Tuesday, October 20
2:30 pm–4:00 pm

107 Hey Counselor, Do You Have a Minute? Ethical Conflicts for In-house Counsel

Ann Cosimano
General Counsel and Secretary
ARAG

Rowland Geddie
Vice President, General Counsel and Secretary
O'Sullivan Industries, Inc.

Adrienne Levatino
Vice President and General Counsel
Patrick Engineering Inc.

Copyright © 2009 Association of Corporate Counsel (ACC) and contributing authors.
Reproduction permission requests should be directed to legalresources@acc.com or +1 202.293.4103, ext. 342.

The information in this ACC Annual Meeting material should not be construed as legal advice or legal opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or the ACC. This ACC Annual Meeting material is not intended as a definitive statement on the subject addressed. Rather, it is intended to serve as a tool providing practical advice and references.

Speaker Biographies

Ann Cosimano

Ann Cosimano is general counsel and secretary for ARAG, in Des Moines, where she directs the company's legal, regulatory, compliance and provider relations departments. She is responsible for coordinating and assisting in the management of the corporation's legal affairs including those related to contract drafting, review and negotiation; product development and distribution; employment related matters, intellectual property, and risk management.

Prior to joining ARAG, Ms. Cosimano served as in-house counsel for Mid-America Housing Partnership, a non-profit, low-income housing organization.

Ms. Cosimano serves on the board of directors of the American Prepaid Legal Services Institute (API). She is a member of ACC, ABA, the Polk County Women Attorneys, Polk County Bar Association, and the Iowa State Bar Association. Ms. Cosimano is actively involved in the ARAG Cares Program, which provides education and free legal services to residents of the Family Violence Center in Des Moines.

Ms. Cosimano received a bachelor's from Peru State College in Peru, Nebraska and attended Creighton University School of Law in Omaha, where she received her JD.

Rowland Geddie

Rowland H. Geddie III has served as the vice president, general counsel and secretary of O'Sullivan Industries Holdings, Inc. As such, he addresses all of the legal issues facing the company, including SEC reporting, contracts, commercial law, risk management, litigation, employment law, benefits, real estate and intellectual property.

Prior to joining O'Sullivan, Mr. Geddie addressed corporate and securities law issues as contract attorney for Tandy Corporation, as senior counsel to Houston Industries Incorporated/Houston Lighting & Power Company and as associate general counsel for the Lower Colorado River Authority. His first position after graduating from law school was as an associate at Baker & Botts in Houston, Texas, where he worked on corporate, securities, mergers, acquisitions and dispositions, and municipal finance.

Mr. Geddie is a long-time member of ACC and is active in the Small Law Department Committee and the Corporate and Securities Law Committee. He is a member, treasurer and past president of the Board of Directors of the Barton County Chamber of Commerce, Treasurer of the Board of Directors of Stone's Throw Dinner Theatre, a member and past president of the Lamar Rotary Club and Vice President and past President of the Tri-State Swim Conference.

Mr. Geddie received his BA and JD from the University of Mississippi.

Copyright © 2009 Association of Corporate Counsel

Adrienne Levatino

Adrienne M. Levatino is vice president and general counsel of Patrick Engineering Inc. and its affiliated companies ("Patrick") in Chicago. Ms. Levatino's essential responsibilities include counseling officers and senior management on legal issues including risk management, complex transactions, professional and corporate licensure, government procurement and regulatory requirements, sales and marketing practices, intellectual property, employment law, and employee compensation and benefits. Ms. Levatino also drafts, reviews, and negotiates professional services contracts with clients, subcontractors, potential business partners and vendors, and manages outside counsel representing Patrick in matters ranging from employment discrimination actions to construction litigation.

Prior to joining Patrick, Ms. Levatino worked for Exelon Corporation in a variety of positions ranging from senior corporate and legislative counsel to corporate communications director to director of external relations for transmission policy. She has also served as vice president for public affairs of the Illinois Hospital Association. Her early legal practice was concentrated on providing corporate, zoning, election law, transactional and litigation counsel to units of local government throughout Illinois.

Ms. Levatino is a member of ACC, ABA, the Chicago Bar Association, and the American Agricultural Law Association.

Ms. Levatino received her BA from Northwestern University and earned her law degree at Loyola University (Chicago) School of Law.

Copyright © 2009 Association of Corporate Counsel

Average time spent by an employee on legal life events in a 12 month period:

• Family-related	57 hours
• Financial-related	54 hours
• Automobile-related	31 hours
• Home-related	22 hours

“Measuring the Effects of Employee Financial & Legal Woes”, Russell Research, 2007.

Copyright © 2009 Association of Corporate Counsel

Who is Your Client?

- ABA Model Rules of Professional Conduct, Rule 1.13
- ABA Formal Ethics Opinions
  - 95-390(1995)
  - 91-361(1991)
- In re Banks, 283 Or. 459, 584 P.2d 284 (1978)

Copyright © 2009 Association of Corporate Counsel

Attorney Client Relationship

- When is it NOT formed
  - When giving general legal advice (State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion Interim No. 96-0013)
  - Explanation can't help
  - Referral to another attorney
  - Legal issue beyond your competency
  - One-sided request (unsolicited e-mail)

Copyright © 2009 Association of Corporate Counsel

Attorney Client Relationship

- When is it formed…
  - Intent of client
    - Consent of lawyer
    - Lawyer should know that person is reasonably relying on provision of services
    - Need not be in writing
    - Implied is enough

A Concise Restatement of the Law Governing Lawyers, American Law Institute Publishers, 2007.

Copyright © 2009 Association of Corporate Counsel

Beware of Inadvertent Clients

- ABA Model Rule 1.3
- Westinghouse Electric Corp v. Kerr-McGee Corp, 580 F. 2d 1311, 1319 (7th Cir. 1978)
- Restatement (Third) of the Law Governing Lawyers
- In re Cordova, 96 C#571, MR16199 (Nov. 22 1999)
- Herbes v. Graham, 180 Ill. App. 3d 692, 536 N.E. 2d 164 (1989)
- In Re Petrie
- Togstad v. Vesely, Otto, Miller & Keefe, MN Supreme Court (1980)

Copyright © 2009 Association of Corporate Counsel

Now You Have a Client, What's Next?

- Lawyer's duties
  - Advance client's lawful objectives
  - Act with competence and diligence
  - Keep confidences
  - Avoid conflicting interests
  - Deal honestly
  - Do not use privileged information adverse to client's interests
  - Fulfill contractual obligations

A Concise Restatement of the Law Governing Lawyers, American Law Institute Publishers, 2007.

Copyright © 2009 Association of Corporate Counsel

Now You Have a Client, What’s Next?

- Rules of Professional Conduct
  - Confidentiality (MPRC 1.6)
  - Lack of Conflicts (MPRC 1.18)
  - Competency (MPRC 1.1)
  - Diligence and Promptness (MPRC 1.3)
  - Ability to Withdraw (MPRC 1.16
  - Licensed and Legally capable within jurisdiction

Copyright © 2009 Association of Corporate Counsel

Conflict With Your Corporate Client

- Model Code 5-18
- ABA Model Rule of Professional Conduct 1.7 and 1.13
- ABA Formal Opinion 95-932

Copyright © 2009 Association of Corporate Counsel

Impact on Privilege

- Hunt v. Blackburn, 128 U.S. 464, 470 (1888)
- Malco Manufacturing Company v. Elco Corp., 45 F.R.D. 24, 26 (D. Mina 1968)
- Iderling Finance Management L.P. v. UBS Paine Webber Inc. 782 N.E. 2d 895 (Ill. App. Ct. 2002)
- Consolidated Coal Company v. Bucyrus Erie Company, 89 Ill 2d. 103, 432 N.E. 2d 250, 59 Ill. Dec. 666(1982)
- Illinois Rule 1.6 and 1.13

Copyright © 2009 Association of Corporate Counsel

UpJohn v. United States

- "Corporate Miranda" warning
  - "We represent the company. These conversations are private, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company and not to you."

Copyright © 2009 Association of Corporate Counsel

Expansion of Upjohn Warning

- Employee may hire his/her own attorney
- Employee’s non-cooperation may result in termination up to and including termination
- Confirm understanding until clear

Copyright © 2009 Association of Corporate Counsel

Cases Arising out of Upjohn

- U.S. v. Nicholas
  - Evidence disallowed due to personal lawyer relationship taking precedence over corporate client
- In re Grand Jury Subpoena: Under Seal
  - No attorney client relationship found

Copyright © 2009 Association of Corporate Counsel

Lessons from Upjohn

- Represent only one client – the corporation
- Anticipate investigational directions
- Retain outside counsel for different roles

Copyright © 2009 Association of Corporate Counsel

Insurance Considerations

- What does D & O cover
  - Wrongful acts while acting solely as director or officer
- What D & O does not cover (possibly)
  - Professional liability
  - Legal malpractice
  - Disciplinary proceedings
  - Investigations regarding law licenses
  - Claims brought by corporate employer
  - Pro bono or moonlighting claims

Copyright © 2009 Association of Corporate Counsel

Employed Lawyer Policy

- Covers:
  - Acts committed in provision of legal or professional services performed for organization
  - Being named personally in civil, administrative or criminal proceeding
  - Personal injury claims by non-client third parties
  - Claims by co-workers for discrimination, harassment or wrongful termination

Copyright © 2009 Association of Corporate Counsel

Potential Solutions

- Bear the risk, lend a hand
  - Seek permission of the Board
  - Signed consent forms consistent with Upjohn and subsequent cases

Copyright © 2009 Association of Corporate Counsel

Potential Solutions

- Refer to a Friend
  - Disclaim knowledge of legal ability
  - Never assert potential for successful outcomes

Copyright © 2009 Association of Corporate Counsel

Potential Solutions

- Local Bar Referral Service
  - Pro Bono eligible
  - Fee for limited service
  - Reduced fee representation
  - ABA web site
    - http://www.abanet.org/legalservices/findlegalhelp/home.cfm

Copyright © 2009 Association of Corporate Counsel

Potential Solutions

- EAP
  - Employer paid plan
  - Low premium
  - Many include limited legal advice element

Copyright © 2009 Association of Corporate Counsel

Potential Solutions

- Legal Expense Insurance Plan
  - Voluntary group benefit much like dental and vision
  - Typically employee paid
  - Include an array of coverages ranging from telephone legal advice to paid in full representation for covered legal matters

Copyright © 2009 Association of Corporate Counsel

Measuring the Effects of **Employee Financial & Legal Woes**

2007 Research Study

Conducted by Russell Research

Commissioned by ARAG

Copyright © 2009 Association of Corporate Counsel

Personal Legal Woes Can Dramatically Affect Workplace Morale, Performance & Productivity

While performing a quarterly personnel review, Charlotte, the human resources manager at a midsized financial services firm, noticed increased absenteeism and indications of lower productivity among a handful of valued employees. This puzzled Charlotte since she considered the employees to be reliable and dedicated. She decided to invite each one in for a conversation about job satisfaction and performance. Surprisingly, Charlotte discovered the absenteeism and productivity concerns were not entirely work-related. Instead, legal life events – such as family or financial concerns – were creating stress, occupying their time and attention, and making it more difficult for them to be fully focused on their jobs.

*For example, Mark in accounting discovered that the person who sold him a car did not have a legal title to the vehicle and now the actual owner is trying to get the car back. Mark is afraid he will lose the car and the money he paid for it. He can't afford to buy another car, and he's receiving harassing calls at work from the "real" owner. Mark is frustrated and doesn't know where to turn for legal assistance.**

Mark is not alone. According to an employee study commissioned by ARAG – a global leader of legal insurance – employees are often adversely affected by legal life events. Legal life events are described as those events in which an individual could benefit from (or require) legal assistance, such as the use of an attorney. Dealing with family, home, financial, automobile and other legal life events can contribute to increased stress, lower productivity and higher absenteeism.
This can have an impact not only on the employee, but the employer, as well.

Copyright © 2009 Association of Corporate Counsel

In 2007, Russell Research, a New York-based research firm, conducted a national study of full-time employees to measure the impact of legal life events, use of legal services and attitude toward legal services. A total of 1,011 interviews were conducted using online methodology. The study participants were evenly divided between male and female, ranged in age from 25 to 65, and were employed full-time in a non-competing industry. They were asked questions about:

- The occurrence and frequency of legal life events
- The impact of legal life events on levels of stress and productivity
- The use of attorney services to address legal life events
- Their perceptions on the availability, cost and value of legal services

The results of the Legal Woes Study are summarized in this document.

Legal life events can contribute to increased stress, lower productivity and higher absenteeism.

Source: ARAG Legal Woes Study

Copyright © 2009 Association of Corporate Counsel

70 Percent of Employees Experienced At Least One Legal Event in Past Year

According to the Legal Woes Study, seven out of 10 employees experienced at least one legal life event in the past year. Among the employees who experience an event, 69 percent experienced two or more, while slightly less than one-half experienced three or more.

Some legal life events are part of everyday life – purchasing or selling an automobile, updating a financial plan or hiring a contractor to work on a residence. Others are perhaps less common but have a strong impact, such as the death of an immediate family member, child custody issues or caring for an aging parent.

Family, financial, home and automobile legal life events are everywhere:

- Adam's new washer has quit working, but the manufacturer refuses to honor the 12-month repair warranty.
- Carlos found suspicious charges on his last credit card bill and does not know how to clear his name.
- Monique was in a fender bender with an underinsured motorist, and now the other driver wants Monique to pay for his repairs and medical bills.

Most Common Legal Life Events

- ***Purchase, sale or lease of an automobile***
- ***Credit trouble or debt collection***
- ***Death of an immediate family member***
- ***Hire of contractors for work on a residence***
- ***Rental of an apartment***
- ***Ticket for a moving violation***
- ***Caring for an aging family member***
- ***Creation or update of a financial plan***
- ***Purchase of a primary residence***
- ***Child support, custody or visitation issues***
- ***Dispute over automobile repair***

Source: ARAG Legal Woes Study

Copyright © 2009 Association of Corporate Counsel

These examples are representative of contractual, financial or other issues that involve legal documents or court appearances.

Some legal life events, such as purchasing a car or signing a warranty contract, may seem simple enough, yet millions of Americans find themselves the victims of consumer fraud each year. Between January and December 2007, the Federal Trade Commission received more than 813,000 consumer fraud and identity theft complaints, representing losses of more than $1.2 billion.[1]

According to the Legal Woes Study, only one-third of respondents used an attorney. Many did consider using legal services or hiring an attorney for some events – particularly cases of marital separation, children's legal troubles or homeowner disputes. Yet not many of those facing a legal life event actually sought legal help.

Attorney Usage

While seven out of 10 employees said they experienced one or more legal life events in a 12-month period, less than one-third used an attorney to deal with their concerns.

Source: ARAG Legal Woes Study

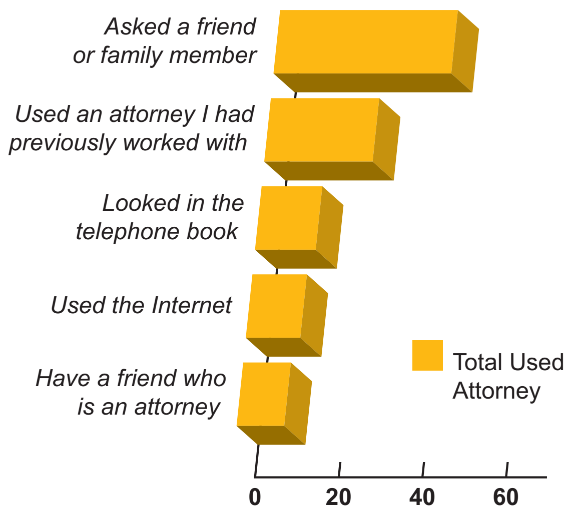
Finding Help to Deal with Legal Woes Is Seen as Challenging, Confusing Process

*Desiree in marketing and her husband, Mike, wanted to build a new patio area and deck in their backyard. The couple just moved to the area and used the phone book to find a contractor. Construction is running behind schedule and over budget, and it seems every day a new problem arises that Desiree has to handle. She would like the help of an attorney, but with all she has going on and the fear of incurring even more expense, finding one is a daunting task.**

The vast majority of surveyed employees (84 percent) said they believe attorneys and legal services are not affordable or accessible, which leads many not to consider hiring an attorney. However, the Legal Woes Study shows that when people do work with an attorney, they are very satisfied.

According to the study, most employees (55 percent) prefer to seek the advice of professionals to resolve unfamiliar situations, while 40 percent tend to delay seeking advice or taking action. A primary reason many people don't hire an attorney to address their specific legal needs is they feel it's difficult to find one. According to the survey, two-thirds of employees who used the services of an attorney to resolve legal life events turned to family, friends, the telephone book or the Internet for guidance in selection.

CHOOSING AN ATTORNEY



Among study participants, asking family and friends was the most common means of finding an attorney, followed by prior experience with that attorney.

Source: ARAG Legal Woes Study

Copyright © 2009 Association of Corporate Counsel

On average, employees spent nearly $1,300 during the year to address legal life events.

Another consideration in the decision of whether to hire an attorney is cost. For the average American, legal life events can be expensive, and many times these costs are unplanned and unbudgeted.

The average hourly rate in the United States for attorneys with 11 – 15 years of experience is $266.[2] Most often, attorneys are paid using a flat fee. A flat fee is a fee charged for the performance of a particular service (for example $8,000 retainer for a divorce). The Legal Woes Study reported that employees paid nearly $1,300 in legal services to address their “legal woes.” One out of five spent more than $2,000.

Paying a flat fee was the most commonly used method to pay for legal services, rather than paying on a retainer or hourly basis. This is reflected in the types of services that people used attorneys for, primarily to develop legal documents, provide advice and make phone calls on their behalf. But due to the often complex nature of family legal issues, which commonly require more involvement from a legal standpoint, they typically have a more complex fee structure than other legal issues.

Remember Charlotte in HR? She recently applied for a car loan and was shocked to find that someone had run up $16,000 in credit card debt using her name. Further investigation revealed that they had stolen Charlotte’s Social Security number and opened three credit lines using Charlotte’s identity. In order for Charlotte to fix her credit rating and obtain her car loan, the burden was on her to prove she didn’t owe the money.

*At that point, Charlotte realized the value of hiring an attorney rather than going it alone. In the end, legal representation saved her time and money and lessened her stress. This made her think legal benefits for employees would be something her company should consider – the benefits to employer and employee alike could be significant.**

Copyright © 2009 Association of Corporate Counsel

Employee Legal Woes Impact Costly In Lost Time & Workplace Productivity

Legal life events can take a personal and professional toll on employees. This can manifest itself through stress-related conditions, disruption of home and work life, and decline in job performance or other factors. In an increasingly complex world, legal woes may be the silent killer of workplace effectiveness by contributing to higher absenteeism and lower productivity as employees struggle to resolve personal issues.

According to the Legal Woes Study, 40 percent of employees who experienced a legal life event reported a negative impact on their work lives. One out of five employees said they were less productive at work, and four out of 10 stated they were very or extremely stressed by a legal life event. One out of three employees took time off of work – an average of 13 days – to deal with legal needs.

Legal life events often take a heavy toll on employees in severity, frequency or complexity. The Legal Woes Study provides valuable data on the amount of time employees spent, on average, during a 12-month period addressing legal life events while at work.

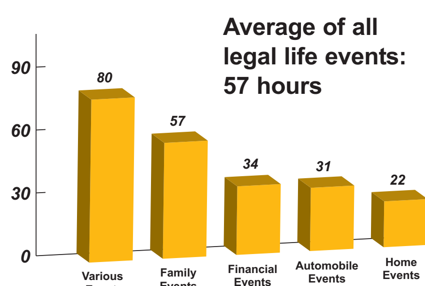
Family legal life issues have the most impact on employees at work – in stress, higher absenteeism and reduced productivity.

Source: ARAG Legal Woes Study

Copyright © 2009 Association of Corporate Counsel

AVERAGE HOURS TAKEN OFF WORK DEALING WITH LEGAL LIFE EVENTS

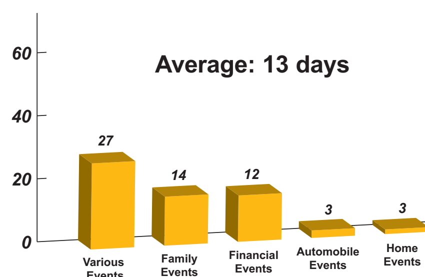
(by type)



Source: ARAG Legal Woes Study

AVERAGE DAYS DEALING WITH LEGAL LIFE EVENTS

(by type)



Source: ARAG Legal Woes Study

Time spent dealing with legal life events:

- Family-related legal life events: 57 hours
- Financial-related legal life events: 34 hours
- Automobile-related legal life events: 31 hours
- Home-related legal life events: 22 hours

Having ready access to legal services or someone to turn to for professional advice during these stressful and challenging times can help to minimize the impact of personal issues in the workplace. Consider these examples:*

Yvonne receives an offer on her house and has three days to review the proposed contract from the buyers. Yvonne doesn't know any attorneys and fears it will take three days just to find an attorney to review the contract.

Tom's neighbor constructed a wooden skate ramp and uses it all hours – with intrusive lights and noise. Tom is not sleeping well and has lost all focus at work – spending all day complaining about his neighbor.

Megan's son was arrested for vandalizing school property and was suspended from school. He says he didn't do it, and Megan believes him. However, her son can't go back to school until the matter is resolved.

Having ready access to legal services or a professional to turn to for advice is a benefit that not many employees currently have at their place of employment, and individually securing help to deal with legal woes can be a challenging and confusing process.

The availability of legal services could provide Yvonne with an attorney recommendation to expedite review of the home sale contract. Legal assistance could help Tom resolve the noise problem with his neighbor for more restful nights and more productive days at work. Megan could hire an attorney to speak with the school and the courts in order to get her son back in school and on track for graduation.

What happens outside the office impacts what happens inside the office, often adversely. These days, more and more ordinary life situations have legal (and associated financial) ramifications.

Copyright © 2009 Association of Corporate Counsel

Legal Insurance Offers Strong Resources To Protect Families, Finances & Futures

Some employers are enhancing their benefits portfolios with group legal plans that help employees address their personal issues. This proactive approach can serve as "preventive maintenance," provide services when needed and help employees achieve better work/life balance. Among the advantages: stress levels can decrease, anxiety may lessen and employees can focus on work instead of dwelling on potential negative outcomes. Their health may benefit, as well.

With legal insurance, Mark could stop worrying about his car ownership concerns. Desiree could more confidently deal with the issues she faces with her contractor. Charlotte would have the resources and representation that she needs to quickly clear her name and restore her credit rating.

A Society of Human Resources Managers (SHRM) benefits survey reported that of the top 20 personal services benefits offered by employers, legal assistance/services demonstrated the highest percentage of increase from 2001 to 2006.[3]

While many employers are recognizing the need for legal insurance, only one of eight employees works for an employer that offers group legal coverage, according to the Legal Woes Study. Yet, seven out of 10 study participants said they would find legal insurance a useful benefit to receive.

Seven out of 10 surveyed employees said they would find legal insurance a useful benefit.

