HANDBOOK FOR LAW FIRM GENERAL COUNSEL

Attorneys' Liability Assurance Society

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FORWARD

Pete Winders has been a respected and trusted general counsel for member firm Carlton Fields for 20 years and a friend to ALAS since 1994. When Pete sent us a draft of his *Handbook for Law Firm General Counsel* and asked us what we thought, we weren't at all surprised that he put together such a useful, practical guide. When he asked if we thought he should share it with other ALAS general counsel, we said, "Absolutely!" And then, of course, we told Pete that we'd like to proofread it because, well, that's what we do. While we did make some edits to Pete's draft, we were careful not to change his message, tone, and point of view. We do note for the reader, however, that not every firm will choose to take the same approach that Pete may suggest because each firm and circumstance is different. But we are confident that this handbook will help you as you navigate your general counsel responsibilities.

INTRODUCTION

What is the general counsel job like?

Note: I use the term general counsel (GC) throughout this handbook. Some firms refer to this person as their primary loss prevention partner. I prefer the term GC for two reasons. First, the term GC connotes a level of gravitas for other partners at the firm, especially recent lateral hires. Second, the term GC will be more familiar to a judge who may have to decide one day whether certain in-firm communications with the GC are protected by the attorney-client privilege.

Back to what the job is like—I'm sure it depends. In sum, it is a series of interruptions to one important project or another. The interruptions are either questions you know the answers to, which is reassuring, or you will learn something, which is always good. The bad thing about the GC job is the same. If you are doing your job correctly, you are the first resource for questions difficult or unusual enough that highly intelligent, if excessively educated, people don't know the answer to, and the need of your clients (i.e., the firm and its constituents) is for immediate answers or plans.

The lack of an answer on a conflicts issue, for example, is paralyzing to the client, the lawyer, and the firm. Nothing can proceed without an answer, and delay risks a firm economic opportunity. The requirement for an answer, rather than a negotiating position, makes it difficult, and the result is that the job is much more stressful than practicing law, at least as a litigator. Litigators get to take positions or develop arguments for a referee to decide. With this job, in contrast, the GC must make decisions. The firm needs an actual practical answer.

It gets easier after the first decade because some of the issues repeat. That decade counts as dog years, both in terms of personal wear and tear and in years of practice, because you will get to participate in some of the most difficult issues the firm will face.

What are the duties of a law firm general counsel?

In my view, they should include chief ethics officer, chief risk management or loss prevention officer, chief claims officer, and chief educator on the loss prevention subjects. The GC is also the chief legal officer of the firm, and as such the lawyer for the firm and its constituents to the extent a constituent's interest does not conflict with the firm's legal interest. In one or more of these roles, she will be the primary contact with the firm's insurers, at least the malpractice, management liability, and employer's liability insurers. The GC will usually be the client contact when outside counsel is employed for claims against the firm.

Can one person do all that?

Not without help. As I have written before, I am convinced that in large law firms a full-time GC is better than attempting to divide the functions among several people who continue actively practicing for clients other than the firm. Competing with practice for clients will significantly slow down response to questions, which in turn will cut down on customer satisfaction (and thus on requests for help). There are some ways the job could be divided, but I do not recommend it. If you are going to have a full-time GC, you should make her responsible for as many things as you reasonably can. I believe that it is best to avoid the situation where several lawyers are balancing the needs of clients against the needs of the firm, as one or the other is likely to suffer. Where the GC needs substantive help, she should identify and deputize a go-to person—employment law, HIPAA, security, leases, for example—and then be sure that the firm, including those evaluating the value of the deputies, realizes the deputies' important contributions. In addition, the GC will likely have to deputize practicing lawyers as claims counsel for particular matters.

The bigger the firm and the more jurisdictions in which it practices, the more demand there will be for the GC's attention. At some point, the Office of General Counsel will need another lawyer or two, or maybe more. In my view, they will do a better job if they are also full time.

I. BEST MANAGEMENT STYLE AND PERSONALITY CHARACTERISTICS

A. An Effective General Counsel Must Be Accessible and Approachable

There are lots of good law firm GCs. Each has strengths and weaknesses. But I believe the most important thing that a GC should strive for and cultivate is to be accessible and approachable. When the lawyers and staff know that the GC will respond quickly and will provide useful information and advice, there will be less resistance to using his services, and the firm safety and compliance quotient will rise. If firm personnel know that the GC will provide advice and help rather than blame or criticism, he will be consulted sooner.

If the GC is a last step rather than a first step in confronting, for example, an ethics issue, then something is wrong. For that reason, every contact with the GC should be a reward, not a punishment. For example:

> Lawyer Jones calls with a question about the Rule in Shelley's Case: "I am calling because I don't know who to ask." If the GC has a background that would allow them to answer the question or at least discuss it, the GC should do so and should also, of course, tell Jones who in the firm might be more current. If the GC has forgotten what they knew about the Rule, if anything, the GC should direct Jones to a ranking member of the real estate practice group. In my opinion, the GC should never tell Jones not to bother them about substantive law questions, that the GC's job is only legal ethics, loss prevention, and advising on firm issues, or that Jones should better educate herself on who the firm practice group leaders (PGLs) are. Help with the problem Jones has, and Jones is more likely to call the GC when the GC's involvement is really important.
>
> Lawyer Smith calls because he has, in fact, made a horrible mistake that may have consequences to the client and the firm. He is emotionally distraught. Like many intelligent, well-educated, and highly motivated people, he has never actually made a mistake that is both (a) going to be discovered and (b) one likely to have adverse consequences to another person for whom he is responsible. He was heretofore unaware that real people actually had this kind of emotion. Regardless of whether the problem is as bad as Smith fears, the GC should reassure him that as far as the GC is concerned, this is a firm problem, and the firm will marshal its resources to minimize the damage. It is not a time to assign blame or punishment, which is, after all, a management job and should never be part of the GC's role as the firm's lawyer. Of course, for the same reason, the GC should not promise that there will not be consequences. Instead, either informing Smith that there is more to malpractice than simply making a mistake or, if the other elements are indeed present, enlisting Smith as a part of the team (for the facts, obviously, not resolving the problem) will help him function and will help the firm get on with managing the problem.

For similar reasons, a GC should make it a policy never to allow a constituent to apologize for taking up the GC's time. It is the GC's job to respond to requests for help. Following this approach will allow your reputation to get around. "Call Pete. He will make you feel better," is a good reputation to have, and helps develop the kind of approachability that should be a goal in order to be most effective as a loss prevention resource.

This is pretty difficult, particularly for someone who also sees irony or humor even when none is present. In 20 years, however, I have been able to resist in all cases but

one the temptation to tell a lawyer, "If this were the Army, I would tell you to go to the chaplain and get your TS card punched." Unfortunately, I then had to explain it to him. Having to explain such remarks ruins them, but it helps one to resist making them.

Several of our lateral partners have contrasted the internal reputation of the GC at their former firms. "We called him 'Doctor No.'" Or: "Everybody dreaded talking to him. He was very smart, but he made you feel like an idiot for asking the question." Or: "They tell me that I shouldn't hesitate to ask for your help and that you try to find a way for us to resolve any problem. In my old firm, the GC would veto anything that had any risk to it, and you had to go to the managing partner to get him overruled." The GC should avoid being any of those people.

I doubt that any of these perceptions were fair (except the second one), but what is important is that they are perceptions. They demonstrate the attention that a GC should give to her accessibility, her willingness to explain and discuss her analysis, her role in educating the firm's lawyers, and her reputation as a ready source of help.

Being accessible may involve giving something up—practicing law for clients other than the firm and its constituents is pretty much a given, but uninterrupted vacations and the like may also be involved.

The ABA has published more than 400 formal opinions on ethics questions. That is about the number of opinions that a GC of a 400-lawyer firm will need to make for the firm in six months. So, the GC's opinion cannot take very long, may need to be influenced by practicality, and must boil down to a "yes" or "no" answer, accompanied by a risk analysis. Of course, some decisions are based on the same questions that others have answered, which makes it more difficult. And all must apply to specific facts.

B. Be Accessible and Approachable to Professional Staff Too

Approachability also involves being accessible to staff. From the GC's perspective, a staff member is equally as important as a lawyer colleague. If that concept is foreign, a GC must learn it. An alert paralegal or assistant who is loyal to the firm rather than to an individual lawyer is one of the firm's best loss prevention resources. They are the best early warning for lawyer impairment or misconduct and one of the best for detecting conflicts, unworthy clients, and other problems that manifest after a matter is already in the door. If staff are hesitant to bring the matter to the attention of management, their loss prevention value is greatly diminished, and the firm is more at risk. As part of the GC's education and loss prevention functions, the GC should ensure that staff understands the firm's loss prevention goals, risks, and solutions, and the GC should actively enlist and expect staff to be a part of loss prevention. The firm will be safer.

Take care to remember that people who have not earned an advanced degree may well be smarter than you. An effective GC, in particular, ignores job or financial status

when dealing with people. Every lawyer should be aware of this, but it is part of the GC's job to know and apply it.

II. INFRASTRUCTURE AND CULTURE

A. Don't Pretend That You Can Accomplish Your Responsibilities Alone

Your loss prevention goals can only be achieved if several other people understand and adopt the same goals. Those people do not work under your direct supervision. Trust accounting will probably be the responsibility of the finance department; a joint effort to jibe what the Supreme Court rules say about trust accounting and what accounting principles say will be necessary. The teamwork that hopefully is encouraged within the law practice should carry over to its administration. It will be a rare GC who can understand and administer the security requirements added with modern information systems and devices, so the IT department must be an ally to ensure that the firm's confidentiality obligations and specific client requirements are kept. And vice versa. IT should know that the GC will support recommendations that have safety, confidentiality, and loss prevention benefits. Management must fund and budget for the extra expense of an effective IT security team, an adequate conflicts department, and a trained finance department with a designated trust accountant.

If there is a general understanding by both staff and lawyers of the firm's ethical obligations, a firm can avoid great ideas that challenge those obligations: "I have a great idea. My favorite charity offers a junk service using long unemployable people. We can have them haul off and destroy our outdated closed files!" A staff member recognized that as a problem unless the firm itself observed the destruction. In part, this needs to be a matter of the culture of the firm, and a matter of communication among the GC and the administrative departments.

B. An Accessible and Skilled Assistant Can Be as Important as You Are

In my case, this is a matter of luck, although I suspect clever engineering on Marie's part, deciding that she wanted to work with me and making it happen in ways I don't quite understand. But gratified as I am when staff contacts me directly (which may show that our efforts to be approachable are working and our core value of teamwork is being observed), there will always be some reluctance. There have been many times when a staff member has approached my assistant with a problem prefaced with, "Don't tell Pete, but …" Of course, my assistant is obligated to tell me, and everybody knows it. I wish I could take credit for this fiction. It is certainly a better one than "imputed knowledge."

