PRACTICAL LAW
THE JOURNAL

Best Practices in Legal Practice

Attorneys must satisfy various professional conduct rules, but compliance with the rules is not enough to ensure successful client relationships and law firm administration. Attorneys and firms should aspire to high levels of professionalism, ethics, and civility, beyond or separate from the applicable standards, and consider how their procedures can be tightened and honed to minimize risk.

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Attorneys must navigate a complex landscape when establishing, structuring, and running their practices. Merely meeting baseline compliance with professional conduct rules may not be enough to guarantee success. There are aspirational aspects to how attorneys should conduct their practices – not only in how they treat clients, colleagues, and adversaries but also in their approach to the practice of law itself.

This article discusses best practices, housekeeping items, and other practical tips for attorneys and firms to consider and implement in their daily processes. It includes real-world examples and cautionary tales that underscore the importance of taking proactive measures and the potential repercussions of casual or otherwise suboptimal practices.

A firm's general counsel should consider formulating a checklist of applicable concerns and best practices, and disseminating the checklist and related notes across the firm periodically. The general counsel should update these communications as new developments arise, and may wish to consider including a comparison document so that those who have seen a prior version can easily identify new or revised portions.

(For resources to assist law firms, law departments, and their personnel in the business of law and the development of legal and practice skills, see Legal Operations, Professional Development & Well-Being Toolkit on Practical Law.)

WRITTEN COMMUNICATIONS

There is an old trope about not putting anything in writing that you do not want to see on the front pages of the press. Although following this principle might seem intuitive, attorneys should carefully review a proposed message before pressing the "send" button, particularly where the message may implicate the attorney-client privilege or contain something potentially damaging or embarrassing. It is understood that attorneys must sometimes communicate controversial or otherwise sensitive information, and the need for carefulness should not make it unduly difficult to practice efficiently. Still, before sending a written communication, counsel should generally take the time to reflect on its content and to determine the best course of action.

PRIVILEGE CONSIDERATIONS

While attorneys generally should take any necessary steps to preserve the attorney-client privilege where possible, they may want to proceed on the basis that the privilege will not ultimately be available and that written or oral communications could eventually surface. The privilege may not be there at all or it may be lost, waived, or subject to an exception.

(For resources to help counsel navigate the attorney-client privilege and the work product doctrine, see Attorney-Client Privilege and Work Product Doctrine Toolkit on Practical Law.)

Caution: Embarrassing Content Can Surface in Unexpected Ways

An attorney at a large law firm sent a series of emails on a project for which the attorney was providing compensation-related advice. The advice, however, was more in the nature of consulting than legal. The emails were written informally and contained embarrassing content, including about some of the individuals involved on the project. They were sent both internally to colleagues at the attorney's firm and externally to the client. A court determined that the missives were relevant to the substance of a related lawsuit and, because they were not deemed legal advice, they were not privileged. The sender's name and portions of the actual content were set out for all to see in the court's decision.

In the US, only the client generally has the power to assert or waive the attorney-client privilege. An attorney cannot require the client to keep privileged information confidential, and the client can waive the privilege at any time. Additionally, where the client is a company or other entity, an individual serving as the contact for the client cannot preserve or waive the privilege (because the privilege belongs to the entity), even where the communication is from, to, or with that particular individual.

Caution: Clients Can Reveal Privileged Communications

A firm was representing a financial institution that was under federal investigation for possible criminal wrongdoing. There were potentially damaging and privileged communications from the firm in the files, so the institution asserted the privilege. The investigators acknowledged the validity of the privilege assertion but made clear indications that, without being provided with the full files, the investigators would simply move to the indictment stage. Notwithstanding the outside attorneys' and inside legal personnel's strong desire to have the communications kept confidential, the full files were provided by the institution to the government.

INFORMAL COMMUNICATIONS

Counsel should not assume that the informality of a communication makes the communication safe. For example, text messages can surface, whether to clients, colleagues, or even family members. In this technology-based world, communications often circulate, even without any bad intent.