Source: ARAG Legal Woes Study

Copyright © 2009 Association of Corporate Counsel

Legal insurance allows employees to protect their families, finances and futures. It does this by helping employees:

- Save hundreds of dollars on legal fees
- Make timely and accurate decisions
- React and respond more quickly to improve outcomes
- Achieve more preventive goals
- Reduce personal and family stress

For employers, legal insurance plans can:

- Enhance the competitiveness of the benefits portfolio for employees
- Attract and retain employees – reducing turnover and increasing satisfaction
- Provide proactive approach to protect employee well-being and create supportive work environment
- Drive down employer cost – contributing to future profitability
- Mitigate negative effects of legal life events on absenteeism and productivity
- Enhance corporate brand and workforce morale

Legal insurance can provide key advantages to employees. Legal plan members can receive access to a group of attorneys and other legal resources to assist with their various legal needs for an affordable premium. Legal plan services may be available over the phone and face-to-face. Some plans offer online tools and resources, such as an attorney directory, do-it-yourself legal documents and educational information. Plans may also provide financial education and counseling services. Most important, legal insurance can help employees turn a "legal woe" into a solution.

For more information about the impact of legal life events on employees in the workplace and the results of the study "Measuring the Effects of Employee Financial & Legal Woes," please visit www.ARAGgroup.com or call 800-888-4184, ext. 271.

Copyright © 2009 Association of Corporate Counsel

Endnotes

[1] "Consumer Fraud and Identity Theft Complaint Data, January – December 2007," Federal Trade Commission Report, 2008.
[2] Survey of Law Firm Economics, Altman Weil Publications, Inc., 2006.
[3] Society of Human Resources Managers (SHRM) Benefits Survey, 2006.

* The examples provided are fictional but are typical of the legal matters available in the ARAG legal plans.

About ARAG
ARAG (www.ARAGgroup.com) is a global leader of legal insurance. The company has an international premium base of more than $1.75 billion and protects 15 million individuals and their families – worldwide. ARAG offers comprehensive legal plans that provide a clear path for resolving legal issues and enable people to protect their families, finances and futures.

Copyright © 2009 Association of Corporate Counsel

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **HENRY T. NICHOLAS, III and WILLIAM J. RUEHLE et al.** **Defendants.**	**Case No.: SACR 08-00139-CJC** **ORDER SUPPRESSING PRIVILEGED COMMUNICATIONS**

INTRODUCTION

The California Rules of Professional Conduct protect clients, promote public confidence in the legal profession, and ensure the fair administration of justice. The most fundamental of these rules is a lawyer's duty of undivided loyalty to his client. A lawyer must do everything legally possible to protect a client. A lawyer can never assume a position adverse to the client or disclose client confidences without the client's knowing,

Copyright © 2009 Association of Corporate Counsel

1 intelligent, and voluntary consent in writing. Unfortunately, in this case, a law firm
2 breached its duty of loyalty to a client in several respects.
3
4 In May 2006, Irell & Manella LLP ("Irell") undertook three separate, but
5 inextricably related, representations of Broadcom Corporation ("Broadcom") and its
6 Chief Financial Officer, Defendant William J. Ruehle. More specifically, Irell
7 represented Broadcom in connection with the company's internal investigation of its
8 stock option granting practices. At the same time, Irell also represented Mr. Ruehle in
9 connection with two shareholder lawsuits filed against him regarding those same stock
10 option granting practices. Prior to undertaking these representations of clients with
11 adverse interests, Irell failed to obtain Mr. Ruehle's informed written consent.
12
13 In June of 2006, Irell lawyers met with Mr. Ruehle at his office to discuss the stock
14 option granting practices at Broadcom. During this meeting, Mr. Ruehle told the Irell
15 lawyers about Broadcom's stock option granting practices and his role in them. Before
16 questioning Mr. Ruehle, however, the Irell lawyers never disclosed to him that they were
17 representing only Broadcom at the meeting, not him individually, and that whatever he
18 said to them could be used against him by Broadcom or disclosed by the company to
19 third parties. Subsequently, Broadcom directed Irell to disclose statements Mr. Ruehle
20 made to the Irell lawyers about Broadcom's stock option granting practices to
21 Broadcom's outside auditors, Ernst & Young, as well as to the Securities and Exchange
22 Commission ("SEC") and the United States Attorney's Office (the "Government"). Prior
23 to making these disclosures, Irell never obtained Mr. Ruehle's consent.
24
25 The Government now argues that it can use Mr. Ruehle's statements to the Irell
26 lawyers against him at the trial in this criminal case. The Government is mistaken. Mr.
27 Ruehle's statements to the Irell lawyers are privileged attorney-client communications.
28 Mr. Ruehle reasonably believed that the Irell lawyers were meeting with him as his

Copyright © 2009 Association of Corporate Counsel

personal lawyers, not just Broadcom's lawyers. Mr. Ruehle had a legitimate expectation that whatever he said to the Irell lawyers would be maintained in confidence. He was never told, nor did he ever contemplate, that his statements to the Irell lawyers would be disclosed to third parties, especially not the Government in connection with criminal charges against him. Irell had no right to disclose Mr. Ruehle's statements, and Irell breached its duty of loyalty when it did so. Accordingly, the Court must suppress all evidence reflecting Mr. Ruehle's statements to the Irell lawyers regarding stock option granting practices at Broadcom.

But the Court has a further obligation in this case. The Court must also ensure the fair administration of justice and promote the public's confidence in the legal profession. By failing to comply with its duties under the Rules of Professional Conduct, Irell compromised these important principles. The Court simply cannot overlook Irell's ethical misconduct in this regard and must refer Irell to the State Bar for appropriate discipline.

BACKGROUND

Both Broadcom and Mr. Ruehle had long-standing relationships with Irell.[1] Beginning in 2002, Irell represented both Broadcom and Mr. Ruehle personally in several securities-related actions ("Warrants Litigation"). (Ex. A.)[2] Irell represented Mr. Ruehle in a deposition taken in connection with the Warrants Litigation. (Tr. 36:12-16 Feb. 24, 2009.) In the course of this representation, Irell informed Mr. Ruehle in writing of the potential for conflicts inherent in dual representation and obtained Mr. Ruehle's informed

---

[1] In fact, Broadcom sold 225,000 shares of Broadcom stock to Irell in 1997, before its initial public offering ("IPO"). The aggregate purchase price for this stock was $1,050,000 or $4.67 per share. (Ex. 1.) It is not clear if or when Irell sold its Broadcom stock, but in the first six months after the IPO, Broadcom's share price increased dramatically, and at various times traded at over $70 per share.

[2] Mr. Ruehle presented many exhibits, some of which are privileged. All privileged exhibits are identified by letters, and all non-privileged exhibits are identified by numbers.

Copyright © 2009 Association of Corporate Counsel

written consent to proceed with the representation. (Exs. A, B.) The Warrants Litigation concluded at the end of 2005. (Ex. E.)

In the spring of 2006, after a series of articles related to the stock option granting practices both at Broadcom and other corporations, Broadcom was aware that it might be investigated by the Government or sued on the basis of its stock option granting practices. (Tr. 8:10-13, Feb. 25, 2009.) In mid-May 2006, Broadcom retained Irell to investigate its stock option granting practices on behalf of the corporation. (Tr. vol. 2, 4:19-21, Feb. 23, 2009.) Shortly thereafter, on May 25, 2006, a group of shareholders filed a derivative action against Mr. Ruehle and other current and former officers of Broadcom ("Derivative Action") concerning the corporation's stock option granting practices. (Ex. 18.) On May 26, 2006, an amended complaint was filed in *Jin v. Broadcom Corp., et al.* ("Jin Action"), naming Mr. Ruehle personally and asserting substantially similar claims regarding stock option practices at Broadcom. (Ex. 14.) In addition to its representation of Broadcom in connection with the internal investigation, Irell accepted individual representation of Mr. Ruehle in both the Jin Action and the Derivative Action, accepting service on his behalf and appearing as counsel of record until September 2006.[3] (Tr. vol. 2, 26:15-27:25, Feb. 23, 2009.) During the entire period of these representations, Irell never obtained Mr. Ruehle's informed written consent to its dual representation of him and the company as required by Rule 3-310(C) of the Rules of Professional Conduct. (*Id.* 36:5-11.)

In late May of 2006, Mr. Ruehle received several emails regarding Irell's representation of him and Broadcom in connection with stock option practices at the company. (Exs. F-K.) On May 30, 2006 at 5:28 p.m., David Dull, General Counsel of

[3] The parties vigorously dispute when the attorney-client relationship between Mr. Ruehle and Irell was formed, but did not dispute that Irell was Mr. Ruehle's personal counsel in both the Derivative Action and the Jin Action until September 2006. (Tr. vol. 2, 32:7-12, Feb. 23, 2009.)

Copyright © 2009 Association of Corporate Counsel

1 Broadcom, sent an email to several people at Broadcom, including Mr. Ruehle, and on
2 which David Siegel, an Irell litigation partner, was copied. (Ex. G.) The email provided
3 information about the nature of the Jin Action and the Derivative Action and assessed the
4 relative strengths and weaknesses of the judge assigned to the case. (*Id.*) Confirming
5 Mr. Ruehle's understanding that Irell would represent Broadcom's officers individually
6 as they had in past litigation, Mr. Dull directed "anyone who has any concerns" to
7 "contact me or any of the Irell lawyers." (*Id.*) Four minutes later, at 5:32 p.m. on May
8 30, 2006, Kenneth R. Heitz, a litigation partner at Irell, sent Mr. Ruehle an email, on
9 which Mr. Siegel, Mr. Dull, and Daniel P. Lefler, another Irell litigation partner, were
10 copied. (Ex. F.) In the email, Mr. Heitz updated Mr. Ruehle about the progress of Irell's
11 interviews of other witnesses with knowledge of the stock option granting practices at
12 Broadcom and requested a time to discuss these issues with Mr. Ruehle. (*Id.*)
13
14 On May 31, 2006, the day before his first interview with the Irell lawyers, Mr.
15 Ruehle received three emails from Mr. Heitz. (Exs. I-K.) The first, on which Mr. Lefler
16 and Mr. Siegel were copied, updated Mr. Ruehle on the Irell lawyer's progress in their
17 interviews of witnesses with knowledge of the stock option granting practices at
18 Broadcom. (Ex. I.) The next, asked Mr. Ruehle to review his personal records for
19 information related to a stock option grant in 2000 and advised him of the relevance of
20 such information to Irell's investigation. (Ex. J.) In the final email Mr. Ruehle received
21 from Mr. Heitz on May 31, 2006, Mr. Heitz provided a further update on Irell's fact-
22 gathering with respect to Broadcom's stock option granting practices. (Ex. K.)
23
24 On June 1, 2006, Mr. Heitz and Mr. Lefler met with Mr. Ruehle and interviewed
25 him regarding Broadcom's stock option granting practices. (Tr. vol. 2, 9:15-20, Feb. 23,
26 2009.) The Irell lawyers did not tell Mr. Ruehle that they were not his lawyers. (*Id.*
27 15:5-10.) The Irell lawyers did not suggest that Mr. Ruehle might want to consult with
28 his own lawyer before speaking with them. (*Id.* 17:21-23.) After their meeting, Mr.

Copyright © 2009 Association of Corporate Counsel

Heitz had subsequent conversations with Mr. Ruehle in June 2006 about Broadcom's stock option granting practices and never disclosed to Mr. Ruehle in any of these conversations that his statements to him would be disclosed to third parties. (*Id.* 33:7-25.)

On June 13, 2006, the SEC commenced its investigation of the stock option granting practices at Broadcom. Throughout June and July 2006, Mr. Ruehle continued to receive legal advice from Irell. (Exs. L-O.) On June 13, 2006, Mr. Ruehle sent an email to Mr. Siegel, on which he copied Mr. Dull, seeking legal advice regarding the SEC's investigation. (Ex. L.) On the same day, Mr. Lefler sent an email to Mr. Ruehle asking him to consent to Irell's acceptance of process on his behalf in the Jin Action. (Ex. M.) On June 28, 2006, Mr. Ruehle received an email from Mr. Siegel, on which Mr. Heitz was copied, that offered detailed strategic advice regarding the SEC investigation. (Ex. N.) Finally, on July 25, 2006, Mr. Dull forwarded an email to Broadcom's board of directors from Mr. Lefler that detailed Irell's strategy for the Derivative Action and the Jin Action. (Ex. O.) Mr. Lefler's memorandum assessed the merits of the actions, considered the strengths and weaknesses of the judge assigned to the case, and outlined the specific litigation tactics Irell planned to employ in these actions. (*Id.*)

In August of 2006, at Broadcom's direction, Irell disclosed the substance of Mr. Ruehle's interviews with Mr. Heitz and Mr. Lefler to Broadcom's outside auditors, Ernst & Young. (Tr. vol. 2, 38:18-23, Feb. 23, 2009.) Thereafter, again at Broadcom's direction, Irell disclosed the same information to the SEC and the United States Attorney's Office in connection with their investigations of stock option granting practices at Broadcom. (*Id.* 40:9-19.) The Government's interviews of Mr. Heitz and Mr. Lefler regarding their conversations with Mr. Ruehle in June 2006 were summarized

Copyright © 2009 Association of Corporate Counsel

in FBI Form FD-302 memoranda. (Exs. Q, R.) Ruehle did not consent to any of these disclosures. (Tr. vol. 2, 40:9-19, Feb. 23, 2009.)

Mr. Ruehle first learned that the Government intended to use his statements to Irell against him when the FBI Form FD-302 memoranda were produced to him in December 2008 in connection with the Government's criminal case. Mr. Ruehle promptly objected and asserted that his conversations with Irell were privileged communications. Mr. Ruehle previously litigated the issue in the Derivative Action before a Special Master, who found Mr. Ruehle's communications were, in fact, privileged.[4] Nonetheless, the Government contended that Mr. Ruehle's assertion of the privilege was not well taken and filed an *ex parte* application for an evidentiary hearing in this Court to determine the applicability of the privilege. The Court held an evidentiary hearing on February 23, 24, and 25, 2009 to determine whether Mr. Ruehle's statements to the Irell lawyers were subject to the attorney-client privilege.

ANALYSIS

A. Mr. Ruehle's Statements to the Irell Lawyers are Privileged Attorney-Client Communications

The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403 (1976). To sustain a claim of privilege, the party seeking to assert the privilege must first establish the existence of an attorney-client relationship. *Id.* Determining whether an attorney-client relationship exists depends on the reasonable expectations of the client. *Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd.*, 150 F.R.D. 648, 652 (N.D. Cal. 1993).

[4] The Special Master's order has not yet been reviewed by a district judge and the Derivative Action has been stayed pending resolution of the criminal charges against Mr. Ruehle.

Copyright © 2009 Association of Corporate Counsel

1 The existence of an attorney-client relationship "hinges upon the client's belief that he is
2 consulting a lawyer in that capacity and his manifested intention to seek professional
3 legal advice." *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997). To
4 determine the reasonable expectations of a client, courts look to "circumstantial evidence,
5 taking into account all kinds of indirect evidence and contextual considerations that
6 appear relevant to determining whether it would have been reasonable for the person to
7 have inferred that she was the client of the lawyer." *Sky Valley*, 150 F.R.D. at 652.
8 Second, the party seeking to assert the privilege must demonstrate that the
9 communication was made in order to obtain legal advice. When a lawyer consults with a
10 client for purposes of "fact-finding" in order to provide legal advice, the discussion
11 between the lawyer and client qualifies as one undertaken for the purpose of seeking legal
12 advice. *United States v. Rowe*, 96 F.3d 1294, 1297 (9th Cir. 1996). "Although some
13 commentators . . . continue to distinguish between fact-finding and lawyering, federal
14 judges cannot." *Id.* at 1296. As the Supreme Court of the United States observed, "the
15 privilege exists to protect not only the giving of professional advice to those who can act
16 on it but also the giving of information to the lawyer to enable him to give sound and
17 informed advice. The first step in the resolution of any legal problem is ascertaining the
18 factual background and sifting through the facts with an eye to the legally relevant."
19 *Upjohn Co. v. United States*, 449 U.S. 383, 390-91 (1981) (internal citations omitted).
20 Finally, in order for the privilege to apply, the communication must be intended to remain
21 confidential. CAL. EVID. CODE § 952. Under California law, communications made in
22 the course of an attorney-client relationship are presumed confidential. CAL. EVID. CODE
23 § 917(a).
24
25 There is no serious question in this case that when Mr. Ruehle met with the Irell
26 lawyers on June 1, 2006, Mr. Ruehle reasonably believed that an attorney-client
27 relationship existed, he was communicating with his attorneys in the context of this
28 relationship for the purpose of obtaining legal advice, and that any information he

Copyright © 2009 Association of Corporate Counsel

1 provided to Irell would remain confidential. Mr. Ruehle testified that he understood Irell
2 would be representing him in both the Jin Action and the Derivative Action. (Tr. 65:1-10
3 Feb. 25, 2009.) Prior to his initial meeting with the Irell lawyers, Mr. Ruehle received an
4 email from Broadcom's General Counsel, Mr. Dull, on which an Irell litigation partner
5 was copied, confirming that Irell would be representing him personally in both litigations.
6 (Ex. G.) In the days leading up to their June 1, 2006 interview, the Irell lawyers
7 frequently updated Mr. Ruehle on the progress of their investigation of the stock option
8 practices at Broadcom. (Exs. F, I, K.) But more than mere progress reports, Mr. Heitz
9 discussed his strategy for defending the corporation and its directors and summarized the
10 fact-finding that would be necessary to support that strategy. (Exs. F, I, J.) In these
11 emails, which were sent to Mr. Ruehle individually as opposed to the entire board of
12 directors, Mr. Heitz asked Mr. Ruehle to review and obtain specific information and
13 advised him how this information would be relevant to preparing a defense. (*Id.*) The
14 evidence establishes that Mr. Ruehle had a reasonable belief that an attorney-client
15 relationship existed prior to his initial interview with the Irell lawyers on June 1, 2006.
16
17 Second, Mr. Ruehle testified that he believed that the interviews were being
18 conducted to gather information in preparation for the litigations and for the purpose of
19 obtaining legal advice. (Tr. 71:4-8, Feb. 25, 2009.) Mr. Ruehle was first asked by the
20 Irell lawyers to schedule a meeting with them in an email that he received 4 minutes after
21 he received an email from Mr. Dull informing Mr. Ruehle that Irell would be
22 representing him personally in the pending litigations. (Exs. F, G.) Mr. Heitz and Mr.
23 Lefler requested a time to discuss Broadcom's stock option granting practices, the exact
24 same subject matter of the two pending civil lawsuits in which Irell represented Mr.
25 Ruehle individually. (Tr. vol. 2, 9:15-20, Feb. 23, 2009.) Mr. Ruehle was never advised
26 that he should have another lawyer present at the meeting to represent his interests. (*Id.*
27 15:5-10, 17:21-23.) Based on these communications, Mr. Ruehle reasonably understood
28 the Irell lawyers to be gathering facts and information for his defense against the claims

Copyright © 2009 Association of Corporate Counsel

asserted against him as well as for the company's own internal investigation.[5] (Tr. 79:20-24, Feb. 25, 2009.)

Finally, Mr. Ruehle intended his statements to be confidential, and he had no reason to suspect that his conversations with the Irell lawyers would be disclosed to third parties. (*Id.* 76:19-21.) Mr. Ruehle testified that had he understood that the Irell lawyers might disclose his statements to third parties, "at a minimum [he] would have stopped and asked some very serious questions at that time." (*Id.* 78:12-13.) Mr. Ruehle was an experienced corporate officer and had substantial prior experience with civil litigation. He knew he was being personally investigated regarding Broadcom's stock option granting practices, and he would never have agreed to provide information that Irell could then turnover to the Government should it commence a criminal investigation of him.[6]

The Government nevertheless suggests that because the Irell lawyers supposedly gave Mr. Ruehle an *Upjohn* warning, his statements to the Irell lawyers are not privileged communications. A so-called *Upjohn* warning or "Corporate Miranda" is ordinarily given to inform a "constituent member or an organization that the attorney represents the organization and *not* the constituent member." (Decl. of Prof. Adam Winkler ("Winkler Decl.") ¶ 20.) The warning is intended to make clear to the individual being interviewed that the corporation, and not the individual employee, is the client and therefore "controls the privilege and the confidentiality of the communication." (Ex. 33.) An *Upjohn* warning apprises a corporate employee that no attorney-client relationship exists, and any

[5] Although the Government disputes when Mr. Ruehle may have first reasonably believed Irell represented him in the Derivative Action and the Jin Action, there is no dispute that at some point in June 2006 Irell began representing Mr. Ruehle in an individual capacity on these matters and that Irell appeared as counsel of record for him until September 2006. (Tr. vol. 2, 26:15-27:25, Feb. 23, 2009.)

[6] The Government argues that Mr. Ruehle knew that Irell would make some disclosure to Ernst & Young in connection with its investigation, and therefore Mr. Ruehle knew that his statements were not confidential. This argument is unpersuasive. Mr. Ruehle never understood that Irell might disclose statements adverse to Mr. Ruehle's interests to the Government for use in a criminal case against him.

Copyright © 2009 Association of Corporate Counsel

1 communication between the lawyer and the individual may be disclosed to third parties at
2 the corporation's discretion. (Winkler Decl. ¶ 24.) In this case, the Government's
3 reliance on the alleged *Upjohn* warning is misplaced.
4
5 As an initial matter, the Court has serious doubts whether any *Upjohn* warning was
6 given to Mr. Ruehle. Mr. Ruehle did not remember being given any warning, no warning
7 is referenced in Mr. Lefler's notes[7] from the meeting, and no written record of the
8 warning even exists. (Tr. 76:6-11, Feb. 25, 2009; Tr. vol. 2, 20:12-14, Feb. 23, 2009.)
9 But even if an *Upjohn* warning were provided to Mr. Ruehle, the substance of the
10 warning Mr. Heitz testified he gave is woefully inadequate under the circumstances. Mr.
11 Heitz testified that he advised Mr. Ruehle on June 1, 2006 that he and Mr. Lefler were
12 interviewing him on behalf of Broadcom in connection with their investigation of
13 Broadcom's stock option granting practices. (Tr. vol. 2, 15:5-10, Feb. 23, 2009.) Mr.
14 Heitz further testified that he never told Mr. Ruehle that he and Mr. Lefler were not Mr.
15 Ruehle's lawyers or that Mr. Ruehle should consult with another lawyer. (*Id.* 15:5-10,
16 17:21-23.) Most importantly, neither Mr. Heitz nor Mr. Lefler ever told Mr. Ruehle that
17 any statements he made to them could be shared with third parties, including the
18 Government in a criminal investigation of him. As Mr. Ruehle testified, had he
19 comprehended the substance of the admonition that Mr. Heitz testified he gave, Mr.
20 Ruehle would never have agreed to the interview and would have sought the advice of
21 another lawyer before providing any information. (Tr. 76:6-11, 78:4-13, Feb. 25, 2009.)
22
23 Perhaps most critically, however, whether an *Upjohn* warning was or was not
24 given is irrelevant in light of the undisputed attorney-client relationship between Irell and
25 Mr. Ruehle. An *Upjohn* warning is given to a non-client to advise the employee that he
26 is not communicating with his personal lawyer, no attorney-client relationship exists, and
27
28

[7] Mr. Heitz did not take notes at the June 1, 2006 meeting. (Tr. vol. 2, 20:1-3, Feb. 23, 2009.)