We all know assistants who assume the status of the boss and savor the power of being the gatekeeper to an executive or senior partner. Not everyone can resist the temptation to use power. It is a similar psychological phenomenon to the well-recognized Federal Judicial Syndrome, except for the lifetime appointment factor. Find an assistant who can resist.

C. Smart and Skilled Conflicts Staff Is Vital

I recognize that not all firms can have a conflicts department. But, if they do, the conflicts department must be carefully trained and well managed. As a rule, well-trained staff are better at identifying conflicts than lawyers. Some dispute that fact with a knee jerk. But careful conflicts review is tedious work. Staff will have at hand the checklist of things to recognize—a checklist developed over time and with experience. Staff will have the discipline to check a remote or minor player, and the knowledge to avoid predictive reasoning (e.g., concluding that "suing ABC cannot be a problem because it is already adverse to us in another matter" without checking sufficiently to find that ABC is adverse by reason of a specific waiver). Ideally, everyone should find a job that matches his personality. An obsessive nature is a plus for both the lab technician and his employer, but not so much in a job that demands output over precision. The firm is safer when conflict checking is not the responsibility of individual lawyers, but rather is turned over to staff who are:

- Smart;
- Careful;
- Instructed with clear rules; and
- Taught to respond to impatient customers that "the firm has set up the rules and if there is an argument it should be addressed to the GC."

Letting the individual lawyer handle it means that the lawyer will resolve such an argument himself. In return, the GC must: (a) ensure that staff is expertly trained; (b) encourage them to ask questions; (c) back up the answers with written confirmation, so that the staff knows the GC stands behind them; and (d) back up staff with impatient lawyers when required.

D. Skilled and Knowledgeable Finance and IT Staff Are Vital to Trust Account and Cybersecurity Compliance

Finance will have the data that can be harnessed to identify weak points—lawyers working alone to a greater degree than is safe, tardy billing and timekeeping, and the like. IT staff also has big responsibilities in a modern law firm to keep information secure. The GC must rely on and support them and encourage and back up their initiatives that have loss prevention and safety implications.

In summary, every staff member is critical to loss prevention, and a GC should strive to ensure that no barrier prevents them from communicating any concerns. The GC can address that goal through education, policy, reputation, and example.

III. GUIDING PRINCIPLES FOR DECISIONS

Every firm should formally adopt core values its members can embrace. Solely from the perspective of the general counsel's job, broad principles should support the following specific ones. Treat them as axioms for resolving issues:

- Decisions must be ethical. That is, legal ethics—obeying the rules to the best of our ability should be a given; real ethics—doing right by all concerned is to be sought when not proscribed by legal ethics.
- Clients do not "belong" to an individual lawyer.
- The interest of the firm, not the interest of an individual lawyer, is paramount.
- The GC is an analyst and an advisor, not a firm manager.

Keeping these things in mind prevents reasoning such as "it may be a conflict, but I doubt if the other client will do anything about it," or "nobody will find out." They allow the GC to be a mediator of different positions and to be a neutral. They also provide for the decision of a debated firm matter by management with a clear statement of what the GC's recommendation will be.

The most frequent (and often the most sensitive) issues the GC will face will be conflict issues. In my opinion, the GC's obligation concerning conflict problems requires (a) advising on a way that a matter can be accepted, if it can ethically be accepted, next (b) assessing any risks, and then (c) weighing those risks. This requires three separate analyses. For example:

- This matter would create a directly adverse conflict with Client X.
- We could handle the matter only with the consent of both X and the new client.
- The matters are unrelated.
- We don't do this kind of work for X.
- This is a transaction that both parties want to finalize as quickly as possible. Thus, it is reasonable to ask for consents.

  OR . . .

- These matters are unrelated.
- But this is litigation.

- So, the possibility of obtaining consents is less likely.
- But we can still ask.
- Thus, talk to the relationship manager for X and get her opinion. We are obligated to each other to ask for consents if reasonable.

  OR. . .

- X is our most important client, and this is a litigation matter.
- This creates an additional "punch pulling" conflict in that an objective lawyer would believe we would be tempted to appease rather than anger X in any contentious aspect of the lawsuit. While theoretically that can be resolved by the consent of the new client, it also raises the question whether we even want to be put in that position.
- If the lawyer insists, bring in the relationship partner for X. If still not resolved, let the lawyers know your recommendation: "The firm would be crazy to ask for a waiver in this case and jeopardize its relationship with X for something like this." Alternatively,
- Changing the facts to be that X is not a significant client. ("We can leave it to management if you two are in disagreement.")

In any event, keep two very important things in mind. First, each solution is a teaching opportunity, both as to the kinds of conflicts we can resolve and in the culture of working together for the right solutions. This is pretty easy for me, as explaining an answer rather than giving it is one of my most irritating gifts, but it works for us in this case.

Second, this analytical approach, incorporating the ethics rules and the practical considerations, is an approach that will enhance the stature and reputation of the firm and the GC's office.

IV. THE LEGAL RELATIONSHIP

As GC to the firm, you are the firm's lawyer. You are also the lawyer for the employees of the firm to the extent there is no divergence of interests. This relationship has several consequences. First, in my view, the GC should not be on the firm's management committee. As with any client, the GC should confine himself to the lawyer's role of adviser/counselor and leave to the client (the law firm) the business and management decisions. Among all the reasons I believe a lawyer should not be on the board of a client's business, the attorney-client privilege discussed below is especially important in a law firm. The GC has an attorney-client relationship (and therefore communications about legal advice are privileged) with firm management and firm employees. Almost as important, nobody else in the firm does.

(Note: Some ALAS firms disagree with my analysis. They believe that when the GC is on the management committee, other lawyers will more greatly respect and abide by their recommendations. They also believe that a GC can better effectuate firm risk management policy when the GC understands the firm's strategic and other business initiatives more clearly. ALAS understands both views and does not take a position on this issue.)

Back to the attorney-client privilege. Make clear to the firm lawyers that communications about firm problems with anyone else in the firm are not privileged. A lawyer reporting a threat against the firm to her PGL is talking to her boss, not her lawyer. The same with reporting to the firm's managing partner. The managing partner is management, not the firm's lawyer. It should go without saying (but it should be repeatedly said because the obvious is so often overlooked on stressful occasions) that the lawyer confronted with a threat to the firm should not consult his law school classmate or friend in the next office. And he should not copy the rest of the team on an email to the GC because that also might well waive any privilege. Usually, the upset lawyer wants to copy others for the well-intentioned reason that she wants to be candid and demonstrate to her team members that she is not blaming them. Good motives like that are wonderful but must be stamped out.

When trying to educate on these principles, emphasize that others will be informed as necessary, but the decision to do so belongs to the GC (who can do so in a privileged communication) and management (who can decide to wait a day before informing the client after possible curative options are considered).

This is a serious subject and bears repeating. When a lawyer thinks he has made a terrible mistake, this often disengages their common sense[1]. The lawyer wants to do the right thing but is often mistaken about what the right thing is. The lawyer wants to immediately tell the client about the mistake and either (a) beg forgiveness, or (b) confess and promise to make it right. The lawyer wants to tell his supervisor, and worse, wants to be sure the team members realize that the lawyer is a good person and is not throwing them under the bus. So, the lawyer wants to send a note to his supervisor, copying teammates, explaining everything, and admitting fault. The policy is and should be: ***Call, do not write, the GC, and the GC only. And do what the GC says. Do not talk to anyone else about it.*** Then this conversation will occur:

> "But I want to explain to my PGL what happened. It is her client. I need to do that."
>
> "Look. This is a firm problem. The firm will handle it. It is my job. You have a privilege to talk to me about it because you are asking for legal advice. You have no privilege with your PGL. She is not your lawyer. I am. She will be told. But I also have a privilege to discuss this with her as

[1] This is a serious phenomenon. If you have experienced it, or observed it, you will know. If you have not, take my word for it until you do.

she will help handle any legal problem. So, she will be told. You are not to discuss it."

"But you always told us that the client needs to be kept informed and I want to be the one to do it."

"Of course, the client will be told. But this is a firm problem. The firm—meaning management (the PGL and maybe the managing partner)—along with the firm's lawyer (meaning me) will decide who is the best one to do it. We want to marshal the firm's resources to analyze and consider how best to address the problem, and it will be best to have a plan in mind and to have digested all the facts before we discuss it with the client. We won't try to fix the problem without telling the client, and the client may not want us to fix it, but when we inform the client there is nothing improper with having the facts and a preliminary assessment of ways to address the problem. It is not now your responsibility. I do want you to write to me (and only me) a detailed report of what happened and why. No copies."

"But you always told us not to put anything in writing."

"I never told you that. I tell you all the time to confirm oral conversations in writing. I want everything in writing while memories are fresh. But I want it to be in a communication (a) to me (b) that I ask for to help with advising the firm (c) so it will be privileged."

When you encounter the situation, I doubt that there will be a dozen words that depart from that conversation.

There should be a formal policy setting out the role and responsibilities of the GC. It should include the GC's authority to appoint deputies to handle specific legal matters or classes of legal matters (e.g., a deputy for the case of *Smith v. Firm;* a deputy counsel for employment law) and the authority to hire outside counsel on the firm's behalf. It should also cover the requirement and process of reporting claims or threats against the firm.

Note: a word about the attorney-client privilege in the law firm context. Although you should educate the firm lawyers about the above, and emphasize it frequently, don't unnecessarily worry about it. The main goal is to be sure that if a claim or threat arises, the GC is told as soon as possible so that the GC can promptly marshal the firm's resources to address the problem, report to the insurer, and enlist outside counsel if necessary. Again, I don't mean it is not important—you should know the law on this issue in every jurisdiction where lawyers at your firm practice (or study the applicable law carefully when you have to decide how to conduct an investigation that a client may want to discover later). ALAS has written extensively on this topic—consult the ALAS Loss Prevention Manual.

V. MOST DIFFICULT LESSONS

A client told the story of two men taking a balloon ride when a storm arose and blew them around for two days. When the weather cleared, they saw a man standing in a field below. They shouted, "WHERE ARE WE?" A man on the ground replied, "YOU ARE ABOUT 100 FEET UP IN A BALLOON!" "Just our luck—the first person we see is a lawyer. Ask him a question and his answer is absolutely accurate and totally useless." A good GC must know the rules of professional conduct, of course, but that is not enough, and sometimes not even what the job is about. A stereotypical law school ethics professor may not be a good candidate for a law firm GC job.

A. Correct Decision; Negative Result

As everyone has, or eventually will observe, a true expert, one who understands all the intricacies and nuances in his field, may evolve in a circle to become as ineffective as the primitive man whose only tool is a hammer. Remember the jokes about the surgeon whose remedy is to remove something when the tailor realizes the patient's underwear is too tight. The element of truth is what makes jokes funny.

