently rejected changes to the Texas rules was

a new rule regarding prospective clients which included the concept of an advance waiver but expressly imputed any conflict to all affiliated attorneys. Again, as with lateral screening under appropriate circumstances, Model Rule 1.18 protects prospective clients while not unduly restricting a firm's ability to represent other clients in the future.

CORPORATE FAMILY CONFLICTS

Some authorities have adopted a bright-line test, holding that a firm may not be adverse to an affiliate of a corporate client. However, numerous authorities have declined to apply a bright-line test and have instead analyzed the particular facts of the corporate family situation. Comment [34] to ABA Model Rule 1.7, now adopted in most jurisdictions, supports this approach. It states:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Also rejecting a bright-line approach, ABA Formal Opinion 95-390 (Jan. 25, 1995) held that "affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly-owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company." Clarification and uniformity of approaches to the corporate-family situation would avoid unnecessary conflict issues and disqualification.

CONCLUSION

While there may be instances where variety and experimentation among the fifty states is a good thing, that is not the case with our disciplinary rules. General uniformity makes sense and benefits all concerned.

Stacy L. Brainin is a Litigation Partner with Haynes and Boone, LLP and serves as the firm's General Counsel. Ms. Brainin is an adjunct professor at The University of Texas School of Law. ★

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[1] *In re Dresser Industries, Inc.* 972 F.2d 540 (5th Cir. 1992).

[2] *See Delta Airlines Inc. v. Cooke*, 908 S.W.2d 632 (Tex. App.–Waco 1995, orig. proceeding) (dissent).

[3] *See* Fallyn B. Reichert, "'Screening' New York's New Rules - Laterals Remain Conflicted Out, 31 Pace L. Rev. 464, 468 (stating that fifty-three percent of lawyers entering the legal field between 2002 and 2007 made at least one employment move between their second and seventh years practicing law.); *see also* Bureau of Labor Statistics, Economic News Release; Table A-14: Unemployed Persons by Industry and Class of Worker, Not Seasonally Adjusted, http://www.bls.gov/news.release/empsit.t14.htm (last modified May 6, 2011) (showing that the national unemployment rate in the Professional and Business Services sector for April 2011 was 9.1 percent).

[4] "Allowing screening as an alternative to imputed disqualification of the entire firm gives clients more freedom to choose attorneys, allows lawyers greater flexibility in moving among employment situations, and permits law firms to hire experienced attorneys without the risk of imputed conflicts." Reichert *supra* note 3, at 468 (discussing the New York lateral screening rules and the trend toward uniform ethics rules and recommending that New York adopt a provision similar to Model Rule 1.10 allowing lateral screening).

[5] Michael J. Dilernia, Advance Waivers of Conflicts of Interest in Large Law Firm Practice, 22 Geo. J. Legal Ethics 97, 132

[6] People who communicate unilaterally to a lawyer without any reason to expect the lawyer is willing to discuss entering into a lawyer-client relationship are not "prospective clients" covered by the rule. Comment [2] to Model Rule 1.18.