Copyright © 2009 Association of Corporate Counsel

1 any communication may be revealed to third parties if disclosure is in the best interest of
2 the corporation. (Winkler Decl. ¶ 24.) Here, Mr. Ruehle was represented by Irell in
3 litigations related to the identical subject matter as Irell's internal investigation on behalf
4 of Broadcom. An oral warning, as opposed to a written waiver of the clear conflict
5 presented by Irell's representation of both Broadcom and Mr. Ruehle, is simply not
6 sufficient to suspend or dissolve an existing attorney-client relationship and to waive the
7 privilege. (Winkler Decl. ¶¶ 19, 32.) An oral warning to a current client that no attorney-
8 client relationship exists is nonsensical at best—and unethical at worst.
9
10 **B. Irell Breached Its Duty of Loyalty to Mr. Ruehle**
11
12 The most fundamental aspect of the attorney-client relationship is the duty of
13 undivided loyalty owed by a lawyer to his client, and ultimately all of the ethical rules are
14 derived from this fundamental principle. *See Flatt v. Superior Court*, 9 Cal. 4th 275 (Cal.
15 1994). The duty of loyalty requires a lawyer "to protect his client in every possible way,
16 and it is a violation of that duty for him to assume a position adverse or antagonistic to
17 his client." *Anderson v. Eaton*, 211 Cal. 113, 116 (Cal. 1930). Thus, a lawyer may not
18 assume "any relation which would prevent him from devoting his entire energies to his
19 client's interests." *Id.* "So inviolate is the duty of loyalty to an existing client that not
20 even by withdrawing from the relationship can an attorney evade it." *Flatt*, 9 Cal. 4th at
21 288. Simply put, a lawyer cannot, consistent with the duty of loyalty, "jettison[] one
22 client in favor of another." *In re Grand Jury Subpoena*, 415 F.3d 333, 340 (4th Cir.
23 2005). All clients are equal under the Rules of Professional Conduct, and no lawyer can
24 sacrifice the interests of one client for those of another.
25
26 In this case, Irell committed at least three clear violations of its duty of loyalty to
27 Mr. Ruehle. First, Irell failed to obtain Mr. Ruehle's informed written consent to Irell's
28 simultaneous representation of Mr. Ruehle individually in the Jin Action and Derivative

Copyright © 2009 Association of Corporate Counsel

1 Action, on the one hand, and Broadcom in its internal investigation, on the other hand.
2 Under the Rules of Professional Conduct, a lawyer may not simultaneously represent two
3 clients whose interests actually or potentially conflict without each client's informed
4 written consent. Rule 3-310(C) provides:

5 A member shall not, without the informed written consent of each client:
6 (1) Accept representation of more than one client in a matter in
7 which the interests of the clients potentially conflict; or
8 (2) Accept or continue representation of more than one client in
9 a matter in which the interests of the clients actually conflict; or
10 (3) Represent a client in a matter and at the same time in a
11 separate matter accept as a client a person or entity whose
12 interest in the first matter is adverse to the client in the first
13 matter.

14 CAL. RULES OF PROF'L CONDUCT R. 3-310(C). The Rule also specifies:

15 For purposes of this rule:
16 (1) "Disclosure" means informing the client or former client of
17 the relevant circumstances and of the actual and reasonably
18 foreseeable adverse consequences to the client or former client;
19 (2) "Informed written consent" means the client's or former
20 client's written agreement to the representation following
21 written disclosure.

22 CAL. RULES OF PROF'L CONDUCT R. 3-310(A). To obtain informed written consent, the
23 client must make his decision "on the basis of adequate knowledge of the facts and an
24 awareness of the consequences of the decision." *Sharp v. Next Entm't, Inc.*, 163 Cal.
25 App. 4th 410, 430 (Cal. Ct. App. 2008). "Once the client has been provided with
26 sufficient information about the situation, the client can make a rational choice, based
27 upon full disclosures as to the risks of the representations, the potential conflicts
28 involved, and the alternatives available as required by the particular circumstances." *Id.*

Copyright © 2009 Association of Corporate Counsel

1 The disclosure and consent must be in writing so that the client understands the
2 seriousness of the decision and to avoid disputes or ambiguities. *Id.*
3
4 By the spring of 2006, Broadcom was acutely aware of the possibility that it might
5 be investigated or sued on the basis of its stock option granting practices. (Tr. 8:10-13,
6 Feb. 25, 2009.) At the time Irell accepted representation of Broadcom and Mr. Ruehle in
7 May 2006, Irell knew or should have known that Broadcom's interests and Mr. Ruehle's
8 interests conflicted and were adverse to each other. If there were any wrongdoing
9 committed in connection with Broadcom's stock option practices, Broadcom might
10 contend that Mr. Ruehle was responsible for it and that he acted without the knowledge
11 and approval of the company. In these circumstances, Irell had a clear duty to disclose to
12 Mr. Ruehle the potential conflict of interest created by the dual representation and obtain
13 Mr. Ruehle's informed written consent to that conflict. Irell readily admits, however, that
14 it did not apprise Mr. Ruehle of that conflict nor did it obtain his written waiver of the
15 conflict.[8] (Tr. vol. 2, 36:5-11, Feb. 23, 2009.)
16
17 Second, Irell breached its duty of loyalty to Mr. Ruehle, a current client, by
18 interrogating him for the benefit of another client, Broadcom. The duty of loyalty
19 requires every lawyer "to protect each of his or her clients in every possible way."
20 *Gilbert v. Nat. Corp. for Hous. P'ships*, 71 Cal. App. 4th 1240, 1253 (Cal. Ct. App.
21 1999). Thus, "[i]t is a clear violation of that duty for the attorney to assume a position
22
23

24 [8] Even if Mr. Heitz did give Mr. Ruehle an *Upjohn* warning, such a warning would not suffice to waive the conflict of interest created by the dual representation. The oral warning Irell claims to have given
25 Mr. Ruehle was not sufficient to apprise him of the potential consequences of the dual representation.
26 Mr. Heitz testified that he merely advised Mr. Ruehle that he and Mr. Lefler were interviewing him on behalf of Broadcom in connection with their investigation of Broadcom's stock option granting
27 practices. (Tr. vol. 2 15:5-10, Feb. 23, 2009.) He did not disclose the specific risks of and alternatives to Irell's representation of both the company and Mr. Ruehle. (*Id.*) Indeed, Mr. Ruehle testified that he
28 did not understand that as a result of the dual representation he might not be able to assert the attorney-client privilege over statements he made to the Irell lawyers. (Tr. 76:6-11, 78:4-13, Feb. 25, 2009.)

Copyright © 2009 Association of Corporate Counsel

adverse or antagonistic to the client without the latter's free and intelligent consent, given with full knowledge of all the facts and circumstances." *Id.*

In *Gilbert v. National Corp. for Housing Partnerships*, a lawyer represented an employee, Franklin, in an action against his employer regarding alleged discrimination and harassment. *Id.* at 1244. After arbitration, the parties entered into a settlement agreement, which required the parties to keep the terms of the settlement agreement confidential. *Id.* at 1245. After the settlement agreement was executed, a second employee contacted the lawyer, seeking representation in a separate action involving similar allegations of discrimination against the same employer. *Id.* The lawyer accepted representation on behalf of that employee as well. *Id.* Before trial on the second employee's claims, the lawyer indicated that he would call Franklin "to testify about complaints he had heard" and his own "observations of alleged racial discrimination." *Id.* at 1246. The lawyer never obtained informed written consent to the conflict posed by the lawyer's continuing representation of both Franklin and the second employee. *Id.* at 1255. The employer filed a motion to disqualify the lawyer, which the trial court granted. *Id.* at 1247. The California Court of Appeal affirmed, holding that the dual representation posed "tremendous risks" to both Franklin and the second employee. *Id.* at 1252. The court went on to discuss the nature of the conflict:

> As an advocate for [the second employee], counsel's duty was to utilize the available witnesses to attempt to support [the second employee's] claims against [the employer]. As an advocate for Franklin and the other maintenance supervisors, on the other hand, counsel's duty was to assist in avoiding potential liability for breaching the Settlement Agreement he himself had negotiated on their behalf. [The second employee] wanted her attorney's other clients to testify in her own case, even though they risked violating the Settlement Agreement and compromising their own interests by doing so.

Copyright © 2009 Association of Corporate Counsel

1 *Id.* at 1254. By attempting to mine information from one client to that client's possible
2 detriment in order to help another client, the court concluded that the lawyer "violated his
3 duty of loyalty." *Id.* Furthermore, because "[t]he paramount concern . . . must be the
4 preservation of public trust in the scrupulous administration of justice and the integrity of
5 the bar," disqualification of the lawyer was an appropriate remedy for the ethical
6 violation. *Id.* at 1255.
7
8 The Fourth Circuit addressed a similar ethical issue in *In re Grand Jury Supboena.*
9 In that case, a law firm undertook an investigation on behalf of a corporation, but did not
10 represent the officers. *In re Grand Jury Subpoena*, 415 F.3d at 335. Before interviewing
11 the corporation's officers, however, the lawyers told the corporate officers that the firm
12 did not represent the officers currently, but assured the corporate officers that the firm
13 could represent them individually. *Id.* at 336. The Fourth Circuit, seemingly incredulous
14 that such assurances were given, noted that it did not implicitly accept "the watered-down
15 '*Upjohn* warnings' the investigating attorneys" provided to the corporate officers. *Id.* at
16 340. The Fourth Circuit went on to note that it "would be hard pressed to identify how
17 investigating counsel could robustly investigate and report to management or the board of
18 directors of a publicly-traded corporation with the necessary candor if counsel were
19 constrained by ethical obligations to individual employees." *Id.* The duty of loyalty
20 prohibits a lawyer refrain from "jettison[ing] one client in favor of another." *Id.* [9]
21
22
23
24
25
26
27
28

[9] It should be noted that the rules regarding conflicts of interest and the duty of confidentiality are also relevant here. Rule 3-310(E) prohibits a lawyer, without a client's informed written consent, from accepting "employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." CAL. RULES OF PROF'L CONDUCT R. 3-310(E). This rule is based on the notion that a lawyer may not use information learned in the course of representing a client to that client's detriment in another action. *See, e.g.*, *Sharp*, 163 Cal. App. 4th at 427-28, *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp.*, 36 Cal. App. 4th 1832, 1839 (Cal. Ct. App. 1995). Again, a lawyer may not sacrifice the interests of a former or existing client by using confidential information obtained in the course of the attorney-client relationship to benefit another client.

Copyright © 2009 Association of Corporate Counsel

1 Absent informed written consent and waiver of the conflict of interest, Irell should
2 not have interviewed Mr. Ruehle on behalf of Broadcom alone. In effect, Irell was
3 interrogating one client to benefit another client. The Rules of Professional Conduct
4 simply do not allow for such subordination. When Irell interviewed Mr. Ruehle about the
5 stock option granting practices at Broadcom, it should have known that in the course of
6 the interview, Mr. Ruehle might provide incriminating evidence about his role in those
7 practices. Irell should never have permitted Mr. Ruehle, let alone encouraged him, to
8 disclose his role without full knowledge of the consequences. Indeed, had Mr. Ruehle
9 understood that he was communicating with Irell in its capacity solely as Broadcom's
10 lawyer and that what he said to Irell could be disclosed to the Government as part of a
11 criminal investigation of him, he never would have agreed to speak to Irell. (Tr. 76:6-11,
12 78:4-13, Feb. 25, 2009.) By sacrificing the interests of Mr. Ruehle in favor of those of
13 Broadcom, Irell breached its duty of loyalty to him.
14
15 Finally, Irell disclosed Mr. Ruehle's privileged communications to third parties
16 without his consent. An attorney has a duty to "maintain inviolate the confidence, and at
17 every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. &
18 PROF. CODE § 6068(e). Only with a client's permission may a lawyer disclose
19 confidential communications. CAL. EVID. CODE § 954; CAL. RULES OF PROF'L CONDUCT
20 R. 3-100. A lawyer's duty to preserve confidences persists beyond the end of the
21 attorney-client relationship. CAL. BUS. & PROF. CODE § 6068(e). Attorneys are bound by
22 the ethical rule against disclosure of client confidences and disclosure of privileged client
23 confidences may result in "State Bar disciplinary proceedings." *Fox Searchlight*
24 *Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294, 309 (Cal. Ct. App. 2001).
25
26 In August of 2006, Irell disclosed the statements Mr. Ruehle made to Irell to
27 Broadcom's outside auditors, Ernst & Young. (Tr. vol. 2, 38:18-23, Feb. 23, 2009.) Even
28 worse, Irell later disclosed the same information to the Government as part of its criminal

Copyright © 2009 Association of Corporate Counsel

1 prosecution of him. (*Id.* 40:9-19.) Mr. Ruehle did not consent to any of these
2 disclosures. (*Id.*) Mr. Ruehle had substantial experience in similar litigation, and he
3 spoke with Irell believing that his statements would be kept in confidence. Had Mr.
4 Ruehle suspected that his statements would be turned over to the Government in a
5 criminal proceeding, he never would have made them to Irell. (Tr. 76:6-11, 78:4-13, Feb.
6 25, 2009.) In any event, Mr. Ruehle never gave Irell permission to jettison his rights for
7 those of Broadcom and disclose the confidential information that he shared with Irell to
8 the Government and other third parties. For Irell to have done so without Mr. Ruehle's
9 consent was wrong and a clear breach of its duty of loyalty to him.
10
11 Irell's ethical breaches of the duty of loyalty are very troubling. Mr. Ruehle's
12 confidential and privileged information has been disclosed to numerous third parties,
13 most notably the Government in connection with its criminal prosecution against him.
14 The Government's case against Mr. Ruehle is a serious one, and Mr. Ruehle faces a
15 significant prison sentence if convicted on all counts charged in the indictment. It must
16 be disconcerting to Mr. Ruehle to know that his own lawyers at Irell disclosed his
17 confidential and privileged information to the Government, lawyers whom Mr. Ruehle
18 trusted and believed would never do anything to hurt him. And now the Court has had to
19 intervene and suppress relevant evidence in the Government's case against Mr. Ruehle.
20 The Government's burden is not an easy one, as it has to prove the charges against Mr.
21 Ruehle beyond a reasonable doubt. Suppressing relevant evidence is obviously not
22 helpful to the Government in that regard, but more importantly, it hinders the adversarial
23 process and the jury's search for the truth. Irell should not have put the parties and the
24 Court in this position. The Rules of Professional Conduct are not aspirational. The Court
25 is at a loss to understand why Irell did not comply with them here. Because Irell's ethical
26 misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal
27 profession, and the fair administration of justice, the Court must refer Irell to the State
28 Bar for discipline. Mr. Ruehle, the Government, and the public deserve nothing less.

Copyright © 2009 Association of Corporate Counsel

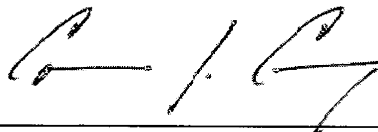
1 **CONCLUSION**

2

3 For the foregoing reasons, all evidence reflecting Mr. Ruehle's statements to Irell
4 regarding the stock option granting practices at Broadcom is suppressed.[10] Irell is hereby
5 referred to the State Bar for appropriate discipline.

6

7 DATED: April 1, 2009



8

9 CORMAC J. CARNEY
10 UNITED STATES DISTRICT JUDGE

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

28 [10] The Court expects that the Government will return all privileged documents to Mr. Ruehle within 14 days, unless otherwise directed by the Court of Appeals for the Ninth Circuit.

Copyright © 2009 Association of Corporate Counsel

NOTICE PARTY SERVICE LIST

Case No. SACR 08-00139-CJC **Case Title** U.S.A. v. Henry T. Nicholas, III, et al

Title of Document Order Suppressing Privileged Communications

	ADR
	BAP (Bankruptcy Appellate Panel)
	BOP (Bureau of Prisons)
	CA St Pub Defender (Calif. State PD)
	CAAG (California Attorney General's Office - Keith H. Borjon, L.A. Death Penalty Coordinator)
	Case Asgmt Admin (Case Assignment Administrator)
	Chief Deputy Admin
	Chief Deputy Ops
	Clerk of Court
	Death Penalty H/C (Law Clerks)
	Dep In Chg E Div
	Dep In Chg So Div
	Federal Public Defender
	Fiscal Section
	Intake Section, Criminal LA
	Intake Section, Criminal SA
	Intake Supervisor, Civil
	MDL Panel
	Ninth Circuit Court of Appeal
	PIA Clerk - Los Angeles (PIALA)
	PIA Clerk - Riverside (PIAED)
	PIA Clerk - Santa Ana (PIASA)
	PSA - Los Angeles (PSALA)
	PSA - Riverside (PSAED)
	PSA - Santa Ana (PSASA)
	Schnack, Randall (CJA Supervising Attorney)
	Statistics Clerk

	US Attorneys Office - Civil Division -L.A.
	US Attorneys Office - Civil Division - S.A.
	US Attorneys Office - Criminal Division -L.A.
	US Attorneys Office - Criminal Division -S.A.
	US Bankruptcy Court
	US Marshal Service - Los Angeles (USMLA)
	US Marshal Service - Riverside (USMED)
	US Marshal Service -Santa Ana (USMSA)
	US Probation Office (USPO)
	US Trustee's Office
	Warden, San Quentin State Prison, CA

	ADD NEW NOTICE PARTY **(if sending by fax, mailing address must also be provided)**

Name: State Bar of California
Firm:
Address (*include suite or floor*): 1149 South Hill St.
Los Angeles, CA 90015
*E-mail:
*Fax No.:

* For CIVIL cases only

	JUDGE / MAGISTRATE JUDGE (list below):

Initials of Deputy Clerk mu

G-75 (08/08) NOTICE PARTY SERVICE LIST

Copyright © 2009 Association of Corporate Counsel

EMPLOYED LAWYERS PROFESSIONAL LIABILITY CLAIMS SCENARIOS

MOONLIGHTING

An Employed Lawyer, represents a friend involved in a lawsuit. The policy provides moonlighting coverage. The lawyer misses the deadline for filing an answer to the complaint. A judgment is then entered against his client. The client sues the lawyer for malpractice.

PRO-BONO

The Employed Lawyer, as part of his pro-bono work, represents the claimant in the purchase of a business. The client alleges that there was a conflict of interest because the insured was representing the seller in a related transaction.

EMPLOYEES

The Employer utilizes the Employed Lawyer to prosecute a case against an ex-employee. The Employer loses the case. The ex-employee sues the Employer and the Employed Lawyer seeking damages for malicious prosecution, damage to reputation and loss of business.

CLIENTS OF EMPLOYER

A Franchise brings a suit against the Employed Lawyer and Franchisor alleging negligent advice and negligent misrepresentation regarding the ultimate cost of the franchise and the terms of the franchise agreement.

OTHER THIRD PARTIES

The lawyers of the .XYZ Company were sued by a former XYZ employee. It is alleged the Employed Lawyer had a conflict of interest when they represented him and the firm in an arbitration proceeding.

(These scenarios are given as brief examples which have given rise to claims. Coverage depends upon the facts of each case and the terms, conditions, exclusions and endorsements of the specific policy.)

*Provided by and reproduced with the permission of, Philadelphia Insurance Companies

Copyright © 2009 Association of Corporate Counsel

1. Insured: Clothing Company
Claimant: Law firm
Description: Clothing company sued its outside law firm, and then law firm sued company's general counsel in third party complaint for failing to advise of applicable insurance coverage for company with respect to underlying lawsuit. Defense counsel is attempting to get the employed lawyer dismissed from lawsuit since he was not acting as an agent of the clothing co. in this regard.

2. Insured: Financial Planning Company
Claimant: Client of above
Description: Employed lawyer prepared estate planning documents for client, who sued after having to pay a penalty large sum of capital gains tax and penalty. We contributed to global settlement, despite fact that liability of lawyer was questionable.

3. Insured: Union
Claimant: Member of Union
Description: Staff attorney represented union member at arbitration regarding his suspension and possible dismissal from Union position. Member sued attorney alleging breach of fair representation and failure to contest decision of arbitrator. Defendant's motion for summary judgment was successful, and plaintiff has appealed.

4. Insured: Financial Institution
Claimant: Commissioner of Insurance
Description: Plaintiff alleged that insured's general counsel was involved in improper takeover. This is primarily a Directors & Officers liability case, and EPL policy isn't being invoked at this juncture.

5. Insured: Private Non-Profit Corporation
Claimant: Ward of the State
Description: Non-Profit Corp. contracted with state agency to serve as local provider of protective services for senior citizens. Staff attorneys provided legal representation. Ward of the state alleged that her constitutional rights were violated when she was removed from her home and placed in a nursing home pursuant to a court order obtained by staff attorneys. Other insurance policies have primary coverage and EPL policy is not being invoked at this time.

6. Insured: County Board of Education
Claimant: Employee
Description: Staff attorney drafted will for employee of Bd. Of Edu. and was sued for negligence. Defense counsel is trying to settle this matter.

7. Insured: Tenant Association
Claimant: Tenant
Description: Insured and staff counsel were named in Article 78 proceeding brought against it, as well as other various government agencies for improper eviction of plaintiff from her apartment. Defendant's motion to dismiss was granted since Article 78 proceeding was improper, and plaintiff has brought another Article 78 proceeding despite the dismissal of the first action.

(These scenarios are given as brief examples which have given rise to claims. Coverage depends upon the facts of each case and the terms, conditions, exclusions and endorsements of the specific policy.)

*Provided by and reproduced with the permission of, Philadelphia Insurance Companies

Copyright © 2009 Association of Corporate Counsel

8. Insured: Adoption Agency
Claimant: Landlord
Description: Adoption agency and general counsel were sued for breach of a lease and fraudulent transfer of assets by the insured to another entity, where agency's in-house attorney conducted valuation of its assets and completed transfer. Lawsuit settled for minimal amount.

9. Insured: Title Insurance Company
Claimant: Former Owner of Property
Description: Potential claim against employed lawyer and title insurance company arising out of an underlying lawsuit involving certain rights which were allegedly granted to lot owners, but were apparently missed during a title search of the property. Main claim is against another entity.

10. Insured: Teachers Association
Claimant: School Employee
Description: Staff attorney was sued for negligence in his negotiation of a settlement on behalf of the plaintiff with the board of education with respect to a retirement benefits plan. Attorney erroneously relied on outdated manual and a repealed statute which misled plaintiff into accepting an unfavorable settlement. We settled with plaintiff for the value of his lost retirement benefits.

11. Insured: Pharmaceutical Company
Claimant: Various Companies With Putative Increase in Patent Applications
Description: Potential claim submitted by general counsel of corporation who acted as a liason with outside counsel hired to file foreign patent applications on behalf of corp. and several other entities with which it had research agreements. Outside counsel missed the deadlines for filing the foreign patent applications. Informed by insured that statute of limitations has run and no lawsuit was brought.

12. Insured: Bank
Claimant: Title Insurance Company
Description: Third-party complaint was brought against insured's in-house counsel alleging that defendant/3rd party plaintiff relied on a legal opinion given by lawyer in connection with title insurance issued by defendant regarding property transaction between insured and several other entities.

13. Insured: Bank
Claimant: Appraiser hired by Bank
Description: Plaintiff sued the insured and its in-house counsel (and their prior law firm) for malicious prosecution regarding an underlying litigation against plaintiff which was voluntarily dismissed without prejudice, for economic/business reasons. Discovery is continuing and defense counsel is preparing a summary judgment motion to dismiss the lawsuit.

(These scenarios are given as brief examples which have given rise to claims. Coverage depends upon the facts of each case and the terms, conditions, exclusions and endorsements of the specific policy.)

*Provided by and reproduced with the permission of, Philadelphia Insurance Companies

Copyright © 2009 Association of Corporate Counsel

14. Insured: Medical Center/Hospital
    Claimant: Doctor
    Description: Hospital and its corporate counsel were sued by plaintiff for denial of staff and clinical privileges based on alleged fraud in his application for employment, and for maliciously publishing a false and libelous report about the plaintiff. There are no allegations of legal malpractice. The hospital is affording its corp. counsel with a defense under its general liability policy, which has the primary and umbrella coverage. We have taken an excess position, along with the D & O policy.