Particularly in the arena of conflicts of interest, the GC's perfectly correct solution may cause much harm. It is not difficult to imagine a GC who may use his deep knowledge and superior analysis to come up with an uncontestably defensible position that so angers the client that the client fires the firm. This may or may not be a bad outcome, but unless the risk is anticipated and is acceptable, the GC is not doing a good job.

Making a decision is often difficult. First, it is much easier to come up with arguments than it is to make a decision. That is why agnosticism is appealing, and why being a litigator in an adversary system is easier than being a businessperson (or a GC). Second, on most questions, a lawyer could easily take a week researching and briefing the question. But the need for a decision is almost always urgent; the firm risks losing a client, or a court or client deadline is looming–so if the decision is not timely, the GC is not doing her job. Third, ideally, the GC in a firm should make ethics decisions and leave business decisions to firm management. But the lines are often not that clear. If ethically there is no conflict because the problem is merely a business rivalry, the GC cannot ignore her additional duty to advise on risk. If the correct ethics decision might cause a client to leave, that is a part of the equation for firm management to consider. If the economics are such that the firm would want to put up with that client, that is one thing. If the client's leaving is a net gain given the new opportunity, it is another—as long as the decision is ethical.

B. Decision-Making

Use the firm's guiding principles, discussed in Section III, as a foundation—either reason from or test against the firm's core values. Assuming these are, in fact, core values, treat them as axioms. For example, good principles to adopt include:

- Decisions must be ethically correct;
- Clients are clients of the firm;
- Decisions should be made as to what is best for the firm, not an individual lawyer;
- Maintain the firm's goal and reputation of being highly ethical and professional;
- Treat individuals fairly.

Illustration No. 1: The decision must be ethical.

> Meaning, no unethical decisions even if there is minimal risk that you will be called out for the decision.

Illustration No. 2: Try to take desirable new representations if it is ethical to do so. (Principles: ethically correct; benefit of the firm as a whole; maintain reputation.)

> Meaning, don't say "no" just to be perfectly safe; make reasoned analyses on the ethical questions, not just the risk-free ones. Then, weigh the economic risks, such as the expense of a disqualification motion, the risk of angering one client or another, and the benefit of all positions. A firm that avoids all risk is not more ethical, just more risk averse.

Illustration No. 3: The risk decision is ultimately a management decision; the ethics and risk analysis are the GC's job, except when it's a no-brainer or there is a previously agreed response to a recurring scenario. (Principles: see all the above.)

> Meaning, rather than going directly to management for a decision, first explain this to the constituents; mediate any debate, and if an agreement is not reached or is bad, ensure that everyone knows the GC's recommendation and that management will make the decision. This approach is likely to enhance the overall appreciation by firm lawyers of the rules under which the firm operates and is also very likely to result in agreement.

C. Do Not Learn Too Much from a Lesson

If one client threatens to fire the firm if it decides to take a case that is not an ethical conflict, do not learn that all clients will do so. Learn instead that this is a risk. The next time it arises, management must decide whether it is a risk worth taking. Resist forming a stereotype that "clients think this is a conflict and will fire us." Each situation demands ethical analysis, risk analysis, and often, a discussion with the client.

VI. MOST FREQUENT QUESTIONS AND ANSWERS

These are the most frequently asked questions that you will get. Don't be too surprised if some of them seem easy.

A. Dealing with Conflicts of Interest Generally

1. Direct Adversity Conflicts

A law firm cannot represent one client directly adverse to another client (Model Rule 1.7(a)(1) and state equivalents (most states). "Represent" is one key concept; "direct adversity" is another. "Represent" involves the scope of the representation—what you agree to do and what you do not agree to do. "Direct adversity" as to another client means representing a party in a contested claim (litigation, arbitration, etc.) or across the negotiating table (contract, lease, mediation, settlement, etc.). Special situations are discussed below.

Some rules once prohibited representation "adverse to the interest" of a client—a term of whim and subjectivity. If you remember that from law school, forget it. (But be sure to analyze the applicable state's formulation of the rule.)

Distinguish this from "indirectly" adverse. Examples: representing a competitor; representing a client against a person who owes the other client money, or that will interfere with that person's ability to perform a contract with the other client.

When does the adversity arise? We take what I believe is a common-sense approach. For example, we represent Contractor who has suffered a loss that is probably covered by insurance. The insurer is also a client in other matters. Contractor wants us to help assemble the information for the claim and provide it to the insurer. We take the position that notifying the insurer of the claim is not adverse. The parties have a contract. There is no reason to assume that one party will breach it or even fight about it. The situation becomes one of direct adversity between the clients only if the insurer denies the claim or wants to negotiate it. At that point, we cannot negotiate for the contractor, nor file suit. Of course, the letter presenting the claim should not be belligerent. It is a notice, not one of the "or we'll see you in court" varieties of communication that some lawyers feel compelled to write.

Note: This, of course, depends on your relationship with the insurance company.

There are other issues to consider. First, you should tell Contractor that you cannot go further than to put the insurer on notice and that he will need other lawyers if there is a dispute. Also, tell the insurer in the notice, "we represent you in other matters, and our involvement in this claim will not extend beyond assisting the contractor in providing notice." Better advice: tell the contractor that a notice letter by a lawyer rather than the insured itself is likely to cause the insurer to involve the legal

department for coverage analysis and may hinder the business-to-business early resolution of the matter. But that ruins the conflicts example.

Note: Direct adversity conflicts are consentable with exceptions. See Consents section below.

2. Punch-Pulling Conflicts

A firm cannot undertake a representation in which duties or interests of other persons would make a reasonable lawyer question whether he can give fully independent representation without being influenced by other considerations. *See* Model Rule 1.7 (a)(2) ("material limitation" or "independent professional judgment," or "punch-pulling" conflicts). These are potentially consentable after explanation to the affected client.

Note: In the case of punch-pulling conflicts, consent is required only from the affected (normally the prospective) client.

But before asking for consent, the lawyer must first determine that he will not in fact be influenced by the other interest. For example, the prospective client asks a lawyer to sue Bank, who is not a client, but lawyer's family is a substantial stockholder. Might this lawyer pull his punches in being adverse to the Bank? What if the lawyer is trying to get Bank as a client? A reasonable, objective lawyer would believe that a lawyer in that position would be influenced. That raises these issues:

First, the lawyer may determine that he will not be affected: Bank is never going to be a client because of strong ties with existing counsel, and the amount involved is significant but not material to Bank's bottom line. Or the individual lawyer with the connection will not be involved or will be screened to remove any influence.

Second, the lawyer must explain all this to the client and ask the client to decide. If the client consents, the representation can go forward. No consent from (or communication to) Bank is necessary or proper.

3. Consents

This is frequently called a "waiver," but "consent" is more accurate as it carries the idea of understanding. Any consent must be after a full explanation by a lawyer of the consequences and risks of the consent. "You have to sign because I need your consent," is not enough. Obviously, the more sophisticated the client is, the less detailed the explanation of the consent needs to be, but the same requirement of understanding risks and consequences exists. Sometimes it is advisable to direct the client to get an opinion about the consent from an independent lawyer (who may be in-house counsel). At other times, you should suggest it.

Always be transparent and make full disclosure. You are explaining things to a client with whom you have a special relationship of trust, not negotiating to sell a horse.

Some conflicts are not consentable. We cannot represent both parties to a transaction, or in litigation, or where the nature of the situation suggests that we cannot give undiluted, independent representation or advice to one client or another.

Factors that make consent a reasonable request:

- The matters are not related.
- The matters will be handled by different lawyers, practice areas, or offices. In our "punch-pulling" conflict example, the lawyer with the personal interest will not be involved.
- Ethical screens are an option to enforce separation and protect confidential information.
- The likely conflict scenarios that might arise can be reasonably predicted and disclosed.

Factors that make consent unreasonable or unconsentable:

- The absence of the consentable factors above.
- Dog/cat roles in transactions: representing both the lender/borrower, lessor/lessee, buyer/seller, etc. And, of course, plaintiff/defendant.

Note: Advance consents can be very useful. On the other hand, they are just a species of consent and must therefore comply with the rules for any other consent. The lawyer must clearly explain the scenarios and consequences enough so that the client can make an informed decision.

For this reason, the very broad advance waivers that some firms try, "We are a huge firm with many clients. You agree that we may take matters adverse to you for another client so long as unrelated to this matter," or the like, may be found to be invalid. This doesn't explain what the client is agreeing to, or the consequences of that agreement.

In contrast, "You have asked us to represent you in securities litigation. To do so, however, you must be aware that our real estate lawyers represent many shopping centers in which you have stores, and our shopping center clients likely have hired us to handle leasing negotiations and disputes. Because a law firm cannot concurrently represent a client and represent another client adverse to it without consent of both clients, to accept the securities litigation we will need your consent in advance to represent any shopping center client in any future lease negotiation or dispute with you." Although this advance consent is broad and does not identify any opponent by name or location, it does so by classification sufficient for the client to make a decision and applies to an identifiable class of adverse representations. This advance waiver *should* be held valid.

Always remember that when the shopping center scenario does arise, you will also need consent from your shopping center client. In addition, you should communicate to the securities litigation client that the waived scenario has arisen. Transparency prevents problems.

4. Frequently Asked Questions

Q: Can we represent a client against another client in an unrelated matter? *(Note: You will be surprised how often this question is asked.)*

A: Not without the consent of both parties. The fact that the matters are unrelated suggests that it might be reasonable for both clients to consent, but consent is required.

Response: "But this is not litigation. It is a transaction that both parties want. And it involves the Atlanta office."

A: Yes, the Georgia rules are looser about transaction conflicts, taking a kind of "know it when you see it" approach to when a negotiation is adverse—"adverse" in Georgia apparently means "unfriendly or contentious" rather than inherently opposing relationships, such as buyer/seller; landlord/tenant; borrower/lender; cat/dog. But it is not safe to assume that the parties will feel the same when things go wrong and raise the conflict in hindsight. For example, two years later the clients might say: "What do you mean not adverse? Look at us now!" And if everything is so friendly, getting the written consent after explanation should be easy.

Plus, we can never represent both sides—even if it were not prohibited, it is stupid. And one of the clients is not based in Georgia and may justifiably expect that we should avoid what everyone else thinks is a conflict.

Remember that nobody needs a lawyer to negotiate a handshake deal. The parties may get along, but their successors may not; economic issues can also strain relationships and high-mindedness. Good document terms resolve problems before they arise, and in an inherently adversarial relationship like lender/borrower, they should be treated as adverse even while everybody is getting along.