Caution: Text Messages Can Be Used as Evidence

A high-profile commentator was sued for, among other things, defamation and intentional infliction of emotional distress in connection with his statements involving a mass shooting and the parents of some of the children who were tragically killed. A key issue in the case was whether the commentator intentionally lied. The plaintiffs' attorney confronted him on the stand with years of text messages that the commentator had sent to his own attorney, which that attorney had given to the plaintiffs' attorney during discovery. The plaintiffs' attorney had previously given notice to the commentator's attorney about the presumably errant production of the texts and offered in writing to ignore them, but the commentator's attorney did not respond.

The plaintiffs' attorney then used the texts during his cross-examination to attempt to establish the intentionality of the alleged earlier misstatements. Ultimately, the families were awarded over $1 billion, and there have been indications that the commentator's family may use the text messages against him in intra-family disputes.

INTERNAL COMMUNICATIONS

Internal written communications within a firm could theoretically surface in any number of ways. Though it may be unlikely as a practical matter for internal communications to circulate outside of the firm, it is not impossible. (The fall from grace of two top partners from a California-based firm was dramatic and striking, and was caused in large part by the firm's release of the partners' internal emails that included racist, sexist, homophobic, and antisemitic language sent over the course of 15 years.) Attorneys should not let their guard down, even when communicating within their own firm.

"DRAFT" NOTATIONS

Counsel should consider leaving a "draft" line on successive iterations of written communications as long as possible. Arguably, in the event that a communication were to surface, this notation could improve the position that the substance and thoughts reflected in the message had not yet been finalized. However, counsel should beware that the "draft" approach is by no means a panacea.

Caution: Even Draft Advice Can Have Consequences

Counsel advised a client about the potential downside of not proceeding with a certain course of action. The client wanted that advice set out in a memorandum. Counsel preferred not to detail the potential downsides in writing to avoid unintended consequences but ultimately deferred to the client's wishes. In this case, counsel was especially worried that the client might eventually want to take an aggressive approach, and that the memorandum in the client's file would make doing so difficult or impossible as a practical matter. The client insisted that the memorandum would be privileged. Counsel marked the document as a draft after again cautioning the client. On receipt, the client promptly called the attorney to object that, with the memorandum in the file (even as a draft), the client would never be able to proceed with an aggressive approach to the issue.

ADDRESSEE LISTS

All of an attorney's work to be careful with their written communications may be undone if their email program autocompletes an email address to an unintended recipient. To avoid this, counsel should skim through the addressee list every time before sending an email. (See *Autocomplete Function* below.)

CONFERENCE CALLS AND SPEAKERPHONES

The manner in which attorneys manage conference calls and the use of speakerphones can have potentially unexpected ramifications.

UNANNOUNCED LISTENERS

Before an attorney listens in on a call unannounced or asks anyone else to come into the room to listen or to dial into a call unannounced, the attorney should confirm that doing so is permitted both under applicable ethical rules and state and federal law. Even where the rules do not specifically prohibit unannounced listeners, they can cause disruption. For example, an unannounced listener may inadvertently say something aloud and raise questions in the minds of other participants about who is speaking. Such an approach can be perceived as unprofessional and be an impediment to building trust.

UNINTENDED LISTENERS

Attorneys should take care with what is said on a conference call, or even in a one-on-one discussion where the other person is on a speakerphone, because there might be others dialed in or listening in a room who are not the intended audience. Privilege, confidentiality, relationship, and other issues could be implicated if there are unidentified people listening. For example, something negative could be said about an individual, where it turns out that the person is listening in and can hear the comment. For particularly sensitive discussions, counsel should consider expressly confirming that there is no one else who can hear the call (such as asking, "It's just the two of us on the line, right?").

HOST PASSCODES

With subscriber-based call systems, host passcodes generally should not be provided to non-firm personnel when using firm-sponsored phone numbers that are not tied to a specifically scheduled conference call (that is, when using firm-sponsored call coordinates that can be used repeatedly for multiple calls). The host information is only for the internal personnel who are hosting the call. If the host information is disseminated outside of the firm, others will be able to use the firm-owned lines and, in what could be a worst-case scenario, may even be able to listen to firm calls. (This issue does not arise where the call coordinates are unique to a single call and therefore cannot be reused.)