15. Insured: Medical Association
    Claimant: Doctor
    Description: Medical center/hospital and all related individuals were sued by doctor for revocation of hospital staff privileges, and for libel and defamation. General counsel was named in complaint, but there are no allegations of legal malpractice. Defense counsel for hospital has filed an answer on behalf of general counsel.

16. Insured: Corporation
    Claimant: Employee
    Description: Employee asserted that he had claims to corporation's stock, and that corporation's in-house counsel had made certain misrepresentations regarding the employee stock purchase plan (which counsel had participate in preparing). Defense counsel settled with the plaintiff for shares of stock of the corporation.

17. Insured: Non-Profit Association
    Claimant: Individual entitled to services of Association
    Description: Non-Profit Assoc. provides services to individuals with disabilities. Staff attorney contacted complainant in an attempt to resolve a dispute which arose between her and the Association's employees. Complainant then sued attorney, alleging harassment and threats of retaliation for bringing a lawsuit against the Assoc. and several employees. Defense counsel recently assigned (new case).

(These scenarios are given as brief examples which have given rise to claims. Coverage depends upon the facts of each case and the terms, conditions, exclusions and endorsements of the specific policy.)

*Provided by and reproduced with the permission of, Philadelphia Insurance Companies

ENDORSEMENT# *13*

This endorsement, effective *12:01 am* *May 24, 2007* forms a part of policy number :
issued to

by *Illinois National Insurance Company*

EMPLOYED LAWYERS PROFESSIONAL LIABILITY EXTENSION

In consideration of the premium charged, it is hereby understood and agreed that the term " **Executive**" is amended to include any " **Employed Lawyer**", but only for **Wrongful Acts** (as defined below) in such **Employed Lawyer's** capacity as such, subject to the terms, conditions and limitations of the policy and this endorsement.

Solely for the purposes of the extension of coverage provided by this endorsement, the term " **Wrongful Act**" means any act, error or omission of an **Employed Lawyer**, in the rendering or failure to render professional legal services for the **Organization**, but solely in his or her capacity as such. Provided, however, the term " **Wrongful Act**" shall not mean any act, error or omission in connection with any activities by such **Employed Lawyer**: (1) which are not related to such **Employed Lawyer's** employment with the **Organization**; (2) which are not rendered on the behalf of the **Organization** at the **Organization**'s written request; or (3) which are performed by the **Employed Lawyer** for others for a fee.

It is further understood and agreed that solely with respect to the coverage as is afforded by virtue of this endorsement, the **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim(s)** made against an **Employed Lawyer**:

(a) alleging, arising out of, based upon or attributable to any **Wrongful Act** occurring at a time when the **Employed Lawyer** was not employed as a lawyer by the **Organization**;

(b) alleging, arising out of, based upon or attributable to any **Wrongful Act**, if as of the **Continuity Date**, an **Employed Lawyer** knew or could have reasonably foreseen that such **Wrongful Act** could give rise to a **Claim**;

(c) alleging, arising out of, based upon or attributable to any activities by an **Employed Lawyer** as an officer or director of any entity other than the **Organization**.

It is further understood and agreed that for the purpose of the applicability of the coverage provided by this endorsement, the **Organization** will be conclusively deemed to have indemnified the **Employed Lawyer** to the extent that the **Organization** is permitted or required to indemnify him or her pursuant to law, common or statutory, or contract, or the charter or by-laws of the **Organization** (which are hereby deemed to adopt the broadest provisions of the law which determines and defines such rights of indemnity). The **Organization** hereby agrees to indemnify the **Employed Lawyer** to the fullest extent permitted by law including the making in good faith of any required application for court approval and the passing of any corporate resolution or the execution of any contract.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

1-14177 - Large Premium D&O Risk

COPY END 13

ENDORSEMENT# *13* **(Continued)**

This endorsement, effective *12:01 am* *May 24, 2007* forms a part of
policy number
issued to

by *Illinois National Insurance Company*

It is further understood and agreed that coverage as is afforded under this endorsement shall apply to a **Wrongful Act** of an **Employed Lawyer** only if one or more **Insured(s)** (other than an **Organization**) are and remain co-defendants in the action along with an **Employed Lawyer.**

It is further understood and agreed that the coverage provided by this endorsement is specifically excess over any other valid or collectible lawyers professional insurance, legal malpractice or errors and omissions insurance and shall only drop down and be primary insurance only in the event of exhaustion of such other insurance due to losses paid thereunder.

The term " **Employed Lawyer**" means any employee of the **Organization** who is admitted to practice law and who is employed, or was employed, at the time of the alleged **Wrongful Act** as a lawyer full time for and salaried by the **Organization.**

Solely for the purposes of the coverage provided by this endorsement the term " **Continuity Date**" means for each **Employed Lawyer** the later of June 28th, 2005, or the first date such person became an **Employed Lawyer** for the **Organization.**

Solely in regard to the coverage provided by this endorsement, the maximum limit of the **Insurer's** liability for all **Loss** in the aggregate arising from all **Claims** combined shall be $1,000,000 (hereinafter the " **Sub-limit of Liability**"). This **Sub-limit of Liability** shall be part of and not in addition to the aggregate **Limit of Liability** stated in the Declarations and will in no way serve to increase the **Insurer's** Limit of Liability as therein stated.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

NOTICE: THESE POLICY FORMS AND THE APPLICABLE RATES ARE EXEMPT FROM THE FILING REQUIREMENTS OF THE NEW YORK STATE INSURANCE DEPARTMENT. HOWEVER, SUCH FORMS AND RATES MUST MEET THE MINIMUM STANDARDS OF THE NEW YORK INSURANCE LAW AND REGULATIONS.

1-14177 - Large Premium D&O-Risk

COPY

END 13

AUTHORIZED REPRESENTATIVE

Legal Needs of Today's
Multi-Generational Workforce

Research Study
Conducted by Russell Research
Commissioned by ARAG®

Copyright © 2009 Association of Corporate Counsel

America's Personal Legal-Related Concerns and Experiences Bridge the Generation Gap

What does a twittering 20-something from Generation Y have in common with a rolling stone from the Baby Boomer generation? More than you might think when it comes to personal legal matters.

Although individual life stages and life styles can be as different as MP3 and 45 RPM, individuals of all ages have many legal concerns and experiences that bridge the generation gap. People also share a common desire for security and protection against legal needs that can affect their personal well-being and work-life balance.

A national study entitled *Legal Needs of Today's Multi-Generational Workforce*[1] reports that an overwhelming majority of Americans are concerned about personal legal matters and have experienced one or more legal needs in the past year. In addition, they view the services of legal professionals as beneficial for addressing personal legal needs that could occur.

The Generations Study was conducted by Russell Research, one of the pioneer firms in the market research industry, and was commissioned by ARAG®, a global leader of legal insurance. The study examined the concerns, experiences and legal service preferences for the four generations in the 21st century workforce:

- Generation Y (born 1978-1989)
- Generation X (born 1965-1977)
- Baby Boomers (born 1946-1964)
- Silent Generation (born before 1946)

Talking about Our Generations

The Generations Study shows that:

- Nine out of 10 Americans are concerned about family, financial, home, vehicle or other legal-related matters.
- In particular, eight out of 10 people are concerned about financial-related issues, such as estate planning, family matters and credit trouble.
- Seven out of 10 people have experienced one or more legal events.
- Legal events can happen to anyone at any time, yet only one out of four people has a plan to pay for legal expenses.

Legal Matters that Most Concerned People

From Michigan to New Mexico and Florida to California, the legal concerns of today's multi-generational workforce can weigh heavily on people's minds – affecting attitudes, relationships and careers.

Across the generations, anyone can be affected:

- Gen Y David in Detroit, a victim of identity theft, struggling to restore his good name and credit history
- Gen X Allison in Albuquerque, stuck in first gear over disputed automobile repairs, trying to turn a lemon into lemonade
- Boomer Barry in Miami, sandwiched between the care of an aging parent and the demands on his family life and career
- Silent Sarah in Sacramento, who can't get her contractor to finish the construction work that was begun weeks ago and now sits idle

Americans have a lot on their minds, which leads to the question: What are they most concerned about?

According to the Generations Study, the areas of greatest concern are financial matters (such as creation/modification of a will, living will, power of attorney, estate plan or trust, and identify theft), family matters (caring for/death of a family member and execution of an estate) and home-related matters (contractor issues).

Estate planning needs resonate more with Generation X, Baby Boomers and the Silent Generation, while credit matters are bigger concerns for Generation Y.

Family-related concerns seem to reflect life stage differences. The younger Generation Y group is more concerned about marriage and child birth, Generation X with child support and custody issues and Baby Boomers with the care of aging family members.

Top 10 Legal Concerns of Americans

- Creation of a will, estate plan or trust
- Modification of a will, estate plan or trust
- Creation of a living will
- Identity theft
- Death of an immediate family member
- Execution of an estate
- Residential contractor issues
- Establishment of power of attorney
- Care of an aging family member
- Credit card theft

Seven out of 10 people experienced one or more legal events during the past year.

Copyright © 2009 Association of Corporate Counsel

Leading financial related legal experiences included credit problems and estate and financial planning issues.

Leading home-related concerns include the purchase, sale, rental or repair of property. Generation Y is concerned about apartment rental or landlord disputes, Generation X about purchasing a home and the Baby Boomers and the Silent Generation about selling a primary residence.

Automobile-related concerns are fairly consistent across the four generations. Their biggest concerns are vehicle repairs, purchase, lease or sale, as well as traffic violations.

Legal Needs that People Most Often Experience

The Generations Study asked Americans about legal needs they experienced in the previous 12 months. Mirroring the results of an earlier Russell Research-ARAG study (*Measuring the Effects of Employee Financial & Legal Woes*), seven out of 10 people said they had experienced at least one personal legal need in the past year.[2]

It's worth noting, the Legal Woes Study showed that:

- Four out of 10 people saw a negative impact on their work lives.
- One out of five people was less productive on the job as a result.
- Four out of 10 people were very/extremely stressed by their personal legal experiences.
- One out of three people took time off work – an average of 13 days – to deal with personal legal issues.
- People spent, on average, 57 hours while at work addressing personal legal issues.

Fast forward to the Generations Study, which found credit problems and estate and financial planning issues to be the financial-related legal needs that Americans most often experience. Baby Boomers are more likely to have family-related needs that involve the care of an immediate family member while Generation X and Generation Y are more likely to get married or have children. The leading home-related legal experiences are apartment rental for Generation Y and dealing with home contractors for Baby Boomers and the Silent Generation.

Top 10 Legal Experiences of Americans

- Purchase/lease of an automobile
- Apartment rental
- Ticket for a moving violation
- Credit trouble/debt collection
- Hiring a contractor for work on a residence
- Sale of an automobile
- Caring for an aging family member
- Death of a family member
- Creation of a will, estate plan or trust
- Financial planning

Legal Matters in Which Attorney Services Are Beneficial

Only one out of four people has a plan to pay for legal services.

The Generations Study also explored public perceptions of professional legal services. The vast majority of Americans said legal services are beneficial for many financial-, family-, home-, automobile- or other legal-related needs.

Most considered legal services important in dealing with financial-related matters: Baby Boomers for wills, estate plans and trusts, Generation X for bankruptcy matters and Generation Y for identity/credit card theft.

Eight out of 10 people indicated that legal services are helpful for marital concerns – divorce, separation, annulment – as well as child-related matters – support, custody or visitation.

Dispute resolution is a common theme for home-related matters. Overall, seven out of 10 people said legal services are helpful in addressing disputes for incomplete or improper contractor work. Generation Y is more likely to see the greatest legal benefit for landlord and rental disputes.

There is consensus across the generations that traffic tickets, license suspension or revocation and vehicle repair disputes are legal issues where an attorney would be beneficial.

How People Prefer to Communicate with Legal Professionals

The Generations Study asked Americans how they would prefer to communicate with legal professionals when receiving legal counsel and document work.

Seven out of 10 people would prefer face-to-face interaction, finding that it's more personal, easier and helps lessen the possibility of misunderstanding. The preference for face-to-face contact is highest with the Silent Generation and lowest with Generation Y.

Communication by telephone was also favored for the convenience and human interaction to seek and receive information. Receiving legal services by E-mail was valued highly by Generation X and Generation Y – not all that surprising given the role that computers and technology have played in their lifetimes.

Other electronic forms of communications, such as instant messaging, and text messaging were much less popular than more traditional forms of legal services interaction – even among the younger generations.

Copyright © 2009 Association of Corporate Counsel

People who are in their 20s and 30s are less likely to have a plan for covering legal costs.

How People Plan to Pay for Legal Expenses

Although Americans recognize the value of professional legal services, most don't have a plan to pay for legal expenses that can occur at any time.

The Generations Study reveals that three out of four people *don't* have a plan to cover legal expenses – they would have to find the means to pay for legal expenses that arise. With an average hourly rate of $286[3] for attorneys in the United States, the cost of legal services can present a financial challenge for many Americans.

People in their 20s and 30s are less likely to have a plan for handling legal expenses – even though they're not less likely to personally experience legal events.

The study showed that people in their 40s and 50s are more likely to have to find a way to pay for legal expenses. The 60-somethings are more likely than other groups to have the means to pay for legal services.

'The Times, They Are A-Changing'

In the early 1960s, Bob Dylan, the poet of his generation, sang, "The times, they are a-changing." Indeed, the decades have witnessed many changes in our society, our world and our daily lives. Yet, when it comes to personal legal matters, the more things change, the more they're likely to remain the same – unless people find ways to effectively address legal matters that can affect their personal lives and workplace effectiveness.

The Generations Study has voiced America's perceptions of legal needs and services in our complex society. Nine out of 10 Americans are concerned about personal matters from a legal standpoint. Seven out of 10 people have experienced one or more legal needs. One out of four people has a plan to finance legal expenses.

Personal legal matters can take a heavy toll on people's lives – their relationships, job performance, workplace productivity and personal well-being.

One of the ways that many Americans today are addressing legal matters is by enrolling in legal insurance plans. Legal plans have become one of the fastest growing voluntary employee benefits in the marketplace, and many leading companies and organizations are adopting legal plans to enhance employee benefit programs, as well as manage business costs. These plans provide convenient access to attorneys, legal services and resources, enabling people like Gen Y David, Gen X Allison, Boomer Barry and Silent Sarah to resolve legal problems or even prevent them from happening. It's one of the ways that people of all generations are changing with the times.

Endnotes

[1]Legal Needs of Today's Multi-Generational Workforce, a national study conducted by Russell Research and commissioned by ARAG, 2008.

[2]Measuring the Effects of Employee Financial & Legal Woes, a national study conducted by Russell Research and commissioned by ARAG, 2007.

[3]Average attorney rates in the United States of $286 per hour for attorneys with 11 to 15 years of experience, Survey of Law Firm Economics, Altman Weil Publications, Inc., 2008.

Copyright © 2009 Association of Corporate Counsel

Page 796
742 P.2d 796
154 Ariz. 295
In the Matter of a Member of the State Bar of Arizona, Robert Alexander PETRIE, Respondent.
No. SB-339.
Supreme Court of Arizona, In Banc.
Sept. 15, 1987.

Page 798

[154 Ariz. 297] Reynolds, Rhodes & Golston by Rodger A. Golston, Joe S. Reynolds, Mesa, for respondent.

Sandra Canter, Phoenix, State Bar Counsel.

HOLOHAN, Justice.

This matter comes to us on the objections of the respondent attorney to the findings, conclusions and recommendation of the Disciplinary Commission.

The Local Administrative Committee of the Arizona State Bar after hearing evidence had recommended that respondent be censured for representing clients with adverse interests in violation of Disciplinary Rule 5-105(A) and (B), and for failing to carry out a contract of employment in violation of Disciplinary Rule 7-101(A)(2). 1

Respondent filed objections to the Committee's findings of fact, conclusions of law and recommendations. The Disciplinary Commission received additional evidence and heard arguments by counsel. The Commission affirmed the Local Committee's findings and conclusions, but the Commission recommended by a vote of five to one, that respondent be suspended from the practice of law for thirty days. The dissent favored the Local Committee's recommendation of censure.

This matter requires that we answer two questions:

1. Did respondent violate conflict of interest rules by representing multiple clients in an adoption proceeding?

2. If so, is a thirty-day suspension the appropriate sanction?

I

Our duty in State Bar disciplinary proceedings is to determine the facts and law independently while giving serious consideration to the findings and recommendations of the Disciplinary Commission and the Local Administrative Committee. See In re Neville, 147 Ariz. 106, 108, 708 P.2d 1297, 1299 (1985). The evidence of unprofessional conduct must be clear and convincing to justify disciplinary action. Id.; In re Moore, 110 Ariz. 312, 313, 518 P.2d 562, 563 (1974). Evidence is clear and convincing when its truth is "highly probable." Neville, 147 Ariz. at 111, 708 P.2d at 1302 (citations omitted).

The complainants, Gregory and Barbara Pietz (Pietzes) consulted with respondent on July 21, 1981 to express their interest in adopting an infant child. Respondent told the Pietzes that he did not know of any infants available at that time. The Pietzes and respondent agreed that if the Pietzes located a baby for adoption, respondent would represent them in the adoption. The Pietzes paid $30 for this consultation.

The Committee found that shortly before January 26, 1983, the Pietzes received information from a long-time friend, Carolyn Iverson, about a child that would be available for adoption. The Pietzes asked Iverson to make an appointment for respondent to meet with the natural mother, and to inform the respondent specifically that the mother was being referred by the Pietzes. Iverson called respondent,

Copyright © 2009 Association of Corporate Counsel

advised him that she had found a baby for the Pietzes, and made an appointment for respondent to meet with the natural mother. The Pietzes had moved to Sierra Vista sometime after their meeting with respondent, so Iverson gave respondent the Pietzes' current address and telephone number in Sierra Vista. She also told him that the Pietzes had become certified by the State of Arizona as acceptable to adopt children.

Respondent testified that he received a call from a woman who advised him of the baby and that "she knew of someone who was interested in an adoption," namely the Pietzes. Respondent claims he did not recognize the Pietzes' name from their visit one and a half years earlier.

The evidence indicates that respondent met with the natural mother and her sister, and he advised them that he had a set of adoptive parents in mind. On January 26,

Page 799

[154 Ariz. 298] 1983, he wrote to the Pietzes, telling them that he had recently interviewed a woman who intended to place a child for adoption and that the Pietzes' names were given when the interview was arranged. Respondent inquired in the letter whether the Pietzes were interested in the adoption. Respondent received a written response on February 3, 1983, in which the Pietzes stated that they were interested in adopting the child, that they were certified by the State to adopt children, and that they were very hopeful concerning the present situation. The Pietzes' letter disclosed knowledge of facts about the natural mother that respondent had not conveyed to them in his original correspondence. Respondent interpreted the Pietzes' letter as "equivocal" because the Pietzes had questions about the adoption and the fees.

Shortly thereafter, respondent received a phone call from another couple, the Buckmasters, who expressed an interest in adopting a second child. In response to respondent's inquiry on February 18, 1983, the natural mother's sister stated that the mother had no obligation to the Pietzes. At respondent's recommendation, the mother agreed to place the baby with the Buckmasters. The Committee found that respondent recommended placement with the Buckmasters because they were more cooperative than the Pietzes and they were locally situated. In addition, respondent was not "excited" about making two appearances in Cochise County, which may have been necessary if the Pietzes were to adopt the child.

When the Pietzes learned from Iverson that the child was going to another couple, Mr. Pietz called respondent, and respondent advised Mr. Pietz for the first time that he had recommended to the natural mother that the child be placed with someone else. Mr. Pietz told respondent that the Pietzes had referred the child to the respondent and consequently they wanted the child placed with them. Respondent refused to do so. Mr. Pietz then initiated this complaint with the State Bar.

II

REPRESENTATION OF CLIENTS WITH ADVERSE INTERESTS

The complaint charged that the respondent violated Disciplinary Rule 5-105(A) and (B), which provides:

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

Copyright © 2009 Association of Corporate Counsel

In Op. No. 72-2, January 26, 1972, the attorney who requested the opinion gave a detailed description of his adoption procedures. Before placing babies, who were usually referred to him by an obstetrician, the attorney reviewed the prospective parents' qualifications. He also explained his fee structure to either the adoptive parents or the natural parents, whichever party he represented. In each instance, the attorney attempted to make sure that the party that he did not represent would obtain counsel. The ethics committee stated that "[h]is practice of seeking to have both parties to the adoption proceeding represented by independent counsel ... is clearly in compliance with the Code of Professional Responsibility...."

By attempting to represent the natural mother, the Pietzes, and the Buckmasters in the same adoption proceeding, respondent violated DR 5-105(A) and (B). In independent adoptions an attorney cannot

Page 803

[154 Ariz. 302] represent multiple parties absent disclosure and consent. See DR 5-105(C); Arden v. State Bar of California, 52 Cal.2d 310, 318-19, 341 P.2d 6, 10-11 (1959).

REPRESENTING A CLIENT ZEALOUSLY

The complaint filed against respondent also charged that respondent violated DR 7-101(A)(2), which provides:

(A) A lawyer shall not intentionally:

* * *

* * *

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

Respondent agreed to represent the Pietzes in an adoption proceeding if the Pietzes located a baby available for adoption. A year and a half later, the Pietzes referred an expectant mother to the respondent. Although respondent initially contacted the Pietzes with regard to adopting the child, he ultimately recommended that the natural mother consent to adoption of the child by another couple that respondent also represented. The respondent conceded that the Pietzes' credentials as adoptive parents were impressive. It appears that he chose the Buckmasters over the Pietzes because the Buckmasters resided locally, and there was a possibility he would have to travel to Cochise County to represent the Pietzes, a possibility he was not "excited" about.

Clearly, by recommending the Buckmasters over the Pietzes, respondent failed to carry out the contract of employment we have found existed between respondent and the Pietzes. We recognize that respondent may not have subjectively believed an attorney-client relationship existed between him and the Pietzes until he was confronted by Mr. Pietz after Pietz learned that someone else was to be adopting the baby. Thereafter, respondent knew, beyond any doubt, that the Pietzes had considered him as their lawyer, and they had expected him to handle the adoption.

After receiving the information from Mr. Pietz, respondent did nothing. The committee and the commission concluded that the respondent had intentionally violated DR 7-101(A)(2). We agree with their conclusion. The respondent had placed himself in the position of conflict, but he had an obligation to carry out the contract of employment with the Pietzes. Having become fully aware of the situation, the least he should have done is secure counsel for the Pietzes and withdrawn from representing any other parties in the matter.

DISCIPLINARY SANCTION

The purpose of attorney discipline is not to punish the offending lawyer, but to protect the public, the profession and the system of justice

Copyright © 2009 Association of Corporate Counsel

Buckmasters, or the natural mother--Petrie has violated DR 5-105(A) or (B).