Note: This situation illustrates the fact that "legal" ethics and "real" ethics (doing right by all concerned in a situation) may be different. For example, there is no real danger that a lease transaction in Miami will interfere with a purchase in New York in which one firm lawyer represents the Miami client as tenant and another firm lawyer represents the New York client as seller. It is prohibited because a rule says so. The rule might be a good idea or not. Sometimes it helps for the GC to explain that to the inquiring lawyer. And if the rule does not seem necessary in a particular situation, point out that this also means the necessary consents should be easy to obtain. The genius of the rule is that it puts the burden on the client to decide; the goblin is that it gives one client a veto that it may use unfairly.

Q: Your law firm represents Client A in a suit against Company B, which is represented by a firm employing an associate who is applying for a job with your firm. The associate says that she has done only a little legal research on the file, knows none of the facts, and has no confidential information. If your firm hires the associate, can you continue to handle this matter with an ethical screen?

A: In many jurisdictions, yes; in others, no, without a waiver. Check the wording of the Rule 1.10 equivalent in the jurisdiction because they vary a little—some require notice to the former firm, for example, while others require consent or an estoppel letter.

Here's how an estoppel letter works. Before you hire the associate, the former firm supervisor confirms to you in writing that the associate received no confidential information. That will enable you to rely on complying with the "about whom the lawyer had acquired confidential information" test, in, for example, the Florida version of Rule 1.10. The estoppel letter request will have information about a screen and the agreement of the former firm that it will not move to disqualify you if we set up a screen. Unfortunately, it may also make the former supervisor feel betrayed, uncooperative, and vindictive. My firm has experienced both the "how sharper than a serpent's tooth to have a thankless associate—no way I am going to help him bite my hand" and the "anything to help her career" reactions from former supervisors in the other firm. The associate himself is not always a good predictor of which reaction you will get, so you should carefully explain the risks to him.

If you wait until AFTER the associate arrives, however, you are asking for a favor, not preventing a problem—you are telling the former supervisor that he may have grounds to disqualify your firm, and please don't. That is not a good position, likely to produce the "I would love to, and if it was up to me, I would agree, but the client won't let me" gambit.

B. Other Conflict of Interest Scenarios

1. Corporate Family Conflicts

The ABA rule and the majority rule is that each member of the corporate family (parent, subsidiary, sister corporation) stands on its own for conflicts purpose (unless it is an alter ego situation). The minority rule (the Georgia rule, among others), and the "feeling" of a lot of clients, is that if one subsidiary is a client, then the parent and all other members of the corporate family are clients.

Client guidelines frequently ask us to follow the minority rule (in effect) by asking us to treat all the related companies as clients for conflicts purposes. For that reason, firms should consider turning down a one-off case for a huge organization unless the firm can get assurances or an agreement that it will not be disqualified from unrelated matters. Some clients will, some will not. (*See* discussion about "Managing Conflicts" in Section VI.D below.)

Keep in mind that, whether there is a promise or a guidelines requirement, a client can terminate or cease to use a firm at will. The firm can lose a client for suing a subsidiary even if it is ethical under the rules of the jurisdiction. So, the decision whether to take a case against a subsidiary of a client or analogous situation without asking consent is part art and part science.

- "No" if we have agreed to use the minority rule.
- "No" if the applicable jurisdiction adopts the minority rule.
- "Not without consents" if the existing client:
  - Is a client we want to keep; or
  - Is so important that we would be concerned about upsetting it, so as to interfere with our independent judgment for the new client (punch-pulling temptation).
- "Maybe" if the majority rule applies and the existing client is not significant to us economically and the prospective client is very promising. In that situation, the representation:
  - Is ethical; and
  - If we lose the existing client because it gets angry, there is no great loss.

2. Positional Conflicts

The classic positional conflict is that, as an advocate, you cannot take contradictory positions for different clients in the same court at the same time. If the statute of limitations for medical malpractice is ambiguous, you cannot argue in the morning for plaintiff Smith before Judge Jones that it is four years and in the afternoon for defendant Williams that Judge Jones should rule it is two years. Advocates can take inconsistent positions, but your duty to both clients includes not destroying your credibility instantly.

Some people also use "positional conflicts" loosely to mean two or three other things, having largely to do with business. "Business conflicts" might be a better term.

- Some areas of the law are divided into plaintiffs' lawyers and defense lawyers. There is nothing unethical about representing a labor union in one matter and defending against an organizing effort in a different matter, or defending a product liability case and representing a plaintiff in a different one, but no other client on either side of those dog/cat

relationships is going to hire you for the next case. So, you may have to pick sides.

- In an industry in which we represent a lot of clients, we will lose business being adverse to a nonclient on an issue that will adversely affect the whole industry.

- Some clients tell us that they do not use firms that represent competitors or a particular competitor. This is a little silly when there is no real conflict because a lawyer does not usually become an expert in a field in which he represents only one client in the area of law. Competitors with the same patent lawyer may have a problem, but a real estate deal for the competitor by the patent lawyer's partner in another state should not. Coke/Pepsi and Home Depot/Lowes are two famous sets of companies that tell us that if we represent one, we cannot represent the other. But even they can be reasonable in the right circumstances. Most often, we will not promise not to represent the competitor, but the client will say it plans to exercise its right to terminate us if we do. That's fine. We stay aware of the issue. The conflicts staff will catch it and raise the question. It makes our decision an economic one, not an ethical one, unless we have made a promise.

Sometimes a client asks us to stand by because of an anticipated major lawsuit: "The REO auto manufacturer (Google it) anticipates a major suit against its dealers, and we do not want you to take any matters for any REO dealer so you will be ready." This is not a good situation unless the litigation occurs. Should our construction lawyers, real estate lawyers, or tax lawyers turn down work for a major dealership for a new showroom? You can handle this with advance waivers, saying we represent REO Inc., in many litigation matters, and we can take the tax case or the property acquisition only if the client consents in advance to unrelated litigation if it ever arises.

Remember that conflict waivers (consents) can be tricky. If you need a consent to take on a new client, and you get one, now the new client is a client and to take an additional matter against that client, even from the old client, you need the new client's consent. Example: We represent B in an SEC action in New York. A wants to buy a building from B in Miami, which requires consent from both A and B. While the consents are being negotiated, B has a tenant dispute with A in Atlanta. Again, both clients must consent. If A refuses, thus disqualifying us from representing B, our longtime client B and his go-to lawyer will be extremely upset. This can be avoided if, at the time of the first request for consent, A was required to give a broad advance waiver promising to consent to unrelated representations of B in future matters, and not to object to our continued established relationship. Some sophisticated clients provide for this in their internal consent policies; the firm should observe them as well, and the firm personnel administering the conflict process should police for this situation.

3. Zero-Sum Game Conflicts

Generally speaking, I believe that a firm cannot represent one client against another client seeking the same prize, where only one can win and the other will lose. Bid contests are a good example. I believe that a firm cannot represent one client in challenging or defending a winning bid by another client is a conflict. If one wins, the other loses. When two clients are seeking the same broadcast license for a territory, only one license will be given, so it is a conflict to represent either, without consents.

Note: Some firms take the approach that they can handle certain zero-sum game matters without waivers depending on the circumstances. But those circumstances are limited.

Representing two plaintiffs against the same defendant who cannot fully satisfy both judgments—the first judgment gets a lien, and thus priority—may also be a conflict, but it is debatable. In any event, as a general rule, the conflict usually disappears when the defendant files bankruptcy because all creditors in a class will be treated equally. If this doesn't happen, it could be trouble—the GC should do a careful assessment of this situation.

I find nothing in the rules that prohibits the firm from representing one client against a nonclient just because we know *another* client will be financially better off if we lose. Some lawyers will disagree. Sometimes, ALAS disagrees. I never said the GC's job was for the faint of heart! Be careful here and consult your friends at ALAS in close calls.

4. Emerging Conflicts Generally

As discussed above, the new business intake process is an opportunity at your firm's front door, before a matter is accepted, to guard against the recognized threats to law firm safety, such as conflicts, unworthy clients, ensuring that lawyers competent in the field of law are assigned, and fee arrangements. After the matter is undertaken, though, there are conflicts that can arise. A borrower will always be looking for a better deal from another lender and may bring a new lender into the negotiations. A defendant may bring a counterclaim or a cross-claim that adds new parties. A conflict search on those parties is necessary, but there is no gate at which that may be enforced. The firm must rely on the lawyers, paralegals, and assistants handling that case to remember to run the additional searches and update the database. Ensuring remembrance requires education and reminders.

We can institutionalize some reminders. For example, the new business or financial software might be programmed to send a reminder on each new matter asking the billing lawyer or responsible lawyer to be sure no new parties have been missed, or in litigation matters, if the client has been advised about litigation holds.

5. Subpoena to a Nonparty Witness Who Happens to Be a Client

Before issuing subpoenas, a lawyer is required to run the names through the conflicts department. If a nonparty witness is a client, there is a potential for conflict. In that case, I believe that the safest course would be for you to have the relationship partner call the witness's inside counsel or the client, explain the situation, and determine if the testimony or documents sought will be controversial or contested. If it is routine and there is no objection, confirm and proceed. If the witness-client will resist the production of documents or the testimony is adverse to the litigation client, turn that aspect of the matter over to co-counsel or special counsel hired for the purpose. *See* ABA Formal Opinion 92-367. The conflict regarding the testimony or discovery does not disqualify the firm from the underlying case, but the firm should stay out of the discovery, the deposition, and the cross-examination at trial. The relationship partner to the contact pre-subpoena should explain that the firm will not be involved if contested, and a different law firm will handle that aspect of the case. It may be illogical, but a different rule would be unworkable. And, of course, all this will need to be explained to the client for whom you are seeking discovery.

6. "Thrust Upon" Conflicts

A "thrust upon" conflict is one that the lawyer did not anticipate and should not reasonably have anticipated. The classic case is: Lawyer represents Plaintiff A in a lawsuit against Company B. During the litigation, Client C acquires Company B by merger and Client C is substituted into the lawsuit. Lawyer is now representing Client A vs. Client C. Client C asks Lawyer to withdraw. Client A objects and would be prejudiced. It is pretty clear in this scenario that Lawyer has committed no ethical breach. It is also pretty clear that Lawyer can choose to stay in the case for Client A and that the judge might not let Lawyer withdraw even if Lawyer wants to.

You can expect questions about this from lawyers who remember such phrases from law school. "But isn't this just a 'thrust upon' conflict, and can't we ignore it?"

But Lawyer still has a conflict. The firm can withdraw and terminate the relationship with Client A. Or the firm may have to withdraw or stay in depending on if Client C wins a motion to disqualify, or the judge won't let the firm out. Or the lawyer may be able to negotiate consents in any circumstance. But none of this means that the lawyer has a right to represent both clients without trying to obtain consents. The law firm should not have to give up Client A or C, but without consents, the firm will have to do what it can, like setting up screens between different teams and the like. The GC should be intimately involved in the solution.

So, the "thrust upon" conflict is basically an exception to the "hot potato" rule where a lawyer cannot drop one client like a hot potato to take a better one. The suddenly dropped client will still be considered a current client for conflicts purposes.

