AVOIDING TROUBLE IN COMMON MULTIPLE CLIENT SITUATIONS

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Potential Signs of Trouble:
- Webs of relationships
- The passage of time
- Changes in status
- Personal attachments
- Lack of clear protocols for potential conflicts
- Hierarchical decisionmaking
- Changes within firm (especially laterals/mergers)
- Business pressures
- Triangular relationships

Tools for Addressing the Signs:
- Anticipation
- Engagement letters (confidentiality and conflicts are the key issues*)
- Automatic reassessment with every new client/status change
- Solo interviews up front
- Clear protocols
- Culture attuned to conflicts issues raised by any attorney involved
- Ability to discuss, negotiate, handle difficult interpersonal discussions with fellow lawyers and clients
- Withdrawal or formal termination of representation

* See draft paragraphs on confidentiality and conflicts on next page of this handout.
Model Language on Confidentiality and Conflicts for a Client Engagement Letter:


Confidentiality. Any information we receive from either or both of you may be shared with others in our office in order to carry out our engagement. The information will not be communicated to others, particularly persons outside our office, except to the extent we believe is reasonably appropriate to share with your other advisors. As between yourselves, you have agreed that there will be full and complete disclosure of all information that is relevant and material to our engagement, including information that one or both of you might characterize as confidential. Accordingly, we may provide information to one of you that we receive from the other regardless of the time or manner in which it is communicated to us.

Conflicts. ...As between the two of you, we will not advocate the interests of one of you over the other. We may not be able to assist with matters in which your interests are directly adverse, such as negotiating and defining your respective interests in a property-status agreement. Should a serious conflict in your interests develop, we may be required to withdraw from representing both of you.
Scenario 1.

Representation of Multiple Family Members in Estate Planning


New client, Cleo, arrives at the office of Anita, the attorney, for estate planning. In the course of the initial interview, Cleo mentions that she has a fiancé, Frank, whom she will marry shortly and, although she does not now have substantial assets, she expects to inherit a one-third interest (along with her two sisters) of her parents’ family business, Family Enterprises, Inc. (FEI). She is currently employed as comptroller at FEI. Frank is head of marketing. Her sisters are not active in the operations or management of FEI. For her current Will, she would like to leave her estate to her sisters. She also wonders whether a premarital agreement would be wise, but feels uncomfortable discussing it with Frank, since he is involved in FEI. She asks for the attorney’s help in broaching the subject with Frank.

It turns out Frank is very receptive to the idea of a premarital agreement because Frank is 15 years older than Cleo, has substantial assets, acquired primarily through inheritance, and has two minor children by a prior marriage. Cleo and Frank marry after executing a premarital agreement, Cleo represented by Anita and Frank represented by his own separate counsel. The agreement provides that their property will remain separate, including property they each already own, acquire during the marriage by inheritance or obtain during the marriage through their employment. In addition, they each waive their rights in each other’s property in the event of divorce or death. Cleo then comes in to redo her Will, now that she is married, and brings Frank along since he does not have a Will.

Frank’s assets include a beautiful home in which the couple now resides. Even though he signed the premarital agreement, Frank wants to provide for Cleo in his Will. In particular, Frank wants Cleo to be able to continue to live in his home if he predeceases her. However, Cleo will not be able to afford the maintenance on the home on her current income. He also plans to name Cleo as executor of his Will.

To compensate for the bequest he plans to make Cleo, Frank decides to create inter vivos trusts for his children and wants to transfer $650,000 to each trust. He would like for Cleo to split the gifts to the trusts with him.

Eventually, Cleo’s father, Thurgood, calls her estate planning attorney, Anita, because he and his wife, Willamina, have been unhappy with their own attorney and Cleo has been so enthusiastic about hers and recommended Anita highly to her parents. Thurgood makes an appointment with Anita’s secretary to meet Anita to redo his and his wife’s Wills.
Anita is not worried about a conflict of interest in her representation of Cleo and Cleo’s parents because Cleo referred her parents to Anita and Cleo serves as comptroller of FEI and is thus fully informed of her parents’ major asset. However, after Cleo’s father arrives at Anita’s office, he reveals that he wants to redo his and his Wife’s Wills to leave the voting stock of the business to Frank, not Cleo, as his successor to run the business because he has more confidence in Frank’s business acumen than in Cleo’s. He will leave non-voting stock to Cleo and her sisters. He says Cleo’s mother agrees and neither of them wants Cleo to know of his business succession plan because it would just upset her.