An attorney-client relationship does not require the payment of a fee but may be implied from the parties' conduct. 7 Am.Jur.2d Attorneys at Law § 118 (1980); In re McGlothlen, 99 Wash.2d 515, 522, 663 P.2d 1330, 1334 (1983). The relationship is proved by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession. 7 Am.Jur.2d Attorneys at Law § 118. The appropriate test is a subjective one, where "the court

Page 801

[154 Ariz. 300] looks to the nature of the work performed and to the circumstances under which the confidences were divulged." Alexander v. Superior Court, 141 Ariz. 157, 162, 685 P.2d 1309, 1314 (1984), citing Developments of the Law--Conflicts of Interest in the Legal Profession, 94 HARV.L.REV. 1244, 1321-22 (1981). An important factor in evaluating the relationship is whether the client thought an attorney-client relationship existed. Alexander, 141 Ariz. at 162, 685 P.2d at 1314. The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on. In re Weiner, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978).

1. The Pietzes

The record contains clear and convincing evidence that respondent became the Pietzes' attorney for handling the adoption. At their initial meeting, respondent agreed to represent the Pietzes if they found a baby to adopt. Clearly, the Pietzes sought out respondent's legal assistance at that time. In referring the pregnant woman through Iverson to respondent for independent placement, the Pietzes had every reason to rely on respondent's original promise that he would represent them in the adoption. Furthermore, the referral of the natural mother by the Pietzes indicates that they understood that the attorney-client relationship with respondent was ongoing. The relationship was not terminated until they wrote to respondent in June 1983, and expressly stated they were discharging him as their attorney.

Even accepting respondent's argument that an attorney-client relationship was subject to the condition that the Pietzes locate a baby, correspondence between the respondent and the Pietzes immediately after respondent's first meeting with the natural mother belies respondent's contention that he did not know that the natural mother had been referred to him by the Pietzes. Respondent's letter to the Pietzes indicated that the person who had made the appointment for the natural mother indicated that the Pietzes might be interested in the adoption. Furthermore, respondent stated in the letter, "I would not expect to have any problem in placing the child but I thought we should write to determine your interest in the placement." The Pietzes unequivocally stated in their response that they were "very hopeful" to adopt the baby. In addition, in their letter the Pietzes alluded to circumstances regarding the natural mother which were not communicated to them by respondent in his original letter. If nothing else, respondent surely should have realized from their letter that the Pietzes were involved in the referral of the baby's mother.

Respondent also argues that no attorney-client relationship developed because the Pietzes were "equivocal" in their response. He points to the Pietzes' questions about when the baby was due, what their expenses in the adoption would be, and where the father of the unborn child fit in. We find that these were natural questions by any prospective adoptive parents and they do not negate the existing attorney-client relationship. Instead, they reinforce the existence of a relationship because they are evidence that the Pietzes continued to seek legal advice from respondent. Furthermore, the fact that the Pietzes wrote back to respondent within eight days to indicate their desire to adopt the child is inconsistent with respondent's characterization of the Pietzes' response as "equivocal."

Copyright © 2009 Association of Corporate Counsel

We agree with the Commission's finding that there was an attorney-client relationship between respondent and the Pietzes.

2. The Buckmasters

The Commission found that an attorney-client relationship later developed between respondent and the Buckmasters. We agree. Mr. Buckmaster testified that he believed that he and his wife were respondent's clients. They met with respondent regarding the adoption and understood that if the natural mother consented, respondent would perform the adoption for them and they would pay the necessary fees. The fact that respondent never actually performed the adoption of the baby

Page 802

[154 Ariz. 301] does not nullify the existence of an attorney-client relationship.

3. The Natural Mother

Respondent agrees that he and the natural mother had an attorney-client relationship. Although the mother was not liable to respondent for legal fees, clearly the natural mother came to respondent seeking legal advice and she received that advice from respondent.

C. Violations of DR 5-105

We find that respondent violated DR 5-105 by representing the Buckmasters in the same matter in which he was already counsel for the Pietzes. Respondent had a duty to advocate for the Pietzes in the adoption proceeding. The natural mother's indication that she was not committed to the Pietzes did not lessen the respondent's duty of loyalty to them. The respondent breached that duty when he accepted profferred employment from the Buckmasters and recommended them as adoptive parents to the natural mother. It is difficult to imagine an action by respondent that would have been more adverse to the Pietzes' interest in the adoption. By accepting employment from the Buckmasters while already representing the Pietzes in the same adoption proceeding without full disclosure and consent, respondent violated DR 5-105(A); by continuing in the simultaneous representation and by ultimately recommending the Buckmasters over the Pietzes, respondent violated DR 5-105(B).

We find that respondent also violated DR 5-105 by representing both the natural mother and the adoptive parents in an adoption proceeding. Respondent claimed that he always represented the natural mother in adoption proceedings. From his testimony, it appears that his usual custom was to maintain a file of potential adoptive parents from which the natural mother who is his client may select the couple best suited to adopt the baby. We do not expressly prohibit this practice. However, the attorney must take special care to avoid violating the ethical rules regarding representation of multiple clients. In this regard, two ethics opinions of the Arizona State Bar Committee on Rules of Professional Conduct are helpful.

In Op. No. 94, February 12, 1962, the attorney represented adoptive parents in an independent adoption. The attorney advised the natural mother that she could obtain her own counsel; however, no lawyer purporting to represent her contacted the attorney in question. The attorney subsequently obtained the natural mother's written consent to adopt, after advising both her and the alleged father of its legal effect. The attorney then assisted in placing the child in the physical control of the adoptive parents, filed the petition to adopt, and accepted a $200 fee for his services. The committee opined that in considering how far the attorney can ethically participate in bringing about the ultimate adoption decree, "[n]aturally, an attorney cannot represent both the natural parent and the adopting parents, and cannot conduct a baby brokerage business under the guise of practicing law." The committee found no unethical activity, however, because the lawyer made clear who he represented and advised the nonrepresented party to seek independent counsel.

In Op. No. 72-2, January 26, 1972, the attorney who requested the opinion gave a detailed description of his adoption procedures. Before placing babies, who were usually referred to him by an obstetrician, the attorney reviewed the prospective parents' qualifications. He also explained his fee structure to either the adoptive parents or the natural parents, whichever party he represented. In each instance, the attorney attempted to make sure that the party that he did not represent would obtain counsel. The ethics committee stated that "[h]is practice of seeking to have both parties to the adoption proceeding represented by independent counsel ... is clearly in compliance with the Code of Professional Responsibility...."

By attempting to represent the natural mother, the Pietzes, and the Buckmasters in the same adoption proceeding, respondent violated DR 5-105(A) and (B). In independent adoptions an attorney cannot

Page 803

[154 Ariz. 302] represent multiple parties absent disclosure and consent. See DR 5-105(C); Arden v. State Bar of California, 52 Cal.2d 310, 318-19, 341 P.2d 6, 10-11 (1959).

REPRESENTING A CLIENT ZEALOUSLY

The complaint filed against respondent also charged that respondent violated DR 7-101(A)(2), which provides:

(A) A lawyer shall not intentionally:

* * *

* * *

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

Respondent agreed to represent the Pietzes in an adoption proceeding if the Pietzes located a baby available for adoption. A year and a half later, the Pietzes referred an expectant mother to the respondent. Although respondent initially contacted the Pietzes with regard to adopting the child, he ultimately recommended that the natural mother consent to adoption of the child by another couple that respondent also represented. The respondent conceded that the Pietzes' credentials as adoptive parents were impressive. It appears that he chose the Buckmasters over the Pietzes because the Buckmasters resided locally, and there was a possibility he would have to travel to Cochise County to represent the Pietzes, a possibility he was not "excited" about.

Clearly, by recommending the Buckmasters over the Pietzes, respondent failed to carry out the contract of employment we have found existed between respondent and the Pietzes. We recognize that respondent may not have subjectively believed an attorney-client relationship existed between him and the Pietzes until he was confronted by Mr. Pietz after Pietz learned that someone else was to be adopting the baby. Thereafter, respondent knew, beyond any doubt, that the Pietzes had considered him as their lawyer, and they had expected him to handle the adoption.

After receiving the information from Mr. Pietz, respondent did nothing. The committee and the commission concluded that the respondent had intentionally violated DR 7-101(A)(2). We agree with their conclusion. The respondent had placed himself in the position of conflict, but he had an obligation to carry out the contract of employment with the Pietzes. Having become fully aware of the situation, the least he should have done is secure counsel for the Pietzes and withdrawn from representing any other parties in the matter.

DISCIPLINARY SANCTION

The purpose of attorney discipline is not to punish the offending lawyer, but to protect the public, the profession and the system of justice

Copyright © 2009 Association of Corporate Counsel

by deterring similar activity by this attorney and others in the future. In re Neville, 147 Ariz. 106, 116, 708 P.2d 1297, 1307 (1985). We will give great weight to the recommendations of both the Local Committee and the Disciplinary Commission regarding what sanction is appropriate for violation of the disciplinary rules, but we must make the final decision. Id. at 115, 708 P.2d at 1306. Recently, in determining the appropriate sanction in attorney disciplinary proceedings, we also have looked for guidance to the Standards for Imposing Lawyer Sanctions, approved in February 1986 by the House of Delegates of the American Bar Association. 3 See In re Hegstrom, 153 Ariz. 286, 736 P.2d 370 (1987). We find these standards especially helpful in cases such as this one, where the recommendations of the Committee and the Commission are in conflict. 4

The ABA standards recommend suspension when an attorney knows of a conflict of interest, does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client. Standard 4.32. The standards

Page 804

[154 Ariz. 303] recommend only reprimand (censure) when the attorney is negligent in determining whether a conflict of interest exists, and causes injury or potential injury to a client. Standard 4.33. From the findings of facts made by the Committee and from our review of the record, it is unclear whether respondent was only negligent in determining a conflict of interest existed or whether he actually knew of the conflict. Respondent testified that his only client was the natural mother. We have determined that both the Pietzes and the Buckmasters were his clients as well. If respondent did not think either the Pietzes or the Buckmasters were his clients, he would not have "known" a conflict of interest existed. However, at a minimum, respondent was negligent in failing to recognize that the potential adoptive parents were his clients and that a conflict existed. Accordingly, we agree with the Local Committee that the appropriate sanction due respondent is censure. We decline to adopt the recommendation of the Disciplinary Commission that respondent be suspended for 30 days because neither the findings of the Local Committee nor our independent review of the record unequivocally reveals that respondent knew the conflict existed. Considering also that respondent has an otherwise flawless record in the almost 30 years he has practiced in Arizona, we find the recommendation of the Commission unduly harsh. See In re McGlothlen, 99 Wash.2d 515, 526, 663 P.2d 1330, 1336 (1983) (court will treat conflict of interest misconduct, standing alone, with relative leniency).

CONCLUSION

The findings of fact and conclusions of law of the Local Committee are approved. Respondent is censured and assessed costs of $2,225.10. 5

GORDON, C.J., and FELDMAN, V.C.J., and CAMERON, J., concur.

MOELLER, J., did not participate in the determination of this matter.

----

1 The alleged infractions in this case took place prior to the 1984 Revision of Supreme Court Rules; thus, the substantive issues will be governed by the Code of Professional Responsibility, Rule 29(a) of the former Supreme Court Rules, 17A A.R.S.

2 Independent (i.e., non-agency) adoptions are permitted by statute in Arizona. It is not alleged that respondent violated the adoption statute, which provided:

D. Any attorney licensed to practice in this state may perform legal services in an adoption proceeding if he does not receive any compensation or thing of value, directly or indirectly beyond a reasonable fee, approved by the court, for legal services rendered, which fee shall not include any compensation for

In Op. No. 72-2, January 26, 1972, the attorney who requested the opinion gave a detailed description of his adoption procedures. Before placing babies, who were usually referred to him by an obstetrician, the attorney reviewed the prospective parents' qualifications. He also explained his fee structure to either the adoptive parents or the natural parents, whichever party he represented. In each instance, the attorney attempted to make sure that the party that he did not represent would obtain counsel. The ethics committee stated that "[h]is practice of seeking to have both parties to the adoption proceeding represented by independent counsel ... is clearly in compliance with the Code of Professional Responsibility...."

By attempting to represent the natural mother, the Pietzes, and the Buckmasters in the same adoption proceeding, respondent violated DR 5-105(A) and (B). In independent adoptions an attorney cannot

Page 803

[154 Ariz. 302] represent multiple parties absent disclosure and consent. See DR 5-105(C); Arden v. State Bar of California, 52 Cal.2d 310, 318-19, 341 P.2d 6, 10-11 (1959).

REPRESENTING A CLIENT ZEALOUSLY

The complaint filed against respondent also charged that respondent violated DR 7-101(A)(2), which provides:

(A) A lawyer shall not intentionally:

* * *

* * *

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102 and DR 5-105.

Respondent agreed to represent the Pietzes in an adoption proceeding if the Pietzes located a baby available for adoption. A year and a half later, the Pietzes referred an expectant mother to the respondent. Although respondent initially contacted the Pietzes with regard to adopting the child, he ultimately recommended that the natural mother consent to adoption of the child by another couple that respondent also represented. The respondent conceded that the Pietzes' credentials as adoptive parents were impressive. It appears that he chose the Buckmasters over the Pietzes because the Buckmasters resided locally, and there was a possibility he would have to travel to Cochise County to represent the Pietzes, a possibility he was not "excited" about.

Clearly, by recommending the Buckmasters over the Pietzes, respondent failed to carry out the contract of employment we have found existed between respondent and the Pietzes. We recognize that respondent may not have subjectively believed an attorney-client relationship existed between him and the Pietzes until he was confronted by Mr. Pietz after Pietz learned that someone else was to be adopting the baby. Thereafter, respondent knew, beyond any doubt, that the Pietzes had considered him as their lawyer, and they had expected him to handle the adoption.

After receiving the information from Mr. Pietz, respondent did nothing. The committee and the commission concluded that the respondent had intentionally violated DR 7-101(A)(2). We agree with their conclusion. The respondent had placed himself in the position of conflict, but he had an obligation to carry out the contract of employment with the Pietzes. Having become fully aware of the situation, the least he should have done is secure counsel for the Pietzes and withdrawn from representing any other parties in the matter.

DISCIPLINARY SANCTION

The purpose of attorney discipline is not to punish the offending lawyer, but to protect the public, the profession and the system of justice

Copyright © 2009 Association of Corporate Counsel

449 U.S. 383
101 S.Ct. 677
66 L.Ed.2d 584
UPJOHN COMPANY et al., Petitioners,
v.
UNITED STATES et al.
No. 79-886.
Argued Nov. 5, 1980.
Decided Jan. 13, 1981.
Syllabus

When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U.S.C. § 7602 demanding production of, inter alia, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, inter alia, that the attorney-client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work-product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the attorney-client privilege, but held that under the so-called "control group test" the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.' " The court also held that the work-product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney-client privilege insofar as the responses to the

Page 384

questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 389-397.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle-level—and indeed

Copyright © 2009 Association of Corporate Counsel

lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 390-392.

(b) The control group test thus frustrates the very purpose of the attorney-client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 392.

(c) The narrow scope given the attorney-client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. P. 392-393.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper-echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. Pp. 394-395.

2. The work-product doctrine applies to IRS summonses. Pp. 397-402.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language

Page 385

or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work-product doctrine. P. 398.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, make clear, such work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 401.

600 F.2d 1223, 6 Cir., reversed and remanded.

Daniel M. Gribbon, Washington, D. C., for petitioners.

Lawrence G. Wallace, Washington, D. C., for respondents.

Page 386

Justice REHNQUIST delivered the opinion of the Court.

Copyright © 2009 Association of Corporate Counsel

We granted certiorari in this case to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 758. With respect to the privilege question the parties and various amici have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney-client privilege protects the communications involved in this case from compelled disclosure and that the work-product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter

Page 387

began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8-K disclosing certain questionable payments.1 A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

"All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any political

Page 388

contributions made by the Upjohn Company or any of its affiliates since January 1,

Copyright © 2009 Association of Corporate Counsel

1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.

"The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a-18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney-client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice . . . for the simple reason that the communications were not the 'client's.' " Id., at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper-echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was

Page 389

within the "control group" could be made. In a concluding footnote the court stated that the work-product doctrine "is not applicable to administrative summonses issued under 26 U.S.C. § 7602." Id., at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the

Copyright © 2009 Association of Corporate Counsel

Page 390

law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. United States v. Louisville & Nashville R. Co., 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, . . . can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. The first case to articulate the so-called "control group test" adopted by the court below, Philadelphia v. Westinghouse Electric Corp., 210 F.Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied sub nom. General Electric Co. v. Kirkpatrick, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), reflected a similar conceptual approach:

"Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, . . . then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See Trammel, supra, at 51, 100 S.Ct., at 913; Fisher, supra, at 403, 96 S.Ct., at 1577. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts

Page 391

with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1:

"A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also Hickman v. Taylor, 329 U.S. 495, 511, 67 S.Ct. 385, 393-394, 91 L.Ed. 451 (1947).

In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below-"officers and agents . . . responsible for directing [the company's] actions in response to legal advice"-who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (CA8 1978) (en banc):

Copyright © 2009 Association of Corporate Counsel

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he interviews employees not having "the very highest au-

Page 392

thority", their communications to him will not be privileged. If, on the other hand, he interviews only those employees with the "very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.' " Id., at 608-609 (quoting Weinschel Corporate Employee Interviews and the Attorney-Client Privilege, 12 B.C.Ind. & Com. L.Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, e. g., Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1164 (DSC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney-Client Privilege in the Corporate Arena, 24 Bus.Law. 901, 913 (1969), particularly since compliance with the law in this area is hardly an instinctive matter, see, e. g., United States v. United States Gypsum Co., 438 U.S. 422, 440-441, 98 S.Ct. 2864, 2875-2876, 57 L.Ed.2d 854 (1978) ("the behavior proscribed by the [Sherman] Act is

Page 393

often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct").2 The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, e. g., Hogan v. Zletz, 43 F.R.D. 308, 315-316 (ND Okl.1967), aff'd in part sub nom. Natta v. Hogan, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with Congoleum Industries, Inc. v. GAF Corp., 49 F.R.D. 82, 83-85 (ED Pa.1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate vice presidents, and not two directors of research and vice president for production and research).

Copyright © 2009 Association of Corporate Counsel

Page 394

The communications at issue were made by Upjohn employees 3 to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments and to be in a position to give legal advice to the company with respect to the payments." (Emphasis supplied.) 78-1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper-echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas.4 The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investiga-

Page 395

tion." It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." Id., at 165a-166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, id., at 39a, 43a, and have been kept confidential by the company.5 Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney-client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

"[T]he protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely dif-

Page 396

ferent thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (q2.7).

See also Diversified Industries, 572 F.2d., at 611; State ex rel. Dudek v. Circuit Court, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot

Copyright © 2009 Association of Corporate Counsel

conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege. As Justice Jackson noted in his concurring opinion in Hickman v. Taylor, 329 U.S., at 516, 67 S.Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."

Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S.Rep. No. 93-1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship . . . should be determined on a case-by-case basis"); Trammel, 445 U.S., at 47, 100 S.Ct., at 910-911; United States v. Gillock, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). While such a "case-by-case" basis may to some slight extent undermine desirable certainty in the boundaries of the attor-

Page 397

ney-client privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals, in this case cannot, consistent with "the principles of the common law as . . . interpreted . . . in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney-client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a-28a, 91a-93a. To the extent that the material subject to the summons is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work-product doctrine does not apply to summonses issued under 26 U.S.C. § 7602.6

The Government concedes, wisely, that the Court of Appeals erred and that the work-product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." Id., at 510, 67 S.Ct., at 393. The Court noted that "it is essential that a lawyer work with

Page 398

a certain degree of privacy" and reasoned that if discovery of the material sought were permitted

"much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Id., at 511, 67 S.Ct., at 393-394.

Copyright © 2009 Association of Corporate Counsel

The "strong public policy" underlying the work-product doctrine was reaffirmed recently in United States v. Nobles, 422 U.S. 225, 236-240, 95 S.Ct. 2160, 2169-2171, 45 L.Ed.2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3).7

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." United States v. Euge, 444 U.S. 707, 714, 100 S.Ct. 874, 879-880, 63 L.Ed.2d 741 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work-product doctrine. Rule 26(b)(3) codifies the work-product doctrine, and the Federal Rules of Civil Procedure are made applicable

Page 399

to summons enforcement proceedings by Rule 81(a)(3). See Donaldson v. United States, 400 U.S. 517, 528, 91 S.Ct. 534, 541, 27 L.Ed.2d 580 (1971). While conceding the applicability of the work-product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78-1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in Hickman:

"We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. . . . And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S., at 511, 67 S.Ct., at 394.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above-quoted language from Hickman, however, did not apply to "oral statements made by witnesses . . . whether presently in the form of [the attorney's] mental impressions or memoranda." Id., at 512, 67 S.Ct., at 394. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters petitioner's case is not of that type." Id., at 512-513, 67 S.Ct., at 394-395. See also Nobles, supra, 422 U.S., at 252-253, 95 S.Ct., at 2177 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513, 67 S.Ct., at 394-395 ("what he saw fit to write down regarding witnesses' remarks"); id, at 516-517, 67 S.Ct., at 396 ("the statement would be his [the

Page 400

attorney's] language, permeated with his inferences") (Jackson, J., concurring).8

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78-1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the Hickman court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's

Copyright © 2009 Association of Corporate Counsel

mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C.App., p. 442 ("The subdivision . . . goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories . . . of an attorney or other representative of a party. The Hickman opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . .").

Page 401

Based on the foregoing, some courts have concluded that no showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, e. g., In re Grand Jury Proceedings, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); In re Grand Jury Investigation, 412 F.Supp. 943, 949 (ED Pa.1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, e. g., In re Grand Jury Investigation, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations . . . must shape any ruling on the discoverability of interview memoranda . . .; such documents will be discoverable only in a 'rare situation' "); Cf. In re Grand Jury Subpoena, 599 F.2d 504, 511-512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work-product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and Hickman make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we

Page 402

think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work-product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work-product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

Chief Justice BURGER, concurring in part and concurring in the judgment.

I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I

Copyright © 2009 Association of Corporate Counsel

agree fully with the Court's rejection of the so-called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." Ante, at 393. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See ante, at 394-395. Because of the great importance of the issue, in my view the Court should make clear now that, as a

Page 403

general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, e. g., Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (CA8 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-492 (CA7 1970), aff'd by an equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); Duplan Corp v. Deering Milliken, Inc., 397 F.Supp. 1146, 1163-1165 (DSC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several amici have suggested in their proposed formulations *—but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly

Page 404

before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," ante, at 396, neither minimizes the consequences of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

1. On July 28, 1976, the company filed an amendment to this report disclosing further payments.

2. The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

Copyright © 2009 Association of Corporate Counsel

3. Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a-38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

4. See id., at 26a-27a, 103a, 123a-124a. See also In re Grand Jury Investigation, 599 F.2d 1224, 1229 (CA3 1979); In re Grand Jury Subpoena, 599 F.2d 504, 511 (CA2 1979).

5. See Magistrate's opinion, 78-1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

6. The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney-client privilege does not apply to them. See n. 3, supra.

7. This provides, in pertinent part:

"[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

8. Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78-1 USTC ¶ 9277, p. 83,599.

* See Brief for Petitioners 21-23, and n. 25; Brief for American Bar Association as Amicus Curiae 5-6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as Amici Curiae 9-10, and n. 5.

Copyright © 2009 Association of Corporate Counsel

ENDORSEMENT# 10

This endorsement, effective 12:01 a.m. June 30, 2009 forms a part of
policy number
issued to

by National Union Fire Insurance Company of Pittsburgh, Pa.