POST-CALL DISCUSSIONS

When a conference call ends, and there will be a post-call discussion with some (but not all) of the participants, the call should be terminated and restarted on a different line. Depending on what is to be said in the later discussion, the possibility that an earlier participant has stayed on the line, intentionally or accidentally, can have damaging or otherwise unforeseen consequences.

EMAIL MANAGEMENT

The proliferation of emails as a means of communication has given rise to a broad range of potentially harmful effects that can put the email sender and the firm at risk. Counsel should take precautions before sending emails outside of the firm as well as for internal-only messages.

THREADS

Before forwarding a message or using an existing email thread for an ongoing discussion, counsel should make sure that everything contained in the thread is appropriate for the recipients to see, as well as for any future recipients who may be added later to the distribution list. Indeed, where a thread has accumulated particularly sensitive information, counsel should consider starting a whole new thread that omits the sensitive information before sending.

Caution: Long Email Threads Can Be Precarious

An employee was leaving his company, and there was a pending agreement on his severance payment. He was subject to a contractual non-solicitation obligation. A day or two before his departure, the employee sent a note to his assistant asking for contact information for some of the people he got to know during his tenure. The assistant forwarded the request to a senior executive at the company for processing. The senior executive probably would not have objected to the request. However, lower in the email thread (unbeknownst to the assistant) were comments by the departing employee about wanting to take these relationships with him, expressly with the hope that the employer he was leaving would be left in tatters.

The employee likely did not realize that he had used that specific thread to ask the assistant for the requested information, especially since the request could easily have been made in a new email. As a result, instead of a severance check, the employee received a cease-and-desist order.

On the other hand, it is often helpful to keep an email thread together and intact, so that recipients can scroll down and read through the discussion history. In this case, counsel should be careful not to mistakenly reply to an old email in the thread, which can cause content that was sent after their response to be effectively lost. Further, if counsel sends an email and then wants to add more thoughts before anyone else has responded, they should reply to their own sent email so that their previous thoughts are not dropped from the thread.

FORWARD FUNCTION

If counsel is concerned that unintended recipients might get included in the addressee lines when replying to an email that has multiple addressees, then counsel should consider using the forward (rather than reply) functionality and constructing the addressee list from scratch.

CAUTIONARY NOTES

Attorneys should keep in mind that any emails they write or forward may be forwarded or re-forwarded by a recipient. Further, any cautionary note that counsel includes in an email (such as "do not forward") may be ignored or overlooked. Indeed, a do-not-forward note may become buried in the thread by subsequent communications, such that the cautionary note has little chance of being remembered or seen by later recipients of the thread. Therefore, in certain cases, counsel should consider putting any cautionary notes regarding forwarding prominently in the subject line of the email.

REPLY TO ALL FUNCTION

Attorneys must beware of the dangers of the ubiquitous "reply to all." There will be times that including certain recipients in an email addressee list can be embarrassing, damaging, or worse. For example, there could be:

- Comments in the email that offend a carelessly included addressee and adversely impacts counsel's relationship with them.
- Confidential information in the email that compromises the interests of a client or even raises privilege-related and ethical issues for counsel.
- A criticism directed at an addressee that is not appropriate for sharing with other addressees.

Additionally, even where replying to all may not be damaging, there could be ensuing replies that some members of the group would simply rather not have received.

In light of considerations like these, before reflexively replying to all, attorneys should take a moment to review and tailor their email distribution list.

Caution: Replying to All Can Have Indelible Impacts

An associate received an email from a partner, with two of the associate's colleagues cc'd. The associate decided to joke around a bit with the two colleagues in a reply email and made some sarcastic comments about the partner. The associate inadvertently replied to all without deleting the partner from the addressee list. The partner responded in good humor with something like, "Wow, I didn't know you felt that way about me." The associate tried to recover with something like, "Hey, wasn't what I said funny?" The partner was not particularly offended, but the associate never felt comfortable around the partner again and eventually left the firm.