**Signs of Trouble:**
- Webs of relationships
- The passage of time
- Lack of clear protocols

**Tools:**
- Anticipation
- Engagement letters
- Automatic reassessment with every new client
- Clear protocols
Scenario 2.

Representation of Multiple Plaintiffs with Closely Aligned Interests

From Susan P. Shapiro, Everests of the Mundane: Conflict of Interest in Real-World Legal Practice, 69 FORDHAM L. REV. 1139, 1164-1165 (2001) (paragraphs added) (Interview #86 from a Collar County [Illinois] firm with fewer than 10 lawyers)

About three years ago I represented a group of homeowners. We were plaintiffs in that action. Everything went fine until I settled it and then it was an issue of how we were going to split up the proceeds. I maxed out on both defendants’ policies. I had a total of... it’s either nine or eleven clients. And the issue was, “okay, how are we going to divvy this stuff up?” Because we couldn’t really break it up based upon a per capita basis. It had to have some relationship to the loss that had been sustained by each of these parties.

And, basically, what I did was I called everybody in. ... I ordered some pizzas and some beer. The beer was had after the agreement was reached. ... And the deal was, “look folks, here are a few alternatives. If you can’t agree, I’m going to have this money paid into the court and the court can decide it. Now, does that really mean you each need to retain alternate counsel? Well, it might, you know, for that stage of it. You’ve all agreed that you wanted to settle this thing for this amount.” And, you know, at that point, “here’s what I suggest.”

And there were a couple of alternatives. And truly, I said, “we can do it based on the number of units. If you’re a unit owner ...” And, there were a total of five units that were represented. So there must have been nine people. And I said, “we can take the total amount and divide it by five. That would mean that one person was actually getting a double share.” ... Another way was to say, “okay, there are nine people; divide the total amount by nine. Another way is to base it on your total amount of your loss— ... the proportion that held up to the proceeds.”

When we ended up, we settled it based upon splitting it five ways in equal shares. Why? Everybody’s loss was speculative. And everybody had actually been reimbursed through insurance for, really, 100% of their loss. And what we ended up with was “gravy,” so to speak. So, they all decided to do it that way. ...

Let me just put it this way: if I had it to do all over again, I could have represented one or two of those people, gotten the same amount—just on one. Because, seriously, I should never have taken all of them. ... You know, honestly,
I had never been in that circumstance before. And, what I did was I went over to the law library and tried to see what I could as far as any research on the issue. There isn't much, as you know. And what I came up with, was I called around to some of my friends who were senior members of the bar. And they said, “why don’t you try this, [names himself].” And, basically, I winged it.

**Signs of Trouble:**
- The passage of time
- Changes in status

**Tools:**
- Anticipation
- Engagement letters
- Withdrawal or formal termination of representation
Scenario 3.

Representation of Closely Held Corporation and Principal in Corporation

From James L. Kelley, LAWYERS CROSSING LINES (ch. 3 “Breaking Up is Hard to Do”) (2001) 47, 48, 49-50, 51, 56-57

“Were you aware that on or about July 16, 1992, your company’s law firm was considering whether Admiral Murphy could divert business to a new company, allowing your company to wither?”

“No. Why would I think that? They were our lawyers.”

--Colloquy between examining attorney and Margot Bester of Murphy & Demory (M&D), in Murphy & Demory v. Admiral Murphy

Deanne Siemer’s [a partner with the law firm of Pillsbury, Madison & Sutro] work for M&D had begun shortly after the firm was founded in 1987.... She also worked for the Admiral [one of the principals of M&D] on personal matters, like his will, and on matters involving both personal and firm interests which were not readily separable. However, all … bills, whether related to M&D or the Admiral, were sent to and paid by M&D.