EMPLOYED LAWYERS PROFESSIONAL LIABILITY EXTENSION WITH SUBLIMIT OF LIABILITY

In consideration of the premium charged, it is hereby understood and agreed that the term "Individual Insured" is amended to include any "Employed Lawyer(s)" (as defined below) of the Company, but only for Claim(s) alleging a Wrongful Act in such Employed Lawyer(s)' capacity as such, subject to the terms, conditions and exclusions of the policy and this endorsement.

Solely for the purposes of this endorsement, the term "Wrongful Act" means any act, error or omission of an Employed Lawyer(s), in the rendering or failure to render professional legal services for the Company, but solely in his or her capacity as such. Provided, however that the term "Wrongful Act" shall not mean any act, error or omission in connection with any activities by such Employed Lawyer(s): (1) which are not related to such Employed Lawyer(s)' employment with the Company; (2) which are not rendered on the behalf of the Company at the Company's written request; or (3) which are performed by the Employed Lawyer(s) for others for a fee.

It is further understood and agreed that solely with respect to the coverage as is afforded by this endorsement, the Insurer shall not be liable to make any payment for Loss in connection with any Claim(s) made against an Employed Lawyer(s):

(a) alleging, arising out of, based upon or attributable to any Wrongful Act occurring at a time when the Employed Lawyer(s) was not employed as a lawyer by the Company;

(b) alleging, arising out of, based upon or attributable to as of , any pending or prior: (1) litigation; or (2) administrative or regulatory proceeding or investigation of which an Insured had notice, or alleging any Wrongful Act which is the same or Related Wrongful Act to that alleged in such pending or prior litigation or administrative or regulatory proceeding or investigation;

(c) alleging, arising out of, based upon or attributable to any Wrongful Act, if as of , an Employed Lawyer(s) knew or could have reasonably foreseen that such Wrongful Act could give rise to a Claim;

(d) alleging, arising out of, based upon or attributable to any activities by an Employed Lawyer(s) as an officer or director of any entity, other than the Company.

It is further understood and agreed that with regards to all Loss arising from coverage as is afforded by this endorsement, the limit of the Insurer's liability shall be (hereinafter the "sublimit of liability"). This sublimit of liability shall be part of and not in addition to the aggregate limit of liability stated in the Item of the Declarations page entitled LIMIT OF LIABILITY and will in no way serve to increase the Insurer's limit of liability as therein stated.

© American International Group, Inc. All rights reserved

END 010

86869 (11/04)

Copyright © 2009 Association of Corporate Counsel

ENDORSEMENT# 10 (continued)

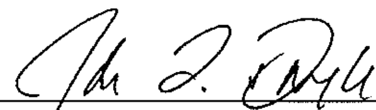
It is further understood and agreed that for the purpose of the applicability of the coverage provided by this endorsement, the Company will be conclusively deemed to have indemnified the Employed Lawyer(s) to the extent that the Company is permitted or required to indemnify them pursuant to law, common or statutory, or contract, or the charter or by-laws of the Company. The Company hereby agrees to indemnify the Employed Lawyer(s) to the fullest extent permitted by law, including the making in good faith of any required application for court approval.

It is further understood and agreed that coverage as is afforded under this endorsement shall apply to a Wrongful Act(s) only if one or more Insured(s) (other than an Employed Lawyer(s)) are and remain co-defendants in the action along with an Employed Lawyer(s).

It is further understood and agreed that the coverage provided by this endorsement is specifically excess over any other valid or collectible lawyers' professional insurance, legal malpractice or errors and omissions insurance and shall only drop down and be primary insurance in the event of exhaustion of such other insurance due to losses paid thereunder.

The term "Employed Lawyer(s)" means any Employee of the Company, in their capacity as such, who is admitted to practice law and who is or was employed as a lawyer full time and salaried by the Company.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.



AUTHORIZED REPRESENTATIVE

© American International Group, Inc. All rights reserved

END 010

86869 (11/04)

Page 2 of 2

Client-Lawyer Relationship
Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Source: http://www.abanet.org/cpr/mrpc/rule_1_2.html

Comment:

Client-Lawyer Relationship
Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer - Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

Copyright © 2009 Association of Corporate Counsel

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree

Copyright © 2009 Association of Corporate Counsel

that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act

Copyright © 2009 Association of Corporate Counsel

contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

http://www.abanet.org/cpr/mrpc/rule_1_2_comm.html

Copyright © 2009 Association of Corporate Counsel

Model Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Copyright © 2009 Association of Corporate Counsel

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

http://www.abanet.org/cpr/mrpc/rule_1_13.html

Copyright © 2009 Association of Corporate Counsel

Model Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1.16 Declining Or Terminating Representation

a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or

Copyright © 2009 Association of Corporate Counsel

incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

http://www.abanet.org/cpr/mrpc/rule_1_16.html

Comment to Rule 1.16:

Client-Lawyer Relationship
Rule 1.16 Declining Or Terminating Representation - Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

Copyright © 2009 Association of Corporate Counsel

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

Source: http://www.abanet.org/cpr/mrpc/rule_1_16_comm.html

Copyright © 2009 Association of Corporate Counsel

Model Rules of Professional Conduct

Client-Lawyer Relationship
Rule 1.18 Duties To Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Source: http://www.abanet.org/cpr/mrpc/rule_1_18.html

Copyright © 2009 Association of Corporate Counsel

Model Rules of Professional Conduct
Client-Lawyer Relationship
Rule 1.18 Duties To Prospective Client - Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the

Copyright © 2009 Association of Corporate Counsel

alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Source: http://www.abanet.org/cpr/mrpc/rule_1_18_comm.html

Copyright © 2009 Association of Corporate Counsel

291 N.W.2d 686
John R. TOGSTAD, et al., Respondents,
v.
VESELY, OTTO, MILLER & KEEFE and Jerre Miller, Appellants.
No. 49483.
Supreme Court of Minnesota.
April 11, 1980.
Page 687
COPYRIGHT MATERIAL OMITTED
Page 688
COPYRIGHT MATERIAL OMITTED
Page 689

Meagher, Geer, Markham, Anderson, Adamson, Flaskamp & Brennan and O. C. Adamson II, Minneapolis, Collins & Buckley and Theodore J. Collins, St. Paul, for appellants.

DeParcq, Anderson, Perl, Hunegs & Rudquist and Donald L. Rudquist, Minneapolis, for respondents.

Heard, considered and decided by the court en banc.

PER CURIAM.

This is an appeal by the defendants from a judgment of the Hennepin County District Court involving an action for legal malpractice. The jury found that the defendant attorney Jerre Miller was negligent and that, as a direct result of such negligence, plaintiff John Togstad sustained damages in the amount of $610,500 and his wife, plaintiff Joan Togstad, in the amount of $39,000. Defendants (Miller and his law firm) appeal to this court from the denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial. We affirm.

In August 1971, John Togstad began to experience severe headaches and on August 16, 1971, was admitted to Methodist Hospital where tests disclosed that the headaches were caused by a large aneurism1 on the left internal carotid artery.2 The attending physician, Dr. Paul Blake, a neurological surgeon, treated the problem by applying a Selverstone clamp to the left common carotid artery. The clamp was surgically implanted on August 27, 1971, in Togstad's neck to allow the gradual closure of the artery over a period of days.

The treatment was designed to eventually cut off the blood supply through the artery and thus relieve the pressure on the aneurism, allowing the aneurism to heal. It was anticipated that other arteries, as well as the brain's collateral or cross-arterial system would supply the required blood to the portion of the brain which would ordinarily have been provided by the left carotid artery. The greatest risk associated with this procedure is that the patient may become paralyzed if the brain does not receive an adequate flow of blood. In the event the supply of blood becomes so low as to endanger the health of the patient, the adjustable clamp can be opened to establish the proper blood circulation.

In the early morning hours of August 29, 1971, a nurse observed that Togstad was unable to speak or move. At the time, the clamp was one-half (50%) closed. Upon discovering Togstad's condition, the nurse called a resident physician, who did not adjust the clamp. Dr. Blake was also immediately informed of Togstad's condition and arrived about an hour later, at which time he opened the clamp. Togstad is now severely paralyzed in his right arm and leg, and is unable to speak.

Plaintiffs' expert, Dr. Ward Woods, testified that Togstad's paralysis and loss of speech was due to a lack of blood supply to his

Copyright © 2009 Association of Corporate Counsel

brain. Dr. Woods stated that the inadequate blood flow resulted from the clamp being 50% closed and that the negligence of Dr. Blake and the hospital precluded the clamp's being opened in time to avoid permanent brain damage. Specifically, Dr. Woods claimed that Dr. Blake and the hospital were negligent for (1) failing to place the patient in the intensive care unit or to have a special nurse conduct certain neurological tests every half-hour; (2) failing to write adequate orders; (3) failing to open the clamp immediately upon discovering that the patient was unable to speak; and

Page 690

(4) the absence of personnel capable of opening the clamp.

Dr. Blake and defendants' expert witness, Dr. Shelly Chou, testified that Togstad's condition was caused by blood clots going up the carotid artery to the brain. They both alleged that the blood clots were not a result of the Selverstone clamp procedure. In addition, they stated that the clamp must be about 90% closed before there will be a slowing of the blood supply through the carotid artery to the brain. Thus, according to Drs. Blake and Chou, when the clamp is 50% closed there is no effect on the blood flow to the brain.

About 14 months after her husband's hospitalization began, plaintiff Joan Togstad met with attorney Jerre Miller regarding her husband's condition. Neither she nor her husband was personally acquainted with Miller or his law firm prior to that time. John Togstad's former work supervisor, Ted Bucholz, made the appointment and accompanied Mrs. Togstad to Miller's office. Bucholz was present when Mrs. Togstad and Miller discussed the case.3

Mrs. Togstad had become suspicious of the circumstances surrounding her husband's tragic condition due to the conduct and statements of the hospital nurses shortly after the paralysis occurred. One nurse told Mrs. Togstad that she had checked Mr. Togstad at 2 a. m. and he was fine; that when she returned at 3 a. m., by mistake, to give him someone else's medication, he was unable to move or speak; and that if she hadn't accidentally entered the room no one would have discovered his condition until morning. Mrs. Togstad also noticed that the other nurses were upset and crying, and that Mr. Togstad's condition was a topic of conversation.

Mrs. Togstad testified that she told Miller "everything that happened at the hospital," including the nurses' statements and conduct which had raised a question in her mind. She stated that she "believed" she had told Miller "about the procedure and what was undertaken, what was done, and what happened." She brought no records with her. Miller took notes and asked questions during the meeting, which lasted 45 minutes to an hour. At its conclusion, according to Mrs. Togstad, Miller said that "he did not think we had a legal case, however, he was going to discuss this with his partner." She understood that if Miller changed his mind after talking to his partner, he would call her. Mrs. Togstad "gave it" a few days and, since she did not hear from Miller, decided "that they had come to the conclusion that there wasn't a case." No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.

Mrs. Togstad denied that Miller had told her his firm did not have expertise in the medical malpractice field, urged her to see another attorney, or related to her that the statute of limitations for medical malpractice actions was two years. She did not consult another attorney until one year after she talked to Miller. Mrs. Togstad indicated that she did not confer with another attorney earlier because of her reliance on Miller's "legal advice" that they "did not have a case."

On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of [her] husband * * *." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

Copyright © 2009 Association of Corporate Counsel

Q And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?

A I am not sure how to answer that. It was for legal advice as to what to do.

Page 691

Q And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?

A Yes.

On re-direct examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that [she and her husband] did not have a malpractice case."

Miller's testimony was different in some respects from that of Mrs. Togstad. Like Mrs. Togstad, Miller testified that Mr. Bucholz arranged and was present at the meeting, which lasted about 45 minutes. According to Miller, Mrs. Togstad described the hospital incident, including the conduct of the nurses. He asked her questions, to which she responded. Miller testified that "[t]he only thing I told her [Mrs. Togstad] after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."

Miller also claimed he related to Mrs. Togstad "that because of the grievous nature of the injuries sustained by her husband, that this was only my opinion and she was encouraged to ask another attorney if she wished for another opinion" and "she ought to do so promptly." He testified that he informed Mrs. Togstad that his firm "was not engaged as experts" in the area of medical malpractice, and that they associated with the Charles Hvass firm in cases of that nature. Miller stated that at the end of the conference he told Mrs. Togstad that he would consult with Charles Hvass and if Hvass's opinion differed from his, Miller would so inform her. Miller recollected that he called Hvass a "couple days" later and discussed the case with him. It was Miller's impression that Hvass thought there was no liability for malpractice in the case. Consequently, Miller did not communicate with Mrs. Togstad further.

On cross-examination, Miller testified as follows:

Q Now, so there is no misunderstanding, and I am reading from your deposition, you understood that she was consulting with you as a lawyer, isn't that correct?

A That's correct.

Q That she was seeking legal advice from a professional attorney licensed to practice in this state and in this community?

A I think you and I did have another interpretation or use of the term "Advice". She was there to see whether or not she had a case and whether the firm would accept it.

Q We have two aspects; number one, your legal opinion concerning liability of a case for malpractice; number two, whether there was or wasn't liability, whether you would accept it, your firm, two separate elements, right?

A I would say so.

Q Were you asked on page 6 in the deposition, folio 14, "And you understood that she was seeking legal advice at the time that she was in your office, that is correct also, isn't it?" And did you give this answer, "I don't want to engage in semantics with you, but my impression was that she and Mr. Bucholz were asking my opinion after having related the incident that I referred to." The next question, "Your legal opinion?" Your answer, "Yes." Were those questions asked and were they given?

MR. COLLINS: Objection to this, Your Honor. It is not impeachment.

Copyright © 2009 Association of Corporate Counsel

THE COURT: Overruled.

THE WITNESS: Yes, I gave those answers. Certainly, she was seeking my opinion as an attorney in the sense of whether or not there was a case that the firm would be interested in undertaking.

Kenneth Green, a Minneapolis attorney, was called as an expert by plaintiffs. He stated that in rendering legal advice regarding a claim of medical malpractice, the "minimum" an attorney should do would be

Page 692

to request medical authorizations from the client, review the hospital records, and consult with an expert in the field. John McNulty, a Minneapolis attorney, and Charles Hvass testified as experts on behalf of the defendants. McNulty stated that when an attorney is consulted as to whether he will take a case, the lawyer's only responsibility in refusing it is to so inform the party. He testified, however, that when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards require that the attorney check hospital records and consult with an expert before rendering his opinion.

Hvass stated that he had no recollection of Miller's calling him in October 1972 relative to the Togstad matter. He testified that:

A * * * when a person comes in to me about a medical malpractice action, based upon what the individual has told me, I have to make a decision as to whether or not there probably is or probably is not, based upon that information, medical malpractice. And if, in my judgment, based upon what the client has told me, there is not medical malpractice, I will so inform the client.

Hvass stated, however, that he would never render a "categorical" opinion. In addition, Hvass acknowledged that if he were consulted for a "legal opinion" regarding medical malpractice and 14 months had expired since the incident in question, "ordinary care and diligence" would require him to inform the party of the two-year statute of limitations applicable to that type of action.

This case was submitted to the jury by way of a special verdict form. The jury found that Dr. Blake and the hospital were negligent and that Dr. Blake's negligence (but not the hospital's) was a direct cause of the injuries sustained by John Togstad; that there was an attorney-client contractual relationship between Mrs. Togstad and Miller; that Miller was negligent in rendering advice regarding the possible claims of Mr. and Mrs. Togstad; that, but for Miller's negligence, plaintiffs would have been successful in the prosecution of a legal action against Dr. Blake; and that neither Mr. nor Mrs. Togstad was negligent in pursuing their claims against Dr. Blake. The jury awarded damages to Mr. Togstad of $610,500 and to Mrs. Togstad of $39,000.

On appeal, defendants raise the following issues:

(1) Did the trial court err in denying defendants' motion for judgment notwithstanding the jury verdict?

(2) Does the evidence reasonably support the jury's award of damages to Mrs. Togstad in the amount of $39,000?

(3) Should plaintiffs' damages be reduced by the amount of attorney fees they would have paid had Miller successfully prosecuted the action against Dr. Blake?

(4) Were certain comments of plaintiffs' counsel to the jury improper and, if so, were defendants entitled to a new trial?

1. In a legal malpractice action of the type involved here, four elements must be shown: (1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; (4) that but for defendant's conduct the plaintiffs would have been successful in the prosecution of their medical malpractice claim. See, Christy v.

Copyright © 2009 Association of Corporate Counsel

Saliterman, 288 Minn. 144, 179 N.W.2d 288 (1970).

This court first dealt with the element of lawyer-client relationship in the decision of Ryan v. Long, 35 Minn. 394, 29 N.W. 51 (1886). The Ryan case involved a claim of legal malpractice and on appeal it was argued that no attorney-client relation existed. This court, without stating whether its conclusion was based on contract principles or a tort theory, disagreed:

[I]t sufficiently appears that plaintiff, for himself, called upon defendant, as an attorney at law, for "legal advice," and that defendant assumed to give him a professional opinion in reference to the matter as to which plaintiff consulted him. Upon this state of facts the defendant must be taken to have acted as plaintiff's

Page 693

legal adviser, at plaintiff's request, and so as to establish between them the relation of attorney and client.

Id. (citation omitted). More recent opinions of this court, although not involving a detailed discussion, have analyzed the attorney-client consideration in contractual terms. See, Ronnigen v. Hertogs, 294 Minn. 7, 199 N.W.2d 420 (1972); Christy v. Saliterman, supra. For example, the Ronnigen court, in affirming a directed verdict for the defendant attorney, reasoned that "[u]nder the fundamental rules applicable to contracts of employment * * * the evidence would not sustain a finding that defendant either expressly or impliedly promised or agreed to represent plaintiff * * *." 294 Minn. 11, 199 N.W.2d 422. The trial court here, in apparent reliance upon the contract approach utilized in Ronnigen and Christy, supra, applied a contract analysis in ruling on the attorney-client relationship question. This has prompted a discussion by the Minnesota Law Review, wherein it is suggested that the more appropriate mode of analysis, at least in this case, would be to apply principles of negligence, i. e., whether defendant owed plaintiffs a duty to act with due care. 63 Minn. L.Rev. 751 (1979).

We believe it is unnecessary to decide whether a tort or contract theory is preferable for resolving the attorney-client relationship question raised by this appeal. The tort and contract analyses are very similar in a case such as the instant one,4 and we conclude that under either theory the evidence shows that a lawyer-client relationship is present here. The thrust of Mrs. Togstad's testimony is that she went to Miller for legal advice, was told there wasn't a case, and relied upon this advice in failing to pursue the claim for medical malpractice. In addition, according to Mrs. Togstad, Miller did not qualify his legal opinion by urging her to seek advice from another attorney, nor did Miller inform her that he lacked expertise in the medical malpractice area. Assuming this testimony is true, as this court must do, see, Cofran v. Swanman, 225 Minn. 40, 29 N.W.2d 448 (1947),5 we believe a jury could properly find that Mrs. Togstad sought and received legal advice from Miller under circumstances which made it reasonably foreseeable to Miller that Mrs. Togstad would be injured if the advice were negligently given. Thus, under either a tort or contract analysis, there is sufficient evidence in the record to support the existence of an attorney-client relationship.

Defendants argue that even if an attorney-client relationship was established the evidence fails to show that Miller acted negligently in assessing the merits of the Togstads' case. They appear to contend that, at most, Miller was guilty of an error in judgment which does not give rise to legal malpractice. Meagher v. Kavli, 256 Minn. 54, 97 N.W.2d 370 (1959). However, this case does not involve a mere error of judgment. The gist of plaintiffs' claim is that Miller failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature. The record, through the testimony of Kenneth Green

Page 694

and John McNulty, contains sufficient evidence to support plaintiffs' position.

Copyright © 2009 Association of Corporate Counsel

In a related contention, defendants assert that a new trial should be awarded on the ground that the trial court erred by refusing to instruct the jury that Miller's failure to inform Mrs. Togstad of the two-year statute of limitations for medical malpractice could not constitute negligence. The argument continues that since it is unclear from the record on what theory or theories of negligence the jury based its decision, a new trial must be granted. Namchek v. Tulley, 259 Minn. 469, 107 N.W.2d 856 (1961).

The defect in defendants' reasoning is that there is adequate evidence supporting the claim that Miller was also negligent in failing to advise Mrs. Togstad of the two-year medical malpractice limitations period and thus the trial court acted properly in refusing to instruct the jury in the manner urged by defendants. One of defendants' expert witnesses, Charles Hvass, testified:

Q Now, Mr. Hvass, where you are consulted for a legal opinion and advice concerning malpractice and 14 months have elapsed [since the incident in question], wouldn't — and you hold yourself out as competent to give a legal opinion and advice to these people concerning their rights, wouldn't ordinary care and diligence require that you inform them that there is a two-year statute of limitations within which they have to act or lose their rights?

A Yes. I believe I would have advised someone of the two-year period of limitation, yes.

Consequently, based on the testimony of Mrs. Togstad, i. e., that she requested and received legal advice from Miller concerning the malpractice claim, and the above testimony of Hvass, we must reject the defendants' contention, as it was reasonable for a jury to determine that Miller acted negligently in failing to inform Mrs. Togstad of the applicable limitations period.

Defendants also indicate that at the time Mrs. Togstad went to another attorney (after Miller) the statute of limitations may not have run and thus Miller's conduct was not a "direct cause" of plaintiffs' damages. As they point out, the limitations period ordinarily begins to run upon termination of the treatment for which the physician was retained. E. g., Swang v. Hauser, 288 Minn. 306, 180 N.W.2d 187 (1970); Schmidt v. Esser, 183 Minn. 354, 236 N.W. 622 (1931). There is other authority, however, which holds that where the injury complained of consists of a "single act," the limitations period commences from the time of that act, even though the doctor-patient relationship may continue thereafter. See, e. g., Swang, supra. Consequently, the limitations period began to run on either August 29, 1971, the date of the incident in question, or October 6, 1971, the last time Dr. Blake treated Mr. Togstad. Mrs. Togstad testified that she consulted another attorney "a year after [she] saw Mr. Miller." Thus, since she visited with Miller on October 2, or 3, 1972, if Mr. Togstad's injuries resulted from a "single act" within the meaning of Swang, supra, the limitations period had clearly run by the time Mrs. Togstad consulted another attorney. If, as defendants argue, the statutory period commenced on the date of last treatment, October 6, and Mrs. Togstad's testimony is taken literally, she would have met with a different attorney at a time when perhaps three days of the limitations period remained.

Defendants' contention must be rejected for two reasons. First, at trial defendants apparently assumed that the limitations period commenced on August 29, 1971, and thus did not litigate the instant issue below. Accordingly, they cannot raise the question for the first time on appeal. E. g., Turner v. Alpha Phi Sorority House, 276 N.W.2d 63 (Minn.1979); Greer v. Kooiker, 312 Minn. 499, 253 N.W.2d 133 (1977). Further, even assuming the limitations period began on October 6, 1971, it is reasonably inferable from the record that Mrs. Togstad did not see another attorney until after the statute had run. As discussed above, Mrs. Togstad testified that she consulted a lawyer a year after she met with

Page 695

Copyright © 2009 Association of Corporate Counsel

Miller. This statement, coupled with the fact that an action was not brought against Dr. Blake or the hospital but instead plaintiffs sued defendants for legal malpractice which allegedly caused Mrs. Togstad to let the limitations period run, allows a jury to draw a reasonable inference that the statutory period had, in fact, expired at the time Mrs. Togstad consulted another lawyer. Although this evidence is weak, it constitutes a prima facie showing, and it was defendants' responsibility to rebut the inference.