BCC FUNCTION

There are constructive and even protective uses of the bcc functionality, for example, when using bulk address lists or other multiple addressees. For emails to one or more groups, the sender may be concerned that a recipient might reply to all, resulting in a procession of inconvenient, unnecessary, unwanted, or undesirable responses. In this case, the sender should consider entering some or all of the distribution list as a bcc (maybe leaving only the sender on the "to" line so that it is not blank) and including on the visible cc list only those individuals who should receive any subsequent responses. This kind of approach can also help protect against an inadvertent broad distribution of confidential or other sensitive comments or information in emails that are sent by recipients who are responding later in the thread, where there is a risk that those later-responding recipients will not be sufficiently attentive to the breadth of the addressee list.

However, counsel should be careful when using the bcc functionality. Sometimes, a recipient who has been bcc'd may reply to all, making it obvious to the other recipients that there were undisclosed individuals who had received the email. This result can cause distrust of the initial sender. Therefore, in appropriate cases, counsel should consider sending the email first to the visible addressees (that is, without using the bcc field) and then forwarding it separately to any others. Alternatively, counsel could state expressly in the body of the email that others have been bcc'd (or, where applicable, have been moved from the "to" or "cc" line to the "bcc" line).

AUTOCOMPLETE FUNCTION

Despite its convenience, using an email program's autocomplete functionality to fill in email addresses can be hazardous. For example, the system may fill in a work email address when a personal email address is intended, or vice versa, or it may fill in an address to which the email is simply not intended to go. Misdirected emails can raise privilege, confidentiality, relationship, and other ethical issues.

INTERNAL DISTRIBUTION LISTS

Electronic lists for internal email distributions can be useful, but senders and personnel creating the distribution lists should review them for under- or over-inclusiveness. List-related issues may depend on the particular characteristics of a firm. For example, firms should consider whether to create one list that captures all fee earners (that is, attorneys and paralegals) and another list that captures only attorneys. Additionally, senders should review the scope of a list before using it to ensure that they do not unintentionally include or exclude certain groups, such as paralegals or administrators and administrative assistants.

SIGNATURE LINES

Email signatures are often device specific. Therefore, even if an email program is common to multiple devices, the signature that a user sets up on their computer or mobile device may not carry over to other devices. For those firms that want email signatures used, counsel should confirm that the desired signature line is included and written as intended from any particular device. Further, when attorneys update their signature line, they should make sure they that do so across all devices.

DISCLAIMERS

Counsel should review the bottom portion of their email templates for old or otherwise stale disclaimers, legends, stickers, and the like. In some cases, these inserts are no longer useful or include out-of-date references. In other cases, underlying legal predicates may have changed. For example, the "Circular 230" sticker that tax practitioners commonly used became obsolete when the IRS changed Circular 230. (Attorneys should note that Circular 230 language generally should not be included in written work of any kind, even if the precedent on which the work is based included the old Circular 230 language.)

There may be cases in which counsel should revise, delete, or otherwise eliminate certain inserts altogether, from all email and other communications platforms. While most inserts may not do any significant harm, they may be anachronistic and, if read carefully by a client, even communicate limitations that counsel did not intend. Further, these inserts can make email threads and printouts longer and more unwieldy than necessary.

DRAFTS

Counsel should take care when using a phone or other device from which a draft message could be sent before it is ready. Counsel may have included sensitive or otherwise unsuitable content in a draft email that they intend to eventually delete or otherwise change, and it is generally impossible to call back an email once it is sent. For particularly sensitive messages, counsel should consider either:

- Drafting the text in a separate document and then copying it over to the email platform when it is finalized.
- Leaving the email addressee lines blank until the text is finalized and ready to be sent.