"Thrust upon" conflicts also arise in transactions, for example, where the buyer of a property is still shopping for better financing terms from different banks or joint venturers. Again, these cannot be ignored but they can usually be resolved by agreement.

7. Prior Work Conflicts

A lawyer defending his own work may well be at odds with the best interest of the client. Or not. In any event, it requires discussion, disclosure, and consent. For example, Law Firm drafts and negotiates a contract for Client A. Three years later, litigation arises in which the other contract party interprets the contract to require Client A to do X, and Client A knows that was not what was intended. Client A contacts Law Firm to represent it in the litigation. Law Firm may be tempted into one of the following responses:

- Lawyer's ego may tempt him to litigate to the highest court to prove he was right in choosing the language, no matter what the cost to the client.
- Lawyer's risk aversion may tempt him to advocate settlement to avoid a decision that Lawyer made a mistake.
- Lawyer may be tempted to ignore the fact that an independent lawyer may think Client A should file a malpractice suit against Lawyer.
- The facts and documentary evidence may show that to a greater or lesser degree Lawyer and Client A recognized the ambiguity and the risk at the time of the contract and accepted the risk in view of the benefit of the deal and the relatively low chance that the ambiguity would cause a problem.
- Some combination of the above.

This sort of prior work conflict is a species of the Rule 1.7(a)(2) "punch-pulling" or "material limitation" conflict.

The prior work scenario is dangerous, in part, because many lawyers will assume this is part of the original file and will begin working to fix the problem, recording time to that preexisting matter number, not because he is supposed to, but because he can. (This is one of many good reasons to close matters promptly after completion and permit reopening them only with the approval of the GC.) Law firm practices should be that a dispute related to the firm's prior work is a new matter—this should be backed up with an inability to skirt the rule. The new matter checklists and safeguards are particularly important in prior work situations; the firm needs a conflict waiver to continue. If the previously involved lawyer has the ability (unthinkingly or knowingly) to overlook the conflict, the gravity of any malpractice claim multiplies. If the lawyer is tempted to treat the dispute as a continuation of the original contract

matter and does not open a new matter with the attendant new engagement letter, a process where the conflict is likely to be raised, the risk increases. Continuing education and emphasis should encourage a new matter to be opened if a dispute relating to prior firm work arises. Further, there should be a new business intake form question that asks, "Does this matter relate to prior firm work?" which should trigger a review by the GC.

The consent necessary should be requested only after an internal review of the facts and scenarios listed above, an analysis of whether it is wise to ask consents or refer the matter out, and an explanation to the client. The consent should review the scenarios, explain why there is not a problem, or what we have done to alleviate any temptation to prefer our own interest over that of the client, and ask for consent.

Often, the only time there would be a temptation would relate to settlement, and one way to handle that is to recite that the client will not be relying on our advice as to settlement but would rely exclusively on inside counsel, or another lawyer. The scenarios above where the lawyer wants vindication or the lawyer fears loss on a personal level, will be taken out of the equation if another lawyer is making the settlement recommendations.

C. Relationship between Ethical Screens, Confidentiality, and Conflicts

1. Lawyers Have a Difficult Time Keeping Client Confidences

In his or her educational function, a GC should provide periodic reminders. The obligation to keep a client's secrets is one of the most basic requirements that a lawyer undertakes. That obligation is embodied in Model Rule 1.6. This rule varies among the states as to what exceptions there are, but it is an obligation foundational to the lawyer-client relationship. Lawyers must not talk about their client's matters, business, or use client information to benefit others.

It will be helpful to the firm if its lawyers are reminded and realize, contrary to . . .

- what they hear lawyers from other firms say in the elevator,
- what they have concluded about the spousal privilege plus (or multiplied by) the attorney-client privilege allowing discussion of a client's business at home, and
- the cocktail gossip that lawyers sometimes preface with "I can tell you about this because it is on file at the courthouse"

. . . that they cannot talk to anybody about client matters or other business, even when it is in the newspaper and even if it is actually interesting. The fact that a lawyer does not have much else interesting to talk about is not a recognized exception.

2. Ethical Screens Are Important, So Ensure They Are Meaningful

Ethical screens are devices/procedures that protect the confidential information of one client from disclosure to the lawyer for a rival client, or to people without a need to know. They are specifically required by certain rules:

- Rule 1.10, in some states, as a condition of allowing a lawyer to switch firms;
- Rule 1.11, as a condition of a government lawyer going into private practice with a firm that had been on the other side of a matter;
- Rule 1.12, for former judges, law clerks, mediators, and the like who may have been involved in a case the firm is later asked to handle or is handling.

More frequent, and probably more important, are the screens offered or imposed as a condition for clients' consents to a conflict. Thus, it is very important that the firm's ethical screens are effective. That is their promise, after all. But there are additional important reasons why they need to be credible.

First, many people, including judges, have the impression that lawyers do not take screens seriously—they give lip service to them, but they are not secure. I would not be surprised if some firms do not take them seriously (and I wonder where those judges practiced), but occasions will arise where it will be important that the firm can demonstrate that the screen was effective and its procedures followed.

Second, several judges (and some judicial opinions) have confused a disqualifying conflict of interest (a breach of a lawyer's duty of loyalty) with the duty of confidentiality. In a disqualification motion, even if the former client conflict rule does not fit the facts, many lawyers will argue that the opposing firm has in its archives information from the former client that might help with the new matter, and that this is a reason to disqualify the firm. Analytically, that argument does not hold water except maybe for a solo practitioner.

True, a law firm is prohibited from using a client's information to that client's disadvantage, but there should be no presumption that a law firm that has confidential information will breach that duty unless the firm is disqualified. All lawyers have confidential information. Most would never use it adverse to a (former) client. An ethical screen is considered enough in the case of government lawyers and judicial clerks and judges and mediators and in most states for lawyers changing firms. If an ethical screen protects against the lawyer in the current case accessing the information another lawyer had in the case that is not substantially related, there is no reason for disqualification. The former client has an interest in seeing that its confidences are protected. If an ethical screen will protect them, that interest is satisfied, and there is no basis for disqualification.

I believe that the present state of the law rarely requires automatic disqualification but will be decided instead at a judge's discretion. Even where local precedent has confusing language about the duty not to use confidential information against a former client, an ethical screen will prove that confidential information will not be improperly used.

3. Creating Effective Screens

It may be a chore, but we have chosen the following template (the original having been an ALAS recommendation, if I recall correctly):

> "Accordingly, appropriate memoranda will be distributed to all Firm personnel notifying them of the ethical screen, the style of the case and other pertinent information, the internal client/matter number, the Carlton Fields attorney responsible for the matter, the specific procedures in place, and the Carlton Fields shareholder responsible for supervising the screen.

Specific practices observed by the firm for ethical screens will include the following:

- Firm personnel are not to discuss with the screened individual, or in his/her presence, any aspect of the matter;
- The screened individual is to be excused from any department, office, firm, or other meeting where the matter is discussed;
- The screened individual is not to be given any client files or other documents concerning the matter and all files will be isolated from the screened individual;
- Labels will be affixed to each file folder stating that the contents are restricted and shall not be given to the screened individual;
- Each document in the computer with respect to the matter is fully secured through limited access;
- Any new lawyer, law clerk, or paralegal joining the firm will be given computer access to the memorandum explaining the ethical screen; and
- All ethical screens for Carlton Fields are managed by Peter J. Winders, the firm's general counsel. If you have any questions, please do not hesitate to give Mr. Winders a call."

4. Ethical Screens Recurring Scenarios

a. "This ethical screen is ridiculous!"

"I haven't worked on anything for XYZ in five years. I am in a different practice group now, and this matter is totally unrelated. I want to be able to work on the ABC side of the screen on unrelated matters. It might be reasonable to screen me if I had worked on the same kind of matter or even on unrelated matters very recently. You are being unreasonable!"

A: "First, understand that the wording of this ethical screen is not our idea. It was a condition required by XYZ to consent to the representation of ABC in this matter at all. The firm would not have the ABC work at all without the consent. We agreed to it to get the ABC work. Second, let's look at XYZ's consent letter again. Maybe you no longer fit the definitions. Sometimes, the changed circumstances permit a modification under the terms of the consent. Third, we can explore a modification of the screen. It is clear that the "unreasonable" wording came from XYZ. The matter has been ongoing for almost two years with no problem. We may be able to negotiate your removal from the screen or a modification."

b. "Do I really have to put labels on the files? There must be hundreds of them!"

A: Yes. We want this reasonably foolproof. We make one exception when files are closed and offsite. We compromise and put the labels only on the boxes, not every file, and put a notation on the stored file computer record that would be required for anyone to retrieve them.

c. "What about the screen of a judicial clerk?"

A: We might not be handling a case now, but we might undertake it at another appellate level or on remand if it is still in the system. Of course, we cannot screen a matter we don't have, but we have a list of the matters the clerk worked on and we have incorporated that list into the conflicts database. We have a question on the new business intake form to alert if the new matter has a litigation history as a double check.

D. Conflicts Management

This is one of the big picture things that somebody should educate the firm about, and because the GC oversees the conflicts system, it is probably the GC's job.

For example, I suspect that many ALAS firms represent banks. Which banks and on what terms you represent them requires important conflicts and business decisions. Here I looked at Banks A, B, and C. We did NOT represent Bank A and made good money being adverse to Bank A on certain matters. We did represent Banks B and C.

First, my firm had to decide whether to continue to represent Bank B. I conducted a study and found, as I suspected, that because of Bank B's unreasonable conflicts waiver policy, the firm made more money NOT representing (suing, negotiating against) Bank A than it did REPRESENTING Bank B. Banks A and B had about the same presence in our market. Bank B was a big outfit, and if we had represented it in most of its work, there would be no issue. But it had a very strict conflicts waiver policy—it did not consent to adverse representations no matter what the situation. If a firm accepted a few pieces of business from Bank B, it accepted all its conflicts without a prospect of reasonable waivers of unrelated matters. That is not a good bargain. As a result, we decided to stop representing Bank B.

Next, my analysis confirmed my belief that Bank C was a client that produced a very significant source of revenue for the firm. Thus, regardless of C's conflicts policy, we would never ask for waivers to be adverse to C because representing another client against a firm's top client would be (a) an automatic punch-pulling conflict, and (b) stupid. So, Bank C's conflicts policy was immaterial.

I tell this story because it illustrates that managing conflicts should include consideration of advance waivers, conditions in engagement letters, and other topics. A GC should help the firm be aware of potential future issues that may arise from unreasonable clients with one-off matters, like a conflict waiver request for one matter that will allow a new client to veto future matters for an existing client, or vice versa.