...Siemer directed Frazer Fiveash, an associate, to do research and write a memorandum on the law governing dissolution of Virginia corporations, the state in which M&D was incorporated. In July, Siemer asked Fiveash for a memorandum concerning whether the Admiral would have the right to divert business from M&D to a new company to be controlled by him alone, allowing M&D to “wither.” Fiveash expressed concern about a conflict of interest, but did as she was told. ...

As the break-up became imminent, the legal work involved in making it happen fell primarily to Keith Mendelson. Mendelson had come to Pillsbury, Madison & Sutro as an associate in 1984. He was promoted to “senior counsel” in 1991 and was under consideration for partner in August 1992 when Siemer drew him into the problems at M&D. Mendelson first became involved on Friday, August 28, when he was called into meetings with other Pillsbury lawyers [and two other M&D employees], ostensibly for his expertise in corporate law. Mendelson’s notes included the statement that he was “uncomfortable that what we were trying to do was find out information about a client of ours,” but he was not uncomfortable enough to decline becoming involved. ...

Mendelson had expressed concerns about a conflict of interest to Siemer before [a] meeting with [another firm principal]. Immediately after leaving [the other firm principal’s]
home, Mendelson called Siemer from a phone booth to restate his concerns. [Siemer] reassured him that they didn’t have a conflict. Siemer flew to California that afternoon on other business and later to Europe, leaving Mendelson to cope with a rapidly unraveling situation. ...

Mendelson hadn’t found Siemer’s judgment completely reassuring. On September 1, after [the third D&M principal] had fired the Pillsbury firm but it was still representing the Admiral, Mendelson telephoned Ben Vandegrift in Sweden. Vandegrift was Mendelson’s supervisor and head of the corporate group in the Washington office. Mendelson had come to recognize that they were dealing with “a thorny, hard issue” and he wanted to get Vandegrift’s judgment on it. Mendelson described the facts to Vandegrift who concluded that they didn’t present a problem. Vandegrift added that “ultimately, the partner in charge [Siemer] has to make that decision.” Mendelson also sought out George Sugiyama, a member of the firm’s professional responsibility committee. Sugiyama had acknowledged that it was a “tough call” but he, too, saw it as Siemer’s decision.

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- Personal attachments
- Lack of clear protocols
- Hierarchical decisionmaking

**Tools:**
- Anticipation
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- Firm protocols
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- Withdrawal or formal termination of representation
Scenario 4.

Representation of Trade Association and Individual Members

From Susan P. Shapiro, 69 FORDHAM L. REV. at 1170 (paragraphs added) (Interview #16 from a Chicago firm with more than 100 lawyers)

The most difficult [conflict of interest] that I had—and it’s only one in four years that I’ve taken to the Executive Committee. ... And by utter coincidence, it’s the only ... formal vote I’ve been involved in in the Executive Committee for four years. We felt we should go of record, so that people would know how we voted on this. And it was a close vote.

It was dealing with a trade association, a few of whose members were going to be joined in some litigation—it was in the nuclear energy field—joined in some possible litigation in southern California, where we had been asked to represent private parties suing certain utilities. And we have been general counsel forever for the [trade association]—a very, very active trade association.

Then that gets into “who’s the client?”—these individuals or the Association? And we had to ferret through contacts with the individual utilities. ... Because you’re not automatically deemed to be the attorney for the members of an association. That doesn’t necessarily follow. And so you have to gather some facts. So, that was a very difficult issue for us to sort out.

And we concluded that there was a conflict, because we had—over the course of many years—we had done a fair amount of work for individual members, including some of the target defendants on the west coast. And when it came to, “should we ask these members of the Association for a consent,” we voted not to. And that’s where we went to the vote on “was there a conflict?” Yes, there was.

“What should we do about it,” was the much more difficult issue. And there we voted “no” for a good reason. The issues that were being raised were gut issues for members of the Trade Association. And to have the lawyers—who have been the Trade Association’s lawyers for twenty years—be on the other side of a gut issue for the Trade Association and, therefore, its members, would have been bad. ...