INFORMAL COMMENTS AND TONE

The informality of many email communications can lead to unintended consequences. Given that emails often take the place of live conversation, counsel should consider whether the tone of their written comments will translate to the recipient as intended. For example, sarcastic and joking references can sometimes be read as serious and even insulting. Additionally, the use of emphasis (maybe meant to show enthusiasm) may be misunderstood and, for example, some recipients may feel that they are being yelled at when text is formatted in all-capital letters.

The informality of emails can also have legal implications. For example:

- Confidential or other sensitive information that is carelessly included in an email may later be distributed to unintended recipients other than the client.

- Email comments may amount to unintended legal advice or legal opinions, even if counsel does not use language such as "we believe …" or "we are of the opinion …." (Issues relating to whether informal communications rise to the level of legal advice or legal opinions are evolving, as informal electronic communications become ever-increasingly common.)

DOCUMENT MANAGEMENT

Administrative matters relating to document management and document management systems (DMSs) can have confidentiality and privilege implications. These issues can put the client, the firm, the individual attorney, and others at risk.

Even if an attorney is attuned to proper document management, others on the team who are working with the document may be less aware and ultimately negate the attorney's efforts to be careful. Counsel should be sensitive to that possibility and adjust accordingly.

COMMENTS, FOOTNOTES, AND METADATA

Attorneys should be especially careful with documents that have comment bubbles, bracketed comments, footnotes, and other metadata. There could be confidential or otherwise sensitive information embedded in the electronic file (some of which may not be readily visible) that is inappropriate for distribution. For example, a document file could include internal notes or discussion points for the client, where the content is not intended for the eyes of others, including an opposing party who may later receive the document.

Caution: Internal Notes Can Be Revealed to an Adversary

An associate included in a draft agreement point-by-point recitations of where the other side might come back with potentially valid drafting responses. The partner carelessly sent the document out with the recitations in the draft. Predictably, the other party pursued (with much success) each of the points included by the associate.

CONFIDENTIAL OR SENSITIVE INFORMATION

When sending a document file out as precedent or other background, in addition to redacting and sanitizing the document for client-specific and other confidential or sensitive information, counsel should make sure that there are no identifying details in:

- The name of the electronic file (such as "Agreement between ABC Co. and XYZ Co.").
- Headers, footers, and endnotes embedded in the document (which may need to be updated from the precedent).
- The body of the document, even if not just proper names (for example, dates, dollar amounts, addresses, genders, and the like).

NUMBERS IN DOCUMENTS

Counsel should be especially focused on the accuracy of dollar amounts and other numbers in documents. A spell check feature generally will not catch mistyped numbers, and erroneous numbers could result in critical operational or substantive errors.

VERSION MANAGEMENT

Attorneys often preserve previous versions of a document in a DMS where the historical drafts may be useful. In these cases, counsel should consider including descriptive information in each version to help those later accessing the document.

However, counsel should minimize the use of unnecessary versions, which can become unwieldy. Further, a recipient of a document may notice an extremely high version count and become concerned about possible inefficiency regarding the drafting.

Attorneys should also take the time to confirm that they are sending the correct or most updated version of a document. Otherwise, critical late-breaking changes may be omitted and that omission propagated. Once an old version gets into an email thread, it can be challenging or impossible to correct the error across the entire distribution list and in every future communication.

COMPARISON DOCUMENTS

When using document comparison programs, counsel should double check that the most recent version is being used as the "new" version in the comparison and that the clean document they send is the latest draft. Additionally, counsel should ensure that the prior version being used in a comparison does not have confidential or sensitive information that may later show up as deleted but nevertheless visible text in the comparison document.

IMPORTING EMAIL CORRESPONDENCE

In certain cases, email correspondence relating to a document file may be useful to others who are later servicing the file. Some DMSs have a convenient functionality that allows for the importation of email correspondence into the DMS. Counsel should consider using this functionality where it may facilitate the ability of others to find and review relevant old emails.