1. Close-Out Letters

If all matters for a client are finished, it is not a current client and the former client conflict rule applies under which the firm is disqualified from being adverse only on the same or substantially related matters. But without a letter defining the end of current matters, the question whether a client is current may be a question of fact. All matters are complete, but the client has used the firm for several matters over the years. The matters of late have been of minimal importance to the firm. The week after the matter is complete, another client approaches the firm to sue the (former?) client in a completely unrelated matter, which is an attractive opportunity for the firm.

The fact issue will look like this: "But you are my lawyer; you have been my lawyer for years; you finished a matter last week, but I have other things in the fire." This will be countered by the firm by stating, "We haven't had an attorney-client relationship for a week." However, the accounting records will show the matter is still open and can be used to support the position that the attorney-client relationship exists. The law firm is likely to lose the argument, in part, because the client's reasonable understanding is very important on the issue. If there has been no new assignment for a month, three months, two years, the chance of the law firm winning the fact dispute improves, but it is still a fact dispute.

If we write the client at the end of the matter stating that the matter is now over and the attorney-client relationship has ended, we are way ahead as to conflict management. It can be a nice letter inviting the client to consider the firm again if it needs legal services, but it should be clear that the matter and the relationship has concluded.

But many lawyers will protest, "I don't want to close this. We negotiated a commercial mortgage loan for an out-of-state Bank. It is over, but I know the borrower is going to default and want to renegotiate, and I want to be sure to get the workout engagement." Handle that by insisting that we close the matter and send the letter but put a legend in the database not to take a matter adverse to that former client without an advance waiver consenting to rework of the particular mortgage. Win-win. If you are still having trouble enforcing this practice, have firm management tell the finance department to send the letter if the matter is over and no time has been posted for X months unless the lawyer can show good cause.

2. Lobbying and Conflicts

Lobbying is not lawyering. Lobbyists do not have to be lawyers. Your engagement letter for lobbying work must spell that out and the consequences (no attorney-client privilege, for example), so our lobbyists can ethically support a position that one of our clients is dead set against and is opposing (through other lobbyists) before the same body. But the legal ethics of the situation does not prevent the other client from getting upset enough to fire us. Remember, this is not science—it is at least partly art.

For example, in *First NBC Bank v. Murex, LLC*, 259 F. Supp. 3d 38 (S.D.N.Y. 2017), a lobbying client of Holland & Knight moved to disqualify the firm in a separate litigation where H&K was representing a client adverse to the lobbying client. I called the H&K lawyers (whom I knew) and found that their analysis was the same as mine, i.e., lobbying does not equal lawyering. The judge agreed in his disqualification opinion but found that the lobbyist had also given legal advice during the course of the representation and disqualified the firm based on that finding. I suspect, but of course cannot know, that the judge was uncomfortable with the situation, and thus was persuaded by the out that a "legal advice" finding provided. Again, part art, part science.

3. Expert Witness Services

Sometimes a lawyer (or nonlawyer) in the firm may be asked to provide expert services to another law firm, either as a consulting or testimonial expert. Examples may include: standard of care in a malpractice case; one state's law in a litigated matter in a foreign jurisdiction (foreign law being an issue of fact); and nonlegal matters if the firm employs economists, accountants, surveyors, etc. These can be important business opportunities, but they should not interfere with the firm's primary business of practicing law. Here are some precautions to minimize any such interference:

Conflicts analysis

A lawyer providing expert witness services on a subject is not "representing" the client in the language of the conflicts rules. The lawyer is giving a neutral opinion. Obviously, the lawyer who is representing the client is not going to use the expert if the opinion does not help the client, but it is she, not the witness, who is "representing" a client "directly adverse to" the opponent under Rule 1.7. We all know of retired Harvard professors who will give the opinion the advocate wants, no matter what it is, and this analysis breaks down if the witness sees himself as an additional advocate. So, don't let your constituents be one of those.

Conflicts agreement and waiver in the engagement letter

Not every client will think the issue through or agree with everything in the preceding paragraph. So, it is a good idea that it be spelled out and agreed to in the engagement letter. Use language something like this:

> "This is not an engagement of Firm to provide legal services to Client. Instead, it is an engagement of John Marshall to serve as an expert witness both to provide expert consultation to Smith & Jones LLP, as the law firm handling the case for Client, and to give opinion testimony as it may be needed. This engagement accordingly does not create an attorney-client relationship between Client and Firm or John Marshall, and Firm will not be prohibited from accepting representation adverse to Client in unrelated matters solely because of this expert engagement. No confidential information received as a result of this expert engagement will be disclosed or used for any purpose other than this expert engagement."

This sort of up-front written conflicts analysis will help manage the potential conflict with the client for whom expert services are provided. The relatively minor engagement of Marshall as expert for a large nonclient with many legal matters will not prevent the law firm from representing clients adverse to it, and if someone disagrees with the analysis, the engagement letter should resolve the problem.

There is nothing, however, that can be done to prevent the other problem—that the offended client will decline to hire the firm at a later date. We had one situation where it was extremely important that we represent only a committee of a subsidiary and not the parent—independence from the parent being a necessity. In a case against the parent, another law firm hired one of our nonlawyer employees as an expert witness. Parent moved to disqualify, which the federal court denied, agreeing with the analysis that (a) an expert witness is not "representing" a party within the meaning of Rule 1.7, (b) a witness is not an advocate, (c) and no confidential information was endangered. Parent was very happy with our work for the subsidiary's committee but was offended enough by the expert engagement to decline to work with the firm

after that engagement was over. I have no way to determine the net value of that particular series of decisions. Consistency is the hobgoblin of a conflicts lawyer.

4. Mediation and Arbitration

The firm should consider the subject of "managing conflicts" also in connection with the engagement of any of its lawyers as a mediator or arbitrator. Like the discussion about expert witnesses, a mediator is not representing any of the mediating parties. Many of the parties will be willing to sign a similar conflict waiver allowing other lawyers in the firm to represent adverse clients on unrelated matters, with an ethical screen and promises of confidentiality. Mediators are hired on an individual basis and are obliged not to disclose to their firms what takes place in the mediation. And, just as important, mediation engagements do not last long, so conflicts problems caused by such representations will soon disappear.

Arbitrations, however, present a much larger conflicts management concern. The parties have a right to expect the arbitrator to remain neutral, and if one of the parties wants to hire the firm, or if the firm wants to represent a client adverse to one of the arbitrating parties, there will be doubt as to whether such a profitable arrangement might affect the sworn neutrality of the arbitrator. And the arbitration can last a year or more, thus increasing the odds that the firm will have to turn down good business if the arbitration involves large corporations that need legal services. The firm might be better off declining the arbitration. Again, a business decision.

E. Multijurisdictional Practice (Model Rule 5.5)

You will get frequent questions about practicing law in states where a lawyer is not licensed to practice. This is an interesting subject. The ABA Model Rules address this issue in Model Rule 5.5 and most states have adopted it. Because the ABA has no jurisdiction, however, the rule, when adopted, is a state rule. Funny though, none of these rules actually apply. The Florida rule that defines how a lawyer can practice across state lines doesn't apply across state lines because it can't—once you go across the Florida border, the Alabama rule applies. If the Alabama rule is the same, that will help, but technically, the Alabama rule doesn't apply unless you are an Alabama lawyer. The Florida rule does say, as most state rules do, that the state's lawyers must obey the laws of other states while they are there on legal business. Please do not explain this to any of your constituents and please don't stress too much about it. (*Note: ALAS addresses multistate and unauthorized practice of law issues in its Loss Prevention Manual at Tab III.Q.)*

1. Frequently Asked Questions

You will likely confront these questions and issues on this topic.

a. "The ABC Firm does it all the time, so it must be okay, right?"

As you probably know, the fact that the ABC Firm does something is not the test, and depending on the firm, some professionals have concluded that doing the opposite is a good rule of thumb. For firms without that distinction, we need to figure out how they justify it, and what all the circumstances are.

b. "I sent a demand letter to a company in Amarillo and got a call from the company lawyer threatening to prosecute me for unauthorized practice by asserting a claim based on what Texas law says. What do I do?"

Roughly, the rule is that if you are sitting in your own office in your own state, you can opine on anything you please to your own client if your client has come to you and asked you. There is nothing unlicensed about sitting in your Georgia office where you are licensed and opining to your Georgia client about Texas law. It may well be a stupid thing to do but it is not a violation of the Texas unauthorized practice rules. There is always a competence rule to worry about, and because each state's laws and procedures contain anti-intuitive traps, you might want a Texas lawyer's backup.

c. "We have a client who wants us to represent it in a [Deal] [Lawsuit] in a state where we have no Offices."

There are things an out-of-state lawyer cannot do:

- Open an office for the practice of law in that state or continuously solicit business in the state.

The Model Rule and its state equivalents suggest that if you are doing business for a regular client that employed you in your home state, you can go where that business takes you.

- For a transaction you are negotiating, which means that you can attend a negotiation anywhere. In litigation in your home state you can probably handle an out-of-state deposition. If you have to call a local judge about a dispute in that state, you might have a problem.

For litigation, you will probably have to be specially admitted for the case in the out-of-state court. That is not an ethical rule (except that the ethics rules require you to follow the statutes and court rules of the other state), but an additional statute or court requirement. Usually, those rules require that you associate with local counsel, a good idea for all concerned in any event.

Most state's ethics rules provide a safe harbor for any close calls—involve local counsel who has a meaningful part in the representation. Again, this is a good idea even when

you are convinced that your activity is well within the rules. Local customs and unwritten codes are a part of the fabric of getting things done in most locales and having somebody familiar with them is an advantage.

d. "Joe in the real estate department in the Florida office went to school in Nebraska and is still licensed there. Can I get him to sign the pleadings and handle this suit in state court there?"

Sure, but having a member of an out-of-state bar who doesn't practice in those courts and who would be dabbling outside his practice area is unwise in the extreme. Although it might be a stopgap, a local litigator is the best guard against significant mistakes.

Note: There are surely more traps for the unwary that need to be considered. For example, a registration requirement or a fee to handle an arbitration in some states, or limitations on how often one can appear pro hac vice in certain jurisdictions, to name two. In other words, there's more work to be done in these situations.

2. Out-of-State Lawyers and the Conventioneer Syndrome

There is a phenomenon with out-of-state lawyers that is not universal, but it is prevalent enough to bear mention. Apparently, it is triggered by the absence of the restraint that a lawyer is under when appearing before the same judges in the same courts year after year in the same legal community. Most lawyers practicing in their home courts are obviously aware of the damage their reputations will suffer if they engage in sharp practice, exaggeration, overstatement, and the like. But some lawyers from good firms write things in briefs that they would never do at home, try histrionics they have always wanted to try, etc. There are many anecdotes to give life to this syndrome. Most of them are funny due to the smug expectation that the local court will fall for it, which always backfires. Here is one in which the court tells the story better than I can. But first the background.