There is also sufficient evidence in the record establishing that, but for Miller's negligence, plaintiffs would have been successful in prosecuting their medical malpractice claim. Dr. Woods, in no uncertain terms, concluded that Mr. Togstad's injuries were caused by the medical malpractice of Dr. Blake. Defendants' expert testimony to the contrary was obviously not believed by the jury. Thus, the jury reasonably found that had plaintiff's medical malpractice action been properly brought, plaintiffs would have recovered.

Based on the foregoing, we hold that the jury's findings are adequately supported by the record. Accordingly we uphold the trial court's denial of defendants' motion for judgment notwithstanding the jury verdict.

2. Defendants next argue that they are entitled to a new trial under Minn.R.Civ.P. 59.01(5) because the $39,000 in damages awarded to Mrs. Togstad for loss of consortium is excessive. In support of this claim defendants refer to the fact that Mr. and Mrs. Togstad were divorced in July 1974 (the dissolution proceeding was commenced in February 1974), and assert that there is "virtually no evidence of the extent of Mrs. Togstad's loss of consortium."

The reasonableness of a jury's damage award is largely left to the discretion of the judge who presided at trial and, accordingly, the district court's ruling on this question will not be disturbed unless a clear abuse of discretion is shown. E. g., Bigham v. J. C. Penney Co., 268 N.W.2d 892 (Minn.1978). Or, as stated by the court in Dawydowycz v. Quady, 300 Minn. 436, 440, 220 N.W.2d 478, 481 (1974), a trial judge's decision regarding the excessiveness of damages will not be interfered with on appeal "unless the failure to do so would be `shocking' and result in a `plain injustice.'" In this case, we believe the trial court acted within its discretionary authority in ruling that Mrs. Togstad's damage award was not excessive.

"Consortium" includes rights inherent in the marital relationship, such as comfort, companionship, and most importantly, sexual relationship. Thill v. Modern Erecting Co., 284 Minn. 508, 170 N.W.2d 865 (1969). Here, the evidence shows that Mr. Togstad became impotent due to the tragic incident which occurred in August 1971. Consequently, Mrs. Togstad was unable to have sexual intercourse with her husband subsequent to that time. The evidence further indicates that the injuries sustained by Mr. Togstad precipitated a dissolution of the marriage.6 We therefore conclude that the jury's damage award to Mrs. Togstad finds sufficient support in the record.

3. Defendants also contend that the trial court erred by refusing to instruct the jury that plaintiffs' damages should be reduced by the amount of attorney fees plaintiffs would have paid defendants had Miller prosecuted the medical malpractice action. In Christy, supra, the court was presented with this precise question, but declined to rule on it because the issue had not been properly raised before the trial court. The Christy court noted, however:

[T]he record would indicate that, in the trial of this case, the parties probably proceeded upon the assumption that the element of attorneys' fees, which plaintiff might have had to pay defendant had he successfully prosecuted the suit, was canceled out by the attorneys' fees plaintiff incurred in retaining counsel to establish

Page 696

that defendant failed to prosecute a recoverable action.

Copyright © 2009 Association of Corporate Counsel

288 Minn. 174, 179 N.W.2d 307.

Decisions from other states have divided in their resolution of the instant question. The cases allowing the deduction of the hypothetical fees do so without any detailed discussion or reasoning in support thereof. McGlone v. Lacey, 288 F.Supp. 662 (D.S.D. 1968); Sitton v. Clements, 257 F.Supp. 63 (E.D.Tenn.1966), aff'd 385 F.2d 869 (6th Cir. 1967); Childs v. Comstock, 69 App.Div. 160, 74 N.Y.S. 643 (1902). The courts disapproving of an allowance for attorney fees reason, consistent with the dicta in Christy, supra, that a reduction for lawyer fees is unwarranted because of the expense incurred by the plaintiff in bringing an action against the attorney. Duncan v. Lord, 409 F.Supp. 687 (E.D.Pa.1976) (citing Christy); Winter v. Brown, 365 A.2d 381 (D.C.App. 1976) (citing Christy); Benard v. Walkup, 272 Cal.App.2d 595, 77 Cal.Rptr. 544 (1969).

We are persuaded by the reasoning of the cases which do not allow a reduction for a hypothetical contingency fee, and accordingly reject defendants' contention.

4. Finally, defendants assert that during closing argument plaintiffs' counsel violated Minn.R.Civ.P. 49 by commenting upon the effect of the jury's answers to the special verdict questions. Rule 49.01(1) reads, in pertinent part, that "[e]xcept as provided in Rule 49.01(2), neither the court nor counsel shall inform the jury of the effect of its answers on the outcome of the case." Rule 49.01(2) states: "In actions involving Minn. Stat.1971, Sec. 604.01 [the comparative negligence statute] the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon * * *." (Emphasis added.) Thus, Rule 49 allows counsel to comment only upon the effect of the jury's answers to the percentage of negligence inquiries.

The statements of plaintiffs' counsel which are being challenged by defendants read as follows:

Now, this Special Verdict is not complicated, but it is a long one. The defense, of course, would like you to find 50 percent or more negligence on the part of my client. Again, whatever you put down in the damage verdict, doesn't mean anything, because he gets nothing. The Judge arrives at the conclusions of law when you answer these questions. If you answer it, there is no causation. He gets nothing.

(Emphasis added.) The first portion of the above comments is proper because it refers to the impact the jury's apportionment of negligence would have on the case. It is unclear, however, whether counsel's reference to causation is consistent with Rule 49. If counsel intended to disclose to the jury the effect the answers to the "direct cause" inquiries would have on whether plaintiffs recovered, then the statement violates Rule 49.

In any event, the question of whether the alleged Rule 49 violation entitles defendants to a new trial is a matter within the sound discretion of the trial court. See, Patterson v. Donahue, 291 Minn. 285, 190 N.W.2d 864 (1971). Here, the district court concluded that the purported improper comments of counsel did not require a new trial. In light of the ambiguous nature of counsel's statement, we hold that the trial court did not abuse its discretion in so ruling.

Affirmed.

Notes:

1. An aneurism is a weakness or softening in an artery wall which expands and bulges out over a period of years.

2. The left internal carotid artery is one of the major vessels which supplies blood to the brain.

3. Bucholz, who knew Miller through a local luncheon club, died prior to the trial of the instant action.

4. Under a negligence approach it must essentially be shown that defendant rendered

Copyright © 2009 Association of Corporate Counsel

legal advice (not necessarily at someone's request) under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby. See, e. g., Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). Or, stated another way, under a tort theory, "[a]n attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." 63 Minn.L.Rev. 751, 759 (1979). A contract analysis requires the rendering of legal advice pursuant to another's request and the reliance factor, in this case, where the advice was not paid for, need be shown in the form of promissory estoppel. See, 7 C.J.S., Attorney and Client, § 65; Restatement (Second) of Contracts, § 90.

5. As the Cofran court stated, in determining whether the jury's verdict is reasonably supported by the record a court must view the credibility of evidence and every inference which may fairly be drawn therefrom in a light most favorable to the prevailing party. 225 Minn. 42, 29 N.W.2d 450.

6. In Dawydowycz v. Quady, 300 Minn. 436, 220 N.W.2d 478 (1974), this court acknowledged that evidence of difficulty in enduring a marriage constitutes proof of loss of consortium.

Copyright © 2009 Association of Corporate Counsel

Chubb Group of Insurance Companies
82 Hopmeadow Street
Post Office Box 2002
Simsbury, CT 06070-7683
Phone: (860) 408-2000 Fax: (860) 408-2002
www.chubb.com

December 17, 2002

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: *SEC File No. 33-8150.wp*
Implementation of Standards of Professional Conduct for Attorneys

Dear Mr. Katz:

On behalf of The Chubb Corporation, and its constituent insurance companies, we write to comment on the above-referenced proposed rule (the "Proposed Rule") establishing standards of professional conduct for attorneys who appear and practice before the Securities and Exchange Commission. Chubb is the 13th largest property and casualty insurer in the United States, and among the largest U.S. writers of professional liability insurance for law firms, in-house counsel to corporations (or "employed lawyers"), and corporate directors and officers. Chubb currently insures the malpractice liability of more than 60,000 attorneys in the United States.

The undersigned, Sean Fitzpatrick, serves as Chief Underwriting Officer of Chubb Specialty Insurance, the executive and professional liability division of Chubb. Mr. Fitzpatrick is a member of the bars of Connecticut, New York, and the District of Columbia. Our comments on the proposed rule are also informed by his academic work as a lecturer at the University of Connecticut School of Law, where he teaches in this field. Julianne Splain serves as Loss Prevention Counsel of Chubb Specialty Insurance, providing loss prevention services to the many law firms insured under Chubb's lawyers professional liability policies. Previously, as Chubb claims manager, she was responsible for the handling of malpractice claims against our insured law firms. Ms. Splain is a member of the bar of Connecticut.

While we commend the Commission on its efforts to clarify the duties of attorneys practicing in the securities area, the Proposed Rule raises many interesting and difficult questions, as noted in the commentary accompanying the Rule. We will, however, restrict the scope of our comments to those issues where we believe our views as an insurer of professional liability risks may be helpful to the Commission. In this connection, we will address three specific questions. First, what will be the likely impact of the Proposed Rule on the exposure of attorneys to professional liability claims? Second, what will be the likely impact of the Proposed Rule on the cost and availability of professional liability insurance for attorneys? Third, what mechanisms can be employed to ameliorate any unintended adverse consequences of the Proposed Rule?

Copyright © 2009 Association of Corporate Counsel

The Impact of the Proposed Rule on Attorney Liability

In our view, the Proposed Rule's imposition of reporting, disaffirmance, and withdrawal obligations on attorneys will result in the expansion of professional liability claims against both outside and in-house counsel. Most obviously, the Proposed Rule will create exposure to regulatory enforcement liability more far-reaching than faced by lawyers in the past. We do not, however, believe this expansion will be limited to enforcement and disciplinary actions by the Commission, notwithstanding the Commission's observation that neither Congress nor the SEC intends to provide a private right of action against an attorney based on compliance or failure to comply with the Rule. *See* Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71669, 71697 (Dec. 2, 2002). Rather, we expect that the requirements of the Proposed Rule, particularly as they may be either (a) misinterpreted by attorneys attempting to comply with them or (b) viewed as conflicting with existing standards of attorney conduct imposed by individual states, will give rise to civil suits against attorneys by clients and non-clients who rely on their work.

In our experience, an alleged violation of a state ethics rule is often the basis for a malpractice claim. Plaintiffs in this area will typically argue that violation of an ethical rule in and of itself establishes a breach of the attorney's duty of care. The American Bar Association recognized this reality in amending its Model Rules of Professional Conduct, observing that "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Model Rules of Prof'l Conduct, Scope para. [20] (2002).

Consider, for example, an attorney who mistakenly interprets his or her duties under the Proposed Rule and too hastily disaffirms a filing with the Commission and withdraws from representing a client. This becomes publicly known (as it almost surely will) and the client sustains economic harm. It is not only likely but virtually certain that the client (and perhaps its investors or creditors) will seek redress in the courts and will as the basis for the suit cite the attorney's alleged breach of duties of both loyalty and confidentiality imposed under state law. Federal preemption of state law does not appear to provide a clear solution to this problem, as the Commission has specifically forsworn any intention to "articulate a comprehensive set of standards regulating all aspects of the conduct of attorneys who appear and practice before the Commission" or to "supplant state ethics law unnecessarily." 67 Fed. Reg. at 71673. Indeed, even absent a conflicting state ethics requirement, an attorney's simple misinterpretation of his or her duties under the Proposed Rule could give rise to malpractice liability.

In sum, we believe the Proposed Rule will increase both the frequency and severity of malpractice claims against attorneys, both by creating a higher volume of regulatory enforcement actions by the Commission and by creating the basis for more traditional malpractice claims.

The Impact of the Proposed Rule on the Cost and Availability of Insurance

Different issues arise in connection with insurance coverage for different groups of attorneys affected by the Proposed Rule, including (i) outside counsel, (ii) employed attorneys who are corporate officers, and (iii) employed attorneys who are not corporate officers. Issues of insurance availability and cost in this context will be played out in the midst of the "hardest" insurance market in 15 years; that is, attorneys and others seeking

Copyright © 2009 Association of Corporate Counsel

professional liability insurance are already facing substantially increasing premiums in response to expanding claims activity in the corporate sector in recent years.

With respect to outside counsel, the Commission should note that the vast majority of lawyers professional liability ("LPL") policies specifically exclude from the definition of a covered claim "disciplinary or grievance proceedings" and further exclude from the definition of covered loss "fines, sanctions, costs, or penalties." *See, e.g.,* Executive Risk Indemnity Inc., Lawyers Professional Liability Form C21138 (2/97 ed.), *available at* http://csi.chubb.com/products/pdf-files/c21138.pdf **;** Ronald E. Mallen, *Law Office Guide to Purchasing Legal Malpractice Insurance* 86-87 (2001). Accordingly, firms will not have coverage for the costs of defending disciplinary proceedings by the Commission under the Proposed Rule, nor for any penalties assessed in such proceedings. Such coverage would be available, if at all, only for substantial additional premium, particularly for a law firm with an active practice before the Commission. Further, public policy limitations likely exist on the ability of insurers to indemnify companies for regulatory fines or penalties, as opposed to defense expenses, even if they are inclined to offer such coverage.

In addition, the risk of "traditional" malpractice claims arising out of misinterpretations of the Proposed Rule or conflicts with requirements of state law, as discussed above, is likely to give rise to new exclusions in LPL policies to address claims arising in connection with the Proposed Rule, but not brought by the Commission itself. Again, given the uncertainty surrounding this exposure, insurance underwriters are likely to demand substantial additional premium in order to accept this risk.

Attorneys practicing in-house may seek insurance for exposures created by the Proposed Rule from two sources: directors and officers ("D&O") insurance if they are corporate officers or employed lawyers professional liability ("ELP") insurance, which will provide professional liability coverage to any attorney employed "for the purpose of providing legal services" to the insured company. *See, e.g.,* Executive Risk Indemnity Inc., Employed Lawyers Professional Liability Policy Form C21901 (11/96 ed.), *available at* http://cber.chubb.com/products/pdf-files/c21901.pdf.

D&O policies, like LPL policies, typically exclude coverage for "fines and penalties." Again, as in the case of LPL, the new potential exposures created by the Proposed Rule will likely lead to the development of more specific exclusions limiting or removing entirely coverage for claims against corporate officers arising out of their duties as attorneys under the Proposed Rule. As such "professional liability" exposures have traditionally been viewed as outside the normal duties of a director or officer for purposes of D&O insurance, there will be a significant reluctance on the part of underwriters to include this type of risk in D&O coverage absent substantial additional premium. *See* International Risk Management Institute, Inc., "Provisions of Typical D&O Policies," *D&O Maps* (2002) at §3.022 ("By the same token, the Vice President for Legal Affairs will be insured in his capacity as a vice president, but may not be insured if acting as corporate counsel for some wrongful act of a "legal malpractice" nature....").

Employed Lawyers Professional Liability insurance is specifically designed to address the malpractice risks faced by in-house counsel, whether or not officers of a corporation, but is purchased by only a small fraction of the corporations regulated by the Commission. Some ELP policies include coverage for defense costs incurred in defending disciplinary proceedings of various kinds, although indemnification for actual fines, sanctions and

Copyright © 2009 Association of Corporate Counsel

penalties is typically excluded (as is probably required by public policy in any event, as noted above). *See, e.g.,* Executive Risk Indemnity Inc., Employed Lawyers Professional Liability Policy Form, *supra*. Other ELP policies include broad "SEC exclusions," which would remove all coverage for claims arising out of practice before the Commission. In any event, enactment of the Proposed Rule in its present form will undoubtedly result in substantial increases in the premiums charged for defense coverage against regulatory claims, as the risk that such costs will be incurred is increased substantially by the new requirements of the Rule.

In-house counsel will, like their brethren in outside law firms, also face increased risk of traditional malpractice suits by their own employers, successors such as bankruptcy trustees, and investors or other third-parties as a result of the Proposed Rule. While this exposure has long existed, enactment of the Proposed Rule will expand the bases for in-house counsel liability in this context. *See, e.g., Escott v. Barchris Construction Corp.*, 283 F. Supp. 643, 686-87 (S.D.N.Y. 1968).

It should also be noted that the scope of coverage of ELP policies does not extend to attorneys employed in a non-legal capacity within a corporation - but only to those employed "for the purpose of providing legal services" - although such attorneys could be considered to be "appearing and practicing" before the Commission under §205.2 of the Proposed Rule and hence subject to liability. Accordingly, while these non-legal capacity attorneys may be equally exposed under the Proposed Rule, they do not enjoy the same access to ELP coverage.

In sum, the existing executive and professional liability insurance coverages available to attorneys practicing before the Commission will generally not respond to the new direct liabilities that will arise as a result of the Proposed Rule, and are likely to be revised to exclude or require substantial additional premium for consequential malpractice liability that may result. Premium increases of 10-50% are likely to be imposed by those underwriters who do not decide to exclude these exposures entirely, depending on the nature of the individual risk presented.

How Can the Proposed Rule be Amended to Promote the Availability of Insurance?

From the perspective of reducing the economic costs of the Proposed Rule to lawyers and their employers, the single most helpful addition to the Commission's draft regulation would be a safe harbor providing protection from malpractice suits to attorneys who act in good faith in attempting to fulfill their responsibilities under the Rule. Such a provision would limit the exposure of attorneys to "consequential" malpractice liability not intended, but nonetheless promoted, by the current draft of the Proposed Rule. A safe harbor provision would prevent attorneys from being caught between the "rock" of Sarbanes-Oxley and the "hard place" of state ethics rules and standards of professional care. The final Rule should expressly prohibit private actions challenging an attorney's decision to take, or not to take, action under the Rule, when taken in good faith. There is precedent for such a safe harbor in the securities legislation governing auditors. *See* 15 U.S.C § 78j-1(3)(c). A safe harbor provision would limit the increase in suits against lawyers, and thus limit the additional costs law firms, issuers, and their employed lawyers will face as a result of enactment of the Rule.

Thank you for the opportunity to comment on this important new regulation.

Copyright © 2009 Association of Corporate Counsel

Respectfully submitted,

Sean M. Fitzpatrick
Chief Underwriting Officer
Chubb Specialty Insurance

Julianne Splain
Loss Prevention Counsel
Chubb Specialty Insurance

Copyright © 2009 Association of Corporate Counsel

CHUBB GROUP
OF INSURANCE COMPANIES

August 13, 2009

United States

Search

Home > Business Insurance > Professional & Management Liability > Errors & Omissions Liability > Employed Lawyers Professional Liability

Employed Lawyers Professional Liability

Chubb Specialty Insurance

As cost-conscious companies have in-house counsel perform legal services traditionally delegated to outside law firms, corporate attorneys face increasing liability exposures, especially to non-client third parties. The Public Company Accounting Reform And Investor Protection Act of 2002 (Sarbanes-Oxley Act) has increased the legal community's awareness of liability issues as well. Chubb understands the unique malpractice risks faced by in-house attorneys, and we developed our Employed Lawyers Professional (ELP) Liability Insurance program to provide broad, responsive coverage for in-house counsel in this changing environment.

Chubb's ELP Liability Insurance program is sponsored by the **Association of Corporate Counsel (ACC)**, the largest organization of in-house counsel in the U.S.

The Chubb ELP policy includes the following coverage features:

- Coverage for claims by non-client third parties.
- Coverage for SEC and regulatory claims available.
- No deductible for claims not indemnified by the employer, and full reimbursement coverage (subject to a self-insured retention) for indemnified claims.
- Punitive damages coverage (where insurable by law).
- Coverage for claims by coworkers for discrimination, harassment, or wrongful termination that arise out of the attorney's legal work for the company.
- Coverage for claims by individual employees the in-house attorney is assigned to represent.
- Defense cost coverage for claims brought by the employer, the board of directors, and officers.
- Coverage for employer-approved pro bono representations.

OTHER SOLUTIONS

Loss Scenarios

Loss scenarios can be used to illustrate common loss exposures and to help explain how insurance coverage can play a role in mitigating risk.

Learn More ›

ChubbPro E&O

Valuable insurance coverage for professionals against lawsuits over alleged or actual mistakes.

Learn More ›

EPP D&O Liability-Public Companies

A public company needs to protect its employees who serve on outside boards from liability lawsuits.

Learn More ›

FFP D&O Liability-Private Companies

Helps protect private companies and their leaders from lawsuits arising from management's decisions.

Learn More ›

Media Liability

Helps protect media organizations from lawsuits alleging defamation, invasion of privacy, and other harm.

Learn More ›

Please contact your agent or broker or email **csi-info@chubb.com** with questions.

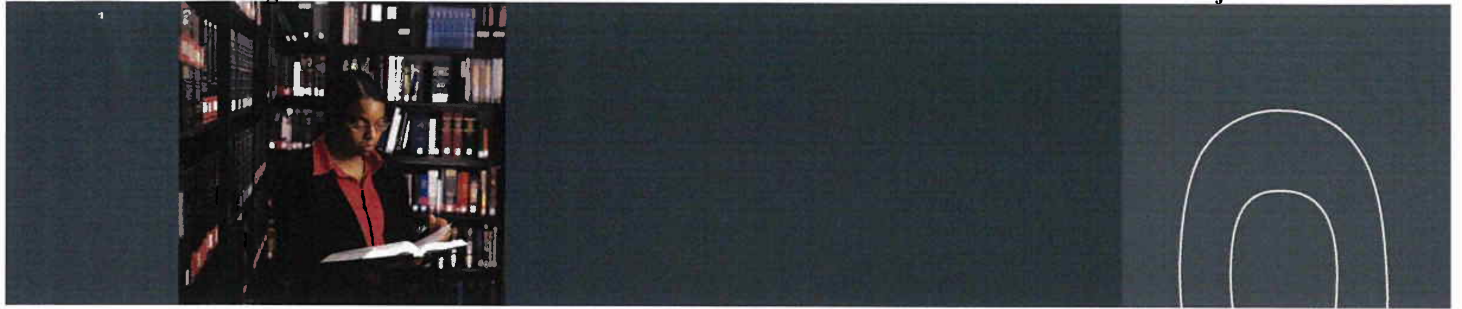
Search our **Forms & Applications**

Brochure (.pdf, 148k) *

* PDFs require the free Adobe Acrobat Reader. Get it here. Click here to read guidelines for usage and important legal information.

Copyright © 1995- 2009 The Chubb Corporation Legal Notices Privacy Policy Producer Compensation RSS Contact Us Site Map Careers

Copyright © 2009 Association of Corporate Counsel



Employed Lawyers Professional Liability

Acting as in-house counsel, whether for a public or private company, is an increasingly complex and vital role. Unfortunately, it also comes with legal malpractice risk. Attorneys need to safeguard their personal assets. Employers need to safeguard not only the company's balance sheet, but also one of its most valuable human resources.

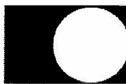
It's not only in-house counsel of large companies who are exposed to allegations of legal malpractice. Attorneys in small private companies and not-for-profit organizations are also vulnerable. In fact, the American Bar Association estimates that 25% of all claims against attorneys are brought by non-client third parties. And the cost of defending these lawsuits—not to mention the settlements—can be beyond the means of most in-house attorneys.

In today's risky liability environment, in-house counsel—and their employers—need the partnership of an insurance company that understands the unique risks faced by in-house attorneys. Chubb developed its **Employed Lawyers Professional Liability Insurance** policy to provide comprehensive coverage for in-house counsel. And with the " Enhanced Full House" endorsement, the policy is now better than ever.