WORKING OFFLINE

Generally, working offline on documents that are being collaboratively revised can become problematic. Counsel should take extreme care when working on a document offline where the online (in-DMS) document is still available for revision by others. Documents being revised are moving targets, and other users may justifiably go ahead and make revisions to the online document without considering that someone else may be making concurrent offline revisions. Additionally, if an attorney works offline while the online document is evolving, it may be difficult for other users to incorporate or restore ongoing changes, and new changes may not be properly inputted.

Besides being inefficient, working offline creates risk. If important changes are lost in the process, the evolving document can be irretrievably corrupted by the resulting omissions. At a minimum, if there is an unavoidable need for offline work where online changes are potentially being made by others, counsel should make sure that all members of the team are aware of all of the logistical details.

PORTABLE STORAGE

Copying documents from a DMS to a portable storage device can raise significant confidentiality issues. Saving and transporting firm documents locally without encryption (including, for example, on hard drives, thumb drives, flash drives, and the like) can also be dangerous from an overall security perspective.

CONFLICTS OF INTEREST

Attorneys should be familiar with basic conflict-of-interest considerations regarding client or matter intake and maintenance. In the US, attorneys generally cannot on behalf of one client be adverse to another client that they represent on unrelated matters without bilateral consent. Conflicts rules have a broad reach and can be especially difficult to navigate for large or growing firms.

(For more on identifying and managing conflicts of interest, see Navigating the Complex World of Conflicts on Practical Law.)

LISTING ALL INVOLVED PARTIES

When a new matter is opened, all parties who may be adverse or otherwise have a significant role in the matter should be listed (in addition to the client). This listing is important to conduct an adequate conflicts check. Any other involved parties should be listed liberally even if not truly adverse. Sometimes, over-inclusiveness during the clearance process can help surface nonobvious conflicts problems and issues as well as potential political and other relationship concerns.

AFFILIATED ENTITIES

Where the client is an entity, its affiliates typically are not grouped with it for conflicts purposes. But that is only a general rule. Depending on the jurisdiction involved and the particular facts of any given situation, there may be exceptions where consent regarding affiliates will be required. Even if consent is not required, affiliates could raise additional business issues. Therefore, when opening a new matter and administering the matter over time, counsel should keep an eye out for affiliates even if they are not directly involved in the matter and consider liberally listing or otherwise identifying affiliates (particularly key affiliates) as counsel proceeds through the clearance process.

NEW PARTIES

Many attorneys overlook the need for the inclusion of adverse (and other) parties that come to light after a matter has been initially opened, which can result in missed conflicts. As new parties enter a matter or are later uncovered, it is important that conflicts checks be run on those additional parties so that the new parties can be added to the file as adverse (or otherwise involved) parties. In other words, if a party would have been listed when a matter was initially opened, then that party should be listed if and when it surfaces after the matter is opened. The request to add a party should then trigger a conflicts check comparable to the check that would have occurred had the party been listed at the time the matter was opened.

NEW ASSIGNMENTS

For new assignments for an existing client that are of significance or that constitute an essentially new type of assignment, counsel should consider opening up a new matter for the client. Doing so can help with the efficient clearing of conflicts, and may also help to facilitate a review of whether the client's existing engagement letter is sufficiently broad. Additionally, where an engagement letter is stale or old and a new assignment comes in, counsel should consider whether a new, more current engagement letter is appropriate, particularly where the new assignment is not similar to prior assignments for the same client.

(For model engagement letters, with explanatory notes and drafting and negotiating tips, see Engagement (Retainer) Letter: Hourly Fee Arrangement, Engagement (Retainer) Letter: Alternative Fee Arrangement, and Engagement (Retainer) Letter: Contingency Fee Arrangement on Practical Law.)

CONFLICT WAIVERS

Under the ethical rules, a client's consent to a conflict is not necessarily sufficient for the representation to proceed. Attorneys must reasonably conclude that they will be able to provide competent and diligent representation notwithstanding the conflict, even where the conflict is waived. Further, in certain rare and unusual situations (for example, where a plaintiff and defendant want to hire the same attorney in a single litigation), a conflict may be altogether unwaivable.