In *General Motors Corp. v. McGee*, 837 So. 2d 1010, 1016, fn. 6 (Fla. Dist. Ct. App. 2003), the appellant was General Motors (GM), the forwarding counsel a California firm selected by GM, and the Florida local counsel a former judge of the court with a good reputation with a fine Florida firm. The California firm wrote the brief and sent it to Florida at the last minute, with no time for input from the former judge, but rather with instructions to "file it." Florida appellate rules, which Florida appeals courts expect to be followed, require a short, neutral, accurate statement of the case and facts, with accurate record citations to set the stage for the court before launching into legal argument. The case involved an accident victim who was badly burned and died at the hospital several hours later. Pain and suffering and punitive damages were big issues in the case, and, of course, a person who dies instantly has no significant pain and

suffering damages. The court was unforgiving of the lawyers' efforts to change the facts and the record. The court opinion advised:

> In recounting the facts in its initial brief, GM wrote: "Gasoline leaked out of the torn full tank, and a spark ignited a fire that engulfed the car. Shane McGee, at first trapped inside, died in the fire." At another point in the initial brief, GM wrote, "in the ensuing fire Shane McGee died...." These excerpts are obviously not accurate. They are emblematic of the mischaracterizations in the initial brief's thirty-one page "Introduction" and "Statement of the Case." Despite being the appellant, GM stated the facts argumentatively and drew all inferences in the light most favorable to itself. This approach severely undermined the credibility of the brief. The panel has carefully read the transcripts of the entire trial to understand what happened at trial in this case.

When your constituent asks you about the boundaries and risks of practicing in a foreign state, it is a teaching opportunity. Warn him against that temptation and remind him not to be *that* lawyer. Remind him of your own firm's requirement in any local counsel engagement to give the local lawyer time to read any filing and advise on the local judge's likely reaction before it is final.

VII. OUTSIDE COUNSEL GUIDELINES

This is every GC's least favorite part of the job, but somebody must review outside counsel guidelines (OCGs) for unusual provisions. I don't see how it can be anybody other than the GC, or someone in the GC's office. OCGs will put you to sleep until you come upon something startlingly overreaching. Here are some important facts to know about OCGs:

Historically (not very long ago) they were short, and they were not common. They identified the line of communication with the corporate client, for example, whether a specific individual in the client's legal department or a businessperson would be assigned as a point of contact. They gave guidance on specific items. Now, they seem to be written by or with a great deal of input from the corporate procurement department, which tends to treat legal services like the services of any vendor. There are many provisions that do not fit the traditional lawyer-client relationship. Below are some other things to watch for.

Definition of Conflicts

Many large corporate clients with lots of subsidiaries and integrated legal departments will ask that the firm treat all members of the corporate family as clients for conflict purposes. If we get a lot of business from the corporate family, that is fine. A minority of states have that rule anyway. And, as a practical matter, we would never take a matter against a subsidiary of our biggest client just because the ethics rules permit it—not only shouldn't we irritate our largest client, but at some point the punch-

pulling conflict line is crossed. But if this is a big company offering a one-off representation, the "little bit of business plus all the conflicts" may not be a good deal. Discuss it with the prospective client and work it out.

Sometimes, the definition of conflicts in the OCGs is extreme. Oftentimes, a company defines a conflict more broadly than the applicable rules of professional conduct do. For example, that conflicts include the taking of positions for another client that may be inconsistent with the company's interest, philosophy, or viewpoint, or otherwise at odds with the company's interest. Before taking any such conflicting position, the matter should be discussed with the company.

Hog Hominy Hell[2], how do I know what are all the positions an artificial person won't like? There is no way we can keep a database of issues and sensibilities! And we cannot violate our duty not to discuss another client's business by trying to get permission from the company to take the other client's engagement. This is so silly that the temptation is to ignore it.

But if the firm wants the business you can respond, "We see no way that we can comply with this sentence, as we are ethically prohibited from discussing with one client the engagements of another, and we can establish no database of sensitive issues. We can say that because the company is in the same business as many of our other clients, we are very sensitive to avoid issues that might adversely affect the industry, and we review and publish internally lists of positional or business conflicts to avoid any such positions. Moreover, because any new matter must be approved by the PGL in the appropriate area of the law, the chances are great that he or she will be aware of any industry-sensitive issues."

Competitors

Some OCGs will have provisions about competitors, either in the conflicts section or elsewhere. Something like, "you should notify us when you are asked to represent our major competitors." We cannot agree to such requests. The response should be along the lines of, "Your guidelines request that we notify you if we are asked to represent competitors. If you will give us a list of the persons you consider your competitors, we can tell you whether we currently represent any of them, and within the limits of our duty of confidentiality to them, we may be able to tell you generally the nature of our representation. We cannot ethically agree to let you know each time we are asked to represent another client. We are sensitive to situations where (etc., as above)."

Indemnity

A few clients ask us to indemnify them from claims arising out of our representation. ALAS, has negotiated directly with some of them as well. So far, in our experience, the

[2] This expletive phrase comes from my favorite book, "Okla Hannali," by R.A. Lafferty. I have never used it until now, but it's the best one I can think of for this subject.

most egregiously worded indemnity provisions have been with two big bank clients, and we have had considerable dialogue about it with them. The provisions variously say something like, "Firm agrees to indemnify and hold harmless Client, its officers, directors, and employees, from any and all claims arising from or connected with the engagement or the work product."

The problem is, while we are insured for almost any damages caused by our fault in the practice of law, we are not insured for a contractually assumed liability like this. The indemnity language obligates us regardless of fault or causation. It obligates us not only to our client but also to third parties such as the client's employees. A lawyer is not the guarantor of his work. He is responsible for damages caused by a failure to follow the prevailing standard of care. This language would make the firm an insurer against claims, even unfounded claims, even in the absence of fault. It is not acceptable and could impact the firm's coverage. If the risk is to be taken, it is a firm management decision.

This type of indemnity clause obviously is copied from the procurement department's contract with the carpet installer. But the carpet installer can buy insurance for any claim arising from their work. If a customer trips over a sloppy seam or a bulge because of improper stretching, a suit might arise against the company and the office manager who did not report the problem, but the installer has insurance, and the company is an "other insured." The lawyer, however, is providing judgment and should not indemnify against whoever disagrees with them.

Where we have been able to compromise, there has been agreement changing the language to limit the obligation to the client to claims caused by the fault of the firm, e.g., "provided that this clause shall not apply to any claims not covered by Firm's LPL insurance."

Most-Favored Client Clauses

Fairly common is the promise that we will not charge a rate higher than we do any other client. There is a temptation to ignore that on the rationale that each client engagement is unique. But it should not be ignored. Our stock response is either:

> "As a matter of policy, we cannot accept these requirements due to the unique circumstances and variability of each of our client relationships, the competitive sensitivity of each rate agreement, and the difficulties we would have in fixing prices across any industry, let alone all industries, we represent."
>
> Or:
>
> "We have too many custom rate arrangements, including fixed fee, blended rates, success fees, volume discounts, historic contracts, etc., to monitor and enforce any such commitment."

VIII. ENGAGEMENT LETTERS

My firm's form engagement letters are pretty good, but no engagement letter is perfect, meaning that it will save you from a malpractice claim. Nonetheless, an engagement letter should be used for every new client and for new matters for existing clients where the new matter will be different from the prior engagement with the client. We would prefer that something close to our template engagement letter be used in every case. Sometimes that seems like overkill; sometimes it is inappropriate; sometimes the originating lawyer will argue about it. I believe that every engagement letter should, at a minimum:

- Be in writing;
- Identify the scope of the engagement (and what is excluded);
- Identify precisely who is the client and who is not (including a separate "I'm not your lawyer letter" if appropriate); and
- Identify the fee arrangement.

It is surprising how difficult some lawyers find these requirements. My firm's business intake department frequently has to reject a letter that describes the client as someone other than the entity that was searched for conflicts, that inadequately describes what we are promising to do, or ambiguously addresses the client as either an individual or more than one entity.

IX. CONFLICTS AND NEW BUSINESS INTAKE DEPARTMENT

There is a lot that could be said here, including the best ways to organize this department. However, I have worked at one firm my whole career, and am sure that much of the thinking here depends on firm structure and culture. Thus, I will limit my comments to a few universal principles that should be considered.

First, administratively, the director of conflicts and business intake often reports to the COO. Substantively, however, the director and their staff must look to the GC for authority, backup, and instruction. As mostly nonlawyers, albeit very bright, dedicated, knowledgeable, well-trained, and hardworking people, the conflicts and business intake staff need the authority and backup of the GC. For example, as to an unanswerable response to a lawyer who wishes the rules were different, the staff needs to be able authoritatively to say that they are following the instructions of the firm. A backup must be, "I'll take it up with the GC and get back to you." Staff does not want or need the authority to make exceptions. The director and the GC have worked out many acceptable accommodations to recurring situations, but the staff needs the protection of having to get the GC's authority or approval and should not be put in the position of making legal or risk decisions, no matter how capable they are.

Of course, both the staff and the lawyers are constituents of the GC's client—the firm—and both deserve the GC's assistance. In case of a disagreement, the staff is most often right to follow instructions, but the GC may make an exception if justified. If the lawyer is mistaken or does not understand the reason behind the rule, the GC should explain the rule to the lawyer as part of the educational aspect of the GC's job.

As a corollary to the above, the policies and procedures of conflicts and business intake should not be adopted if there is no need for them, or if you cannot ensure compliance. *See* the discussion of adopting policies in Section XI below.

An important, if not every day, part of the job is balancing the necessary part of business intake and guarding against what adds burdens to it. The new business intake process is unmatched as a gatekeeping opportunity. If a matter cannot be opened or billed or credit given until the requirements are complied with, there is a big incentive to comply with them. The main purpose of that opportunity, however, should be loss prevention—i.e., avoiding the pitfalls of unworthy clients, conflicts, dabbling, etc.

But this gatekeeping opportunity is also a tempting place to gain knowledge for other firm departments. The marketing department may want to maintain a database of client contacts and believes that business intake is an opportunity to force better responses. Same with industry classification, cross-marketing opportunities, and the like. There are several things to consider before adding to the boxes to be checked—i.e., the information to be gathered at business intake:

- Will it create a delay in opening the matter?
- Is it information that the lawyer's assistant will know? Most lawyers expect their assistants to fill out the intake forms and delays often occur when the lawyer is the only source of needed information. This is already a problem with some individual lawyers and with all when they are unavailable. Try not to add to it.

Be able to justify the need for the information. The question whether the new matter arose out of prior firm work is easily justified. The question whether any of the new client's officers are members of the Okefenokee Glee and Perloo Society (Google it) may not be. Consider alternatives. Conflicts and business intake can generate an automatic email to the responsible lawyer that will be sent after the matter is open. My firm generates such automatic emails to remind litigators to take care of litigation hold obligations, and, after six months, to ask if additional parties have been added to any matter, both litigation and transactions, to ensure an accurate conflicts database.