RISK PROFILE

In-house counsel may be at risk if they are engaged in activities such as:

- Human resource management work on activities such as downsizing.
- Review of advertising, press releases, and other communications.
- Reports or opinion letters to outside agencies or regulatory bodies, including the Securities and Exchange Commission (SEC).
- Approval of contract language used with outside vendors or customers.
- Any other legal services for the company that might be relied upon by third parties.



Chubb Group of Insurance Companies

Copyright © 2009 Association of Corporate Counsel

If you think you have coverage for these exposures under your directors and officers (D&O) liability insurance or employment practices liability (EPL) insurance policies, you could be mistaken! D&O and EPL policies generally do not provide coverage for:

- Professional services or legal services.
- Counsel who are not also officers of the corporation.
- Other legal staff such as legal assistants and paralegals.
- Volunteer or *pro bono* legal services.
- Disbarment or similar disciplinary proceedings.
- "Internal" claims.

COVERAGE HIGHLIGHTS

Employed Lawyers Professional Liability Insurance:

Chubb's policy addresses liability for legal malpractice, including claims by non-client third parties and by those individual employees that an in-house attorney may be assigned to represent. Features include:

- Broad definition of professional services.
- Worldwide coverage, both as to where the wrongful act occurred and where the claim was made.
- Duty to defend.
- No deductible for claims not indemnified by the employer.
- Reimbursement coverage for indemnified claims.
- Noncancellable by the insurer except for nonpayment of premium.

Chubb's "Enhanced Full House" Endorsement:

Chubb's Enhanced Full House endorsement responds directly to the increasingly complex nature of the work of in-house counsel. Some of the coverage enhancements contained in this endorsement include:

- Expanded definition of insured to include independent contractor attorneys, temporary attorneys, paralegals, legal assistants, and notaries public working under the supervision of employed lawyers.
- Broadened definition of professional services to include moonlighting services, as well as personal legal services performed for officers or employees of the company.
- Non-rescindable coverage for non-indemnifiable claims under Insuring Agreement (A).
- Conversion of policy to claims made from claims made and reported.
- Coverage for defense costs and loss payments for certain internal claims brought against the employed lawyer by a director, officer, or employee of the company.

Copyright © 2009 Association of Corporate Counsel

The SEC and Sarbanes-Oxley Endorsement:

This endorsement specifically addresses the heightened risks in-house counsel face in the wake of the Sarbanes-Oxley Act of 2002, which imposed new obligations on attorneys who appear and practice before the SEC. The endorsement amends the definition of wrongful act to include violations of Sarbanes-Oxley legislation.

Other Endorsements Available:

- Order of payments.
- Choice of counsel.
- Most favorable jurisdiction (with respect to punitive and exemplary damages).

SPONSORED BY THE ASSOCIATION OF CORPORATE COUNSEL (ACC)

In recognition of our expertise in underwriting coverage for in-house counsel, Chubb is proud to be an ACC Alliance Partner providing employed lawyers professional liability insurance to members of The Association of Corporate Counsel, the largest organization of in-house counsel in the United States.

WHY EMPLOYED LAWYERS PROFESSIONAL LIABILITY INSURANCE FROM CHUBB?

Integrity in underwriting—We would rather earn the respect of our customers than jump into short-term deals that may promise a quick gain but risk undermining long-term trust. Therefore, we underwrite with "intellectual integrity," selectively searching for customers who have earned reputations for their expertise and professionalism and who value long-term business relationships.

Financial stability—Chubb's financial stability and ability to pay claims rate among the best in the insurance industry, as attested by Standard & Poor's and A.M. Best Company, the leading insurance rating services. For more than 50 years, Chubb has remained part of an elite group of insurers that have maintained Best's highest ratings. Agents, brokers, and prospective customers often seek out our services because our reputation in the market is well known.

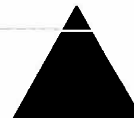
Outstanding claim service—Chubb's guiding philosophy in each and every claim settlement has always been to treat each customer the way we would like to be treated if we experienced the same loss—with empathy, promptness, expertise, and fairness. We are dedicated to a high level of integrity, open dialogue, and the amicable resolution of disputes whenever possible. We strive for cooperation and partnership with customers to provide either a vigorous defense against meritless claims or a prompt and appropriate settlement where warranted. Our commitment has earned us an enviable reputation for unparalleled claim service.

Local presence—Chubb's branch office network spans the United States and 31 countries around the globe. Our local presence helps ensure that we are in touch with the particular competitive and legal issues that are specific to a geographic region. We make it our business to give customers the individual attention they deserve.

Copyright © 2009 Association of Corporate Counsel

Executive Risk
Management Associates

82 Hopmeadow Street
Simsbury, Connecticut 06070-7683



APPLICATION FOR EMPLOYED LAWYERS PROFESSIONAL LIABILITY INSURANCE

THIS APPLICATION IS FOR "CLAIMS MADE AND REPORTED" INSURANCE.

NOTICE: THE LIMIT OF LIABILITY AVAILABLE TO PAY JUDGMENTS OR SETTLEMENTS SHALL BE REDUCED BY AMOUNTS INCURRED FOR DEFENSE. FURTHER NOTE THAT AMOUNTS INCURRED FOR DEFENSE SHALL BE APPLIED AGAINST THE DEDUCTIBLE AMOUNT. READ THE ENTIRE APPLICATION CAREFULLY BEFORE SIGNING.

1. A) Name of Company: ______________________________
   (Wherever used, Company shall mean the Applicant.)

   B) Address of principal office of the Company: ______________________________
   City: ______________________ State: _______ ZIP: ____________

   C) State of Incorporation: ______________

   D) Total number of Employed Lawyers: ______________________________

   E) Is any Employed Lawyer a member of the American Corporate Counsel Association (ACCA)?
   ☐ Yes ☐ No

   F) Please attach a separate page providing the following information for each Employed Lawyer to be insured: lawyer name, title, ACCA membership number (if applicable), year of admission to bar, principal area(s) of practice, and whether the lawyer is a director or officer of the Company.

COMPANY INFORMATION

2. A) Please attach a copy of the Company's latest annual report, SEC Form 10K, and most recent SEC Form 10Q, including audited financial statements with all notes and schedules, and any other relevant financial materials. If the Company has made a public offering of debt or equity within the past twenty-four (24) months, please attach prospectuses.

   B) If no annual report is available, please provide a general description of the business of the Company:
   ____
   ____
   ____

Form D21903 (11/96 ed.)

Catalog No. ELa-E
Form 14-02-0250

Copyright © 2009 Association of Corporate Counsel

3. A) The Company is: ☐ Publicly held ☐ Privately held

   B) The Company is: ☐ For-profit ☐ Non-profit

   C) Is the Company considering a public offering of debt or equity within the next eighteen (18) months?
   ☐ Yes ☐ No

   If "Yes," please provide details and attach available prospectuses.

   ____
   ____
   ____

4. Does the Company have an indemnification policy or practice applicable to Employed Lawyers, regardless of whether those Employed Lawyers are directors or officers of the Company?
   ☐ Yes ☐ No

   If "Yes," please provide details and attach indemnification provisions and relevant limitation of liability provisions in the certificate of incorporation or corporate bylaws, as well as any other indemnification policies or agreements.

   ____
   ____

LEGAL DEPARTMENT INFORMATION

5. A) Please check all areas which account for more than five percent (5%) of the total work done by all Employed Lawyers and indicate the number of lawyers working in each area:

Area		Area	
Contract Drafting/Review/Approval	☐ ______	Other Regulatory Compliance	☐ ______
Copyright/Patent/Trademark	☐ ______	"Moonlighting" (representation of clients other than the Company)	☐ ______
Collection/Repossession	☐ ______	Pro Bono	☐ ______
Corporate Finance	☐ ______	Real Estate	☐ ______
Corporate Transactional	☐ ______	Securities	☐ ______
Environmental Compliance	☐ ______	Taxation	☐ ______
ERISA/Employee Benefits	☐ ______	Utility Regulation	☐ ______
International Law	☐ ______	Other	☐ ______
Labor Relations	☐ ______	Other	☐ ______
Litigation	☐ ______		

   B) Does any Employed Lawyer issue written legal opinions to or for the use of:
   The Board of Directors? ☐ Yes ☐ No
   Entities other than the Company in which the Company has an equity or other interest? ☐ Yes ☐ No
   Third Parties? ☐ Yes ☐ No
   Other? ______________________ ☐ Yes ☐ No

   If "Yes" to any part of this question, please describe the types of opinions issued and the recipients thereof.

   ____
   ____

Copyright © 2009 Association of Corporate Counsel

C) Does any Employed Lawyer prepare, review, comment on, or approve financial statements, proxy statements, prospectuses, registration statements, annual or quarterly reports, or other reports filed with federal or state agencies or released to shareholders or the public regarding the Company?
☐ Yes ☐ No

If "Yes," please describe the role of Employed Lawyer(s) in such preparation, review, comment or approval.

____

____

D) Does any Employed Lawyer represent individual employees of the Company in judicial, administrative, or other proceedings?
☐ Yes ☐ No

If "Yes," please provide details.

____

E) Does any Employed Lawyer provide personal legal services to any director, officer, or employee of the Company in such director's, officer's, or employee's individual capacity?
☐ Yes ☐ No

If "Yes," please indicate:

i) The type of personal legal services provided:

____

ii) The percentage of the Employed Lawyer's time devoted to the provision of personal legal services: ____

6. Please provide a brief description of the structure and management of the legal department, including the legal department's placement within the general organization of the Company.

____

____

____

7. Does the Company and/or the legal department have written policies or procedures with regard to the following:

Training of newly hired Employed Lawyers? ☐ Yes ☐ No
Continuing legal education for Employed Lawyers? ☐ Yes ☐ No
Circulation and updating of commonly used form documents within the legal department? ☐ Yes ☐ No
Litigation docket control within the legal department? ☐ Yes ☐ No
Preparation and approval of legal opinions to or for the use of entities other than the Company? ☐ Yes ☐ No
Employee hiring, termination, and promotion, and the investigation and reporting of employee complaints under any federal, state, or local antidiscrimination statutes or regulations? ☐ Yes ☐ No

If "No" to any of the above, please describe any relevant unwritten policies and procedures.

____

____

____

Copyright © 2009 Association of Corporate Counsel

8. Please indicate the types of legal work that are typically referred by the Company to outside counsel and any guidelines governing such referrals.

____

____

COVERAGE AND CLAIMS HISTORY

9. After inquiry, has any Employed Lawyer ever been the subject of a reprimand or disciplined by, or refused admission to, a bar association, court or administrative agency?
☐ Yes ☐ No

If "Yes," please provide the name of the Employed Lawyer and a brief explanation.

____

____

10. After inquiry, have any claims or suits been made against any Employed Lawyer within the past five (5) years arising out of his or her provision of legal services, whether or not such claims or suits arose out of work performed for the Company?
☐ Yes ☐ No

If "Yes," please complete a Claim Summary Supplement for each such claim or suit.

NOTE: Information provided in response to Question 10 does not constitute notice of a claim or suit under any insurance policy. All such notices must be submitted in accordance with the policy.

11. After inquiry, is any Employed Lawyer aware of any circumstance, allegation, or contention as to any incident which may result in a claim or suit against any Employed Lawyer?
☐ Yes ☐ No

If "Yes," please complete a Claim Summary Supplement for each such circumstance, allegation, or contention.

NOTE: Information provided in response to Question 11 does not constitute notice of a claim or potential claim under any insurance policy. All such notices must be submitted in accordance with the policy.

12. A) Does the Company currently carry Employed Lawyers professional liability coverage?
☐ Yes ☐ No

If "Yes," please provide the following information:

Carrier: ____________________
Limit: ____________________
Deductible(s): ____________________
Policy Period: ____________________
Premium: ____________________

B) Has any insurer providing Employed Lawyers professional liability coverage or similar insurance to the Company ever canceled or refused to renew such coverage? (Not applicable in Missouri.)
☐ Yes ☐ No

If "Yes," please provide details.

____

____

Copyright © 2009 Association of Corporate Counsel

13. Does the Company carry directors and officers liability or other professional liability insurance?
☐ Yes ☐ No

If "Yes," please provide the following information with regard to all directors and officers and other professional liability insurance carried by the Company, and attach a copy of all notices of claims submitted to such insurers within the past three (3) years:

Type of Coverage:	__________	Type of Coverage:	__________
Carrier:	__________	Carrier:	__________
Limits:	__________	Limits:	__________
Deductible(s):	__________	Deductible(s):	__________
Policy Period:	__________	Policy Period:	__________
Premium:	__________	Premium:	__________
Retroactive Date:	__________	Retroactive Date:	__________
Number of Years Continuously Insured:	_____	Number of Years Continuously Insured:	_____

NOTICE TO APPLICANT – PLEASE READ CAREFULLY.

FOR THE PURPOSES OF THIS APPLICATION, THE UNDERSIGNED AUTHORIZED AGENT OF THE PERSONS AND ENTITY(IES) PROPOSED FOR THIS INSURANCE DECLARES THAT THE STATEMENTS HEREIN ARE TRUE AND COMPLETE TO THE BEST OF HIS/HER KNOWLEDGE AND BELIEF, AFTER REASONABLE INQUIRY. THE UNDERWRITER IS AUTHORIZED TO MAKE INQUIRY IN CONNECTION WITH THIS APPLICATION. SIGNING THE APPLICATION DOES NOT BIND THE UNDERWRITER TO COMPLETE, OR THE APPLICANT TO PURCHASE, THE INSURANCE.

FOR THE PURPOSES OF THIS APPLICATION, THE "UNDERWRITER" IS THE INSURANCE COMPANY WHICH ISSUES A POLICY OF INSURANCE TO THE APPLICANT IN RELIANCE ON THIS APPLICATION. THE INFORMATION CONTAINED IN AND SUBMITTED WITH THIS APPLICATION IS ON FILE WITH THE UNDERWRITER AND ALONG WITH THE APPLICATION IS CONSIDERED PHYSICALLY ATTACHED TO THE POLICY AND WILL BECOME A PART OF IT. THE UNDERWRITER WILL HAVE RELIED UPON THE COMPLETE APPLICATION AND ATTACHMENTS IN ISSUING ANY POLICY.

IF THE INFORMATION IN THIS APPLICATION MATERIALLY CHANGES PRIOR TO THE EFFECTIVE DATE OF THE POLICY, THE APPLICANT WILL NOTIFY THE UNDERWRITER, WHO MAY MODIFY OR WITHDRAW ANY OUTSTANDING QUOTATION.

INFORMATION PROVIDED IN CONNECTION WITH THIS APPLICATION DOES NOT CONSTITUTE NOTICE OF A CLAIM OR NOTICE OF A POTENTIAL CLAIM. ALL SUCH NOTICES MUST BE SUBMITTED IN ACCORDANCE WITH THE POLICY.

THE UNDERSIGNED DECLARES THAT THE INDIVIDUALS AND ENTITY(IES) PROPOSED FOR THIS INSURANCE UNDERSTAND THAT (I) THE POLICY SHALL APPLY ONLY TO "CLAIMS" MADE (OR DEEMED MADE) AND REPORTED TO THE UNDERWRITER DURING THE "POLICY PERIOD" OR TO "CLAIMS" MADE AND REPORTED TO THE UNDERWRITER DURING ANY APPLICABLE "DISCOVERY PERIOD"; (II) THE LIMIT OF LIABILITY CONTAINED IN THE POLICY SHALL BE REDUCED, AND MAY BE COMPLETELY EXHAUSTED, BY THE COST OF DEFENSE AND, IN SUCH EVENT, THE UNDERWRITER SHALL NOT BE LIABLE FOR THE COSTS OF DEFENSE OR FOR THE AMOUNT OF ANY JUDGMENT OR SETTLEMENT TO THE EXTENT THAT SUCH COST OR AMOUNT EXCEEDS THE LIMIT OF LIABILITY IN THIS POLICY; AND (III) THE DEFENSE COSTS THAT ARE INCURRED SHALL BE APPLIED AGAINST THE RETENTION AMOUNT.

NOTICE TO ARKANSAS, MINNESOTA, AND OHIO APPLICANTS: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE/SHE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT IS GUILTY OF INSURANCE FRAUD, WHICH IS A CRIME.

Copyright © 2009 Association of Corporate Counsel

NOTICE TO COLORADO APPLICANTS: IT IS UNLAWFUL TO KNOWINGLY PROVIDE FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE COMPANY. PENALTIES MAY INCLUDE IMPRISONMENT, FINES, DENIAL OF INSURANCE, AND CIVIL DAMAGES. ANY INSURANCE COMPANY OR AGENT OF AN INSURANCE COMPANY WHO KNOWINGLY PROVIDES FALSE, INCOMPLETE, OR MISLEADING FACTS OR INFORMATION TO A POLICY HOLDER OR CLAIMANT FOR THE PURPOSE OF DEFRAUDING OR ATTEMPTING TO DEFRAUD THE POLICY HOLDER OR CLAIMANT WITH REGARD TO A SETTLEMENT OR AWARD PAYABLE FROM INSURANCE PROCEEDS SHALL BE REPORTED TO THE COLORADO DIVISION OF INSURANCE WITHIN THE DEPARTMENT OF REGULATORY AGENCIES.

NOTICE TO DISTRICT OF COLUMBIA, MAINE AND VIRGINIA APPLICANTS: IT IS A CRIME TO KNOWINGLY PROVIDE FALSE, INCOMPLETE OR MISLEADING INFORMATION TO AN INSURANCE COMPANY FOR THE PURPOSE OF DEFRAUDING THE COMPANY. PENALTIES MAY INCLUDE IMPRISONMENT, FINES, OR A DENIAL OF INSURANCE BENEFITS.

NOTICE TO FLORIDA APPLICANTS: ANY PERSON WHO, KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD, OR DECEIVE ANY EMPLOYER OR EMPLOYEE, INSURANCE COMPANY, OR SELF-INSURED PROGRAM, FILES A STATEMENT OF CLAIM OR AN APPLICATION CONTAINING ANY FALSE OR MISLEADING INFORMATION IS GUILTY OF A FELONY OF THE THIRD DEGREE.

NOTICE TO KENTUCKY APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE CONTAINING ANY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME.

NOTICE TO LOUISIANA AND NEW MEXICO APPLICANTS: ANY PERSON WHO KNOWINGLY PRESENTS A FALSE OR FRAUDULENT CLAIM FOR PAYMENT OF A LOSS OR BENEFIT OR KNOWINGLY PRESENTS FALSE INFORMATION IN AN APPLICATION FOR INSURANCE IS GUILTY OF A CRIME AND MAY BE SUBJECT TO CIVIL FINES AND CRIMINAL PENALTIES.

NOTICE TO MARYLAND APPLICANTS: ANY PERSON WHO, WITH INTENT TO DEFRAUD OR KNOWING THAT HE/SHE IS FACILITATING A FRAUD AGAINST AN INSURER, SUBMITS AN APPLICATION OR FILES A CLAIM CONTAINING A FALSE OR DECEPTIVE STATEMENT MAY BE GUILTY OF INSURANCE FRAUD.

NOTICE TO NEW JERSEY APPLICANTS: ANY PERSON WHO INCLUDES ANY FALSE OR MISLEADING INFORMATION ON AN APPLICATION FOR AN INSURANCE POLICY IS SUBJECT TO CRIMINAL AND CIVIL PENALTIES.

NOTICE TO NEW YORK APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SHALL ALSO BE SUBJECT TO A CIVIL PENALTY NOT TO EXCEED FIVE THOUSAND DOLLARS AND THE STATED VALUE OF THE CLAIM FOR EACH SUCH VIOLATION.

NOTICE TO OKLAHOMA APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO INJURE, DEFRAUD OR DECEIVE ANY INSURER, MAKES ANY CLAIM FOR THE PROCEEDS OF AN INSURANCE POLICY CONTAINING ANY FALSE, INCOMPLETE OR MISLEADING INFORMATION IS GUILTY OF A FELONY.

NOTICE TO OREGON AND TEXAS APPLICANTS: ANY PERSON WHO MAKES AN INTENTIONAL MISSTATEMENT THAT IS MATERIAL TO THE RISK MAY BE FOUND GUILTY OF INSURANCE FRAUD BY A COURT OF LAW.

NOTICE TO PENNSYLVANIA APPLICANTS: ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR OTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SUBJECTS SUCH PERSON TO CRIMINAL AND CIVIL PENALTIES.

Copyright © 2009 Association of Corporate Counsel

Notice: This Application is signed by the undersigned authorized agent of the Applicant on behalf of the Applicant and all Employed Lawyers.

APPLICANT:		
BY (*Authorized Agent*):	TITLE:	DATE:

PRODUCED BY *(Insurance Agent)*	INSURANCE AGENCY
INSURANCE AGENCY TAXPAYER ID OR SOCIAL SECURITY NO.	AGENT LICENSE NO.
ADDRESS *(No., Street, City, State, and ZIP Code)*	

SUBMITTED BY *(Insurance Agency)*	INSURANCE AGENCY TAXPAYER ID OR SOCIAL SECURITY NO.	AGENT LICENSE NO.
ADDRESS *(No., Street, City, State, and ZIP Code)*		

Copyright © 2009 Association of Corporate Counsel

EXECUTIVE RISK MANAGEMENT ASSOCIATES
EMPLOYED LAWYERS PROFESSIONAL LIABILITY INSURANCE
CLAIM SUMMARY SUPPLEMENT

Name of Applicant: ______________________________

This document is part of the Application for Employed Lawyers Professional Liability Insurance.

Instructions: This form is to be completed if any Employed Lawyer has been involved in any claim, suit, circumstance, allegation, or contention, as indicated by a "Yes" answer to either Question 10 or 11. Please complete one Claim Summary Supplement for each claim, suit, circumstance, allegation, or contention. Use separate sheets if necessary to provide complete responses.

1. Full name of individual lawyer(s) involved in claim, suit, circumstance, allegation, or contention:
____
____

2. Name of claimant(s):
____

3. Additional defendants:
____

4. Date of alleged error or misconduct: ____________

5. To what insurance company was this claim, suit, circumstance, allegation, or contention reported?
____

6. Date of report to insurance company: ____________

7. Description of claim, suit, circumstance, allegation, or contention and current status. If claim, suit, circumstance, allegation, or contention has been resolved, provide total defense costs, settlement(s), or judgment(s) incurred (including amounts within any self-insured retention). (Please attach additional sheets if necessary.)
____
____
____
____
____
____
____

I understand that information submitted herein becomes part of the Applicant's Application for Employed Lawyers Professional Liability Insurance and is subject to the representations and conditions set forth therein. I also understand that there will be no coverage afforded under the proposed insurance for any matter(s) listed in response to this supplement.

Authorized Agent ____________________ Title/ Capacity ____________________

(Please print name) ____________________ Date ____________

8

Copyright © 2009 Association of Corporate Counsel

ACC Extras

Supplemental resources available on www.acc.com

Conflicts of Interest: Who is Your Client.
Program Material. May 2008
http://www.acc.com/legalresources/resource.cfm?show=20029

Toolkit: Corporate Conflict of Interest, American-style.
ACC Docket. December 2005
http://www.acc.com/legalresources/resource.cfm?show=20814

Code of Ethics and Conflicts of Interest Policy for Directors, Officers and Senior Team Leaders.
Sample Form & Policy. December 2006
http://www.acc.com/legalresources/resource.cfm?show=12689

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.

Copyright © 2009 Association of Corporate Counsel