The group of lawyers ... on the west coast who were urging us to seek consent, were brand new to the firm. So we had a business issue internally. ... So
we had the more peculiar business setting of a group of lawyers who had just joined the firm, who felt very strongly, “Gee how, how could you? We're just.... We want to prove ourselves in [names firm]. We’ve got this great opportunity. Just ask for consent. That’s the least ....”

And we say, “well yeah, but you don’t understand.” “Well, why didn’t you tell us that when we joined?” “Well, we didn’t know that you were going to have this.” So that was a particularly thorny issue. That was complicated. It wasn’t complicated intellectually; it was complicated in the personal relationship.

And that’s where I felt that—in fairness to the new attorneys who had joined us on the west coast—that the decision should not be made by our Committee or by me. ... I’ve taken it to the highest counsels of the firm. Full presentation, opportunity to think about it, and then we went to a vote. Which is what we did. So, I think that was the most difficult one that we’ve handled.

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**Tools:**
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Scenario 5.

Representation of Insured When Costs of Representation Borne by Insurer

From Susan P. Shapiro, 69 FORDHAM L. REV. at 1173, 1174-1175 (paragraphs added) (Interview #33 from a Chicago firm with 50-99 lawyers and Interview #54 from a firm with 20-49 lawyers located in a large city [in downstate Illinois])

Our biggest problem is really not conflicts. ... You know, I have a very strong belief that whatever client you’re representing, that you represent them to the best of your ability. And you should do all those things necessary to win—within certain parameters. Once you’re in those, I mean, gloves pretty much, are off. ... I mean, once you get to the courtroom, it’s a fight. And the question is: who fights their way out of it the best? And sometimes what happens is not a conflict.

But, let’s say, for example, you have a client where three companies have asked you to represent a different client. And now you’re in the middle of a hell of a fight. There’s no conflict per se. But, companies that send you a lot of business. ... Insurance companies can become very disenchanted with the fact that you’re kicking one of their insureds in a fight, where now the defendants have decided that they’re going to fight with each other. That happens.

And, fortunately, most companies recognize that fact. And even when they get upset, you tell them, “Well, if I were representing you here, would you want me to back off merely because that other person also sends me business?” Well, they always answer that “No.” And most of them recognize that.

But that’s an ongoing problem that all firms that do our kind of work face. And that is that it’s rare that, ... in the cases we’re in, that the other defendants that are in the case are probably not assigned to attorneys that that client—that is, the insurance company—also assigns you business. ... It’s inevitable almost every case we’re in. Then the question is: how do you handle it? How do you get into a situation so you don’t annoy the other client? Well, I think what you’ve got to do is you represent the client in the case, who is the insured, not the insurance company. And you have to do your best....

But where you get into a problem ... is when the insurance companies—because they’re so cost-conscious—will send you a file and they’ll say, you know, “protect the interest of the insured. Follow the appropriate pleadings, motion, whatever.” And the next sentence says, “do not start any discovery until
we notify you.” Or they’ll say, “minimize the amount of discovery.” I know they’re looking at the cost side of it. Well that puts you in a real box. Because your duty is owed to the client, not to the insurance company at that point. And, yet, if you send a bill say, to the insurance company, and you show, say, a thousand dollars of interrogatories, some paper chase or some depositions—and you aren’t authorized to do it, but yet you feel you have to do it to learn things about the case, that can cause a conflict.

And we’ve just gone ahead and did it. We just go ahead and do what we think has to be done. We get these letters and I look at them and say, “that’s interesting, but I’m the one to be sued [for malpractice], not the insurance company.” So that’s what we do. .... I’m sure any lawyer that does defense work has gotten these letters from insurance companies. “Cut down costs, cut down costs.” And things like, “don’t use any more than ten hours of legal research.” Right! [laughter] ... And we’ll send a bill in. And somebody up in never-never land—with a red pencil—goes through these. He will audit my statements and says, “Ah ha! I see ten point five hours of legal research. [laughter] We’re going to dock you for point five hours.” So, you think, “geez, you know, come on!” So that’s a conflict. ...

You owe your duty to your client to do as much as you can, what you think is appropriate. And someone else is trying to put a dollar bill on that and say, “don’t do it.” So yeah, that comes up with clients sometimes.

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- Business pressures
- Triangular relationships

**Tools:**

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