X. ADOPTING POLICIES

Note: ALAS recommends that firms adopt several loss prevention policies. And they back it up with the ALAS Prototype Lawyers' Manual, which contains sample loss

prevention policies. I highly recommend it. My thoughts below relate to whether firms should consider adopting those and other policies.

Part of the GC's job will be to recommend, draft, and update policies. ***One of the most important rules, in my view:*** Do not adopt a policy for which you will not get 90% compliance.

A policy that is aspirational but will not be complied with is basically an admission that proves that the noncompliant are doing something wrong. Of course, we are talking about policies relating to loss prevention or ethics, not dress codes. For example, a few years ago, a law firm was held liable for a traffic accident caused by a combination of a deer and an associate talking on the phone about firm business. Some pundits recommended that law firms adopt policies prohibiting lawyers from talking on the phone about company business while driving. This was not well thought out because:

- The same percentage of lawyers who do it now will do it anyway.
- The adoption of a company policy is an acknowledgment that the firm thinks it is dangerous in every situation.
- The establishment of a firm "standard of care" will make it easier for a fact finder to find fault.

The policy will not affect a "scope of employment" question—if the lawyer is talking about firm business or driving for a firm purpose, the policy will have no defensive value.

Occasionally, we have lawyers who advise us to adopt, but not post our policies. That is inherently bad advice. If the policy is not public, there is an argument that it is not binding if some aspect of consent may be involved in an issue. We have "always" had a policy that a lawyer leaving the firm was not entitled to compensation that had not been fixed. For example, if a shareholder has a reasonable expectation of a bonus at the end of the year of $12,000 but leaves the firm in September, he gets no bonus—he doesn't get a proration based on his nine months of service for the year. Further, if the policy is not publicized, there is an opening to argue that it is unfair. There is a reasonable justification for it, but to avoid argument, the policy must be publicized. Even if a lawyer never bothers to read the policy, the fact that it is in the firm's handbook or on its intranet makes it hard to argue against and easy to support. And a lawyer leaving the firm for legitimate reasons—retirement, taking an in-house job, moving to another state with a transferred spouse—will be able to count the cost of his or her timing decisions.

The same is true about the lawyer exit procedure, the way we communicate with clients about that, the obligations of the departing lawyer regarding billing, exit memos, and file transfers. "We don't want to talk about lawyers leaving." What "we" is that? If a conscientious lawyer wants to know what is expected of her if she leaves, she

can look at the policy; if a different kind of lawyer wants to pirate clients, the policy discourages it, or the clear violation of a publicly available policy helps the firm.

XI. PROFESSIONAL LIABILITY INSURANCE

One of the GC's duties may be to arrange legal malpractice, employment practice, management, and cyber liability insurance. My firm has been insured by ALAS since 1994, and we currently purchase limits of $100 million per claim ($200 million aggregate), the maximum limits that ALAS offers. To those of you who are tasked with arranging professional liability insurance, know that some lawyers in your firm may want to influence the insurance decision to please their broker or insurance company clients. If you become aware of such overtures—or receive inquiries about other insurance coverage—I encourage you to reach out to the ALAS Member Services Department. They will be able to answer your questions and provide you with important information, including policy comparisons. Know that malpractice insurance and malpractice insurers are not fungible. Far from it.

XII. GENERAL LOSS PREVENTION ADVICE—FINAL THOUGHTS

Loss prevention in a law firm encompasses a lot. Education about ethics, rules, and risks. Policies and procedures and their enforcement. Systems such as the new business intake system, a gatekeeping opportunity to enforce policies. Culture—including ensuring, to the extent possible, that culture does not interfere with good policy and safe practice.

A. New Business Intake—A Gatekeeping Opportunity

Before time can be recorded or a bill sent on a new matter, an account must be created in the finance department. Every lawyer wants her accounts opened as soon as possible for many reasons, including the benefit to the client and the firm and her compensation. Aha! We can hold this hostage until certain important policies are followed!

Besides actual mistakes, many claims against lawyers are caused by (and can be avoided by preventing): (a) unworthy clients; (b) conflicts; (c) inadequate communication; and (d) dabbling—a lawyer handling a matter outside his or her field.

Thus, before opening a file:

- We can ensure a proper conflicts check.
- We can require determining if the client has a criminal record, fraud conviction, is trying to raise money from others, has a history of changing lawyers or accountants, and a checklist of other "yellow flag" questions.

- We can require an engagement letter that defines the scope of the engagement and who exactly the client is (and is not) and an understanding about fees. A written agreement and future exchanges *in writing* about what the client can expect is one of the single greatest preventers of claims against the firm, and it can start with the engagement letter.

- We can check other things: Does the matter arise out of prior work of the firm (a special kind of conflict problem)? Does it involve a prior appeal (special conflict rules for former judicial clerks)?

- We can ensure that the person handling the matter is competent, among other things, by requiring PGL approval of the matter and the staffing.

- And several important administrative matters.

Without going into every question in the new business intake process, this gatekeeping event is one of the best loss prevention opportunities we have.

B. Protections After the Matter Is in the Door

After the gatekeeping opportunity, things can go wrong. As discussed above, new parties can be added to the deal or the litigation, and the lawyer or assistant can forget to run conflicts and add them to the database and the matter. A new client who passed our initial client investigation can start behaving badly. A client can be severely critical of a lawyer or strategy and make a threat. A client can ask a lawyer to join its governing board, which, as I hope you know, creates risks.

These situations can only be addressed by adopting and publicizing policies and by training. Some of those subjects are discussed above, but how do you raise the general awareness of the ethical and business risks so that each staff member and lawyer is part of the firm's early warning system?

As I have written before, when I was asked to take this job, I anticipated it would be part time. When I got into it, I realized there was a lot to do to bring us into reasonable compliance with smart practices. As I began learning about the risks, I began sending short (but not too short) emails about them. Each time, I would get a response (average three) from people who appreciated the message. Thus, one percent of the firm acknowledged that they knew something that made us safer. If this happened once a month, at the end of a year our loss prevention quotient was considerably increased. The questions I got were more frequent and became more and more sophisticated. As a result, the questions I had to get help with from ALAS became more sophisticated. If each of our lawyers and staff is attuned to risk, it is like having a good watchdog. We will learn early that something seems amiss and can do something about it.

Formal CLEs are not enough. They are hard to schedule and infrequent, and everybody cannot attend. And most people filter out advice that doesn't apply to them. For example, a new associate will tend to ignore the message about the risk of serving on a client board because he cannot see an immediate application. So, repeat it every year. I remember well an occasion when I sent a firm-wide discussion of the "prior work conflict" issue and received a note from a rather senior shareholder stating, "I had never heard of such a thing; this is an important message." I sent him the last three messages on the same subject and reminded him of the claim against the firm resulting from *his* ignoring the prior work conflict problem two years earlier.

C. Good Habits Should Be Continuously Emphasized

1. Confirm Things in Writing

Many claims against a law firm can be avoided with a habitual confirmation in writing of agreements big and small with clients, with opponents, and with each other. Everybody knows that people don't hear the same things in a conversation. You learned that early playing parlor games. They don't remember the same things about conversations either. One party is listening for a guarantee and the other is seeking a certain price. Even if both are honest and intelligent, they will remember the conversation differently. "But don't you remember, I asked if I could be sure it would work for me?"; or, "Well, maybe you said something about that, but I would never guarantee it," would be a common, predictable, and honest conversation six months after something failed. Please emphasize to every lawyer how important it is to have a short confirming email. "Good talk today. Confirming: I will do X and the cost will be Y." Better if you add more details, such as when X is to be done and when the payment is due, but this may be enough. There will be no doubt as to what was promised each way. And if the recipient emails the lawyer back to say, "We also agreed that X would be done by the 15th and no payment would be due if not completed by that time," so much the better. If there is dissatisfaction at some time in the future, it will not involve conflicting memories—it is right there in black and white. And this is even more important for lawyers because jury studies (and lots of anecdotes) show that people believe lawyers are careful people who make thorough records of everything. "If the lawyer had really said that, it would be in writing." Without the writing, the jury will believe the nonlawyer.

Regularly, I hear a protest, "I don't like the idea of a CYA email every time I talk to the client." A confirming email is not a CYA measure. If the email is written a year after the conversation in an attempt to create a record that is not contemporaneous but supports a beneficial version of the facts, then it can be characterized as CYA. Reconstructing one party's version of the facts in writing to bolster her after-the-fact memory is not what we are talking about. Contemporaneous confirming short written messages ensure that both parties are on the same page.

2. The Dumbest Advice

I have heard many times, "Do not put things in writing. They might be discoverable." The advice comes from the fact that writings are discoverable, and people cannot resist saying stupid, tasteless, or sarcastic things in emails. And it is certainly the stuff of legend when a cross-examiner can confront a witness with his own words. But the real danger is in being unable to prove what really happened. Good advice: Don't write stupid emails. Bad advice: Don't write emails. A file documented by contemporaneous confirming emails to the corresponding person (much better than a note to the file) should be a goal because it is a very important protection against misunderstanding, bad memory, and falsehood.

3. Be Transparent

When a client needs to be told something, tell the client. We can and should pause to decide who is the best messenger if it is bad news, and we can take time to plan it, but candor and a complete enough dose of it so the client understands is an ethical duty, and with nonclients is just basic honesty. It is also safer. This is a must for client communications.

4. Firm Culture Can Be a Loss Prevention Aid or Detriment

The more the firm and its constituents embrace a loss prevention outlook, the more likely that they will both recognize an issue and also bring it to the attention of the GC to oversee the response. Similarly, to the extent that risky behavior is rewarded, loss prevention suffers. For example, in an "eat what you kill" compensation system, warnings against specialists in one field dabbling in unfamiliar ones are unlikely to keep the construction litigator from trying to draft the will for his richest developer client because the compensation rewards are too tempting. He will get origination credit, working attorney credit, and billing credit. Similarly, the estate planning lawyer may be fine with that because if she has plenty of work that she generates herself, some of the fees on the developer client's matter will be allocated to the originating construction lawyer and she is better off handling only "her own" work. The GC should point out that the firm should not reward risky behavior through its compensation system and should be alert to other policies and practices that have unintended consequences.

To the extent the culture of the firm is to involve the GC whenever the GC should be consulted (e.g., from the combination of education, accessibility, good experiences, and the like) the firm is safer. "The partner I am working with told me I should call you," is a nice indication of how you are doing.

XII. CONCLUSION

Thank you for reading this handbook. I thoroughly enjoyed writing it and I hope it helped you. Again, there is so much more that can be said on this topic, but I have

covered what I believe are the essentials. If you have any questions, please reach out to me. And, of course, I highly recommend you contact ALAS Loss Prevention with any questions you have as well.