Advance waivers of conflicts of interest can be especially useful, because they permit work for other clients that arises after the initial retention (and clearing) of a client. However, even where properly obtained, advance waivers are not always effective. Before relying on a previously obtained advance waiver, counsel should make sure that there is a sufficient level of comfort that the advance waiver is valid in actual application under the eventual facts at hand. Also, waivers generally need to be bilateral. Therefore, the existence of an earlier advance waiver from a client (even if the waiver is effective) will not vitiate the need to inform the other client of the conflict and, depending on the situation, to get the other client's express consent to and waiver of the conflict.

(For model conflict waiver letters, with explanatory notes and drafting and negotiating tips, see Law Firm Client Conflict Waiver Letter (Current/Former Client) and Law Firm Client Conflict Waiver Letter (Prospective Client) on Practical Law.)

CONFLICTS CLEARANCE

There should be clarity in a firm's procedures regarding whose responsibility it is (the individual attorneys, the clearance team, or someone else) when opening a matter to attain a sufficient level of comfort that conflicts have been cleared and all waivers have been obtained and adequately documented. It also may be sensible for all final waiver and other clearance documentation to be forwarded to a centralized location.

CLIENT-RELATIONSHIP CONCERNS

Before taking on a new project, counsel should consider whether there might be political, business, or other relationship issues regarding existing or potential clients, regardless of whether there is an actual conflict. For example, if a firm procures a waiver that allows it to be adverse to a valued client in a particular matter, the attorneys and firm should consider whether any volatility surrounding the matter may jeopardize the firm's relationship with the client. Further, even if a conflict does not exist, relationship considerations may arise where a firm takes on a project adverse to a company (or other companies in the same business sector) that the firm might someday want to represent.

TRUSTEE AND BOARD POSITIONS

A firm may wish periodically to solicit information relating to non-family (that is, charitable and business) trustee and board positions held by the firm's attorneys. Roles like these could have both conflicts and business-relationship implications.

REFERRALS AND RECOMMENDATIONS

An attorney may be asked by a client or other party to recommend a service provider. As a general matter, issues may arise where the attorney recommends one of the firm's clients. Further, it may not always be obvious that the attorney is making a recommendation. For example, the attorney could be running a request for proposal (RFP) for a client and suggesting candidates for inclusion in the RFP, in which case the attorney could effectively be making recommendations.

Before providing a referral or other recommendation, an attorney may wish to consider:

- **Confirming whether the potential service provider is a firm client.** Even where the attorney does not think that the recommended party is a client of the firm, it may be prudent to run a check to confirm this, particularly where the attorney is with a large law firm.
- **Consulting with the firm's clearance team.** Unless the attorney is already aware of the issues that may be implicated, it may be appropriate for the attorney to contact a member of the firm's clearance team before recommending a client or including the client on an RFP's candidate list. These issues are more complex if the party seeking the recommendation is itself a firm client. It may be necessary to check all conflicts, clearance, and related issues before a firm client is referred to another firm client.
- **Disclosing that the potential service provider is a firm client, if applicable.** If the attorney wishes to recommend a client of the firm, including in an RFP, the attorney should typically disclose that the recommended party is a client to the party seeking the recommendation or RFP. It is also generally preferable and, in some cases, may be required to obtain the client's permission before disclosing the attorney-client relationship.
- **Identifying the potential service provider as an involved party for a conflicts check.** Where the attorney is running an RFP for a client, the recommended parties should typically be listed as involved parties when the attorney opens the new matter for the RFP. If the matter already exists, the attorney should generally run a supplemental conflicts check that identifies all of the parties being included in the RFP.
- **Avoiding the recommendation of existing clients in certain cases.** Where the attorney's firm is general outside counsel to the party seeking the recommendation, or the firm will otherwise be involved in the retention process or the client's continuing relationship with the service provider, additional issues may arise. For example, where the attorney is recommending another client or including the client as a candidate in an RFP, the firm may have limited or no ability to serve as counsel for either party in:
  - the retention process, or
  - a subsequent dispute between the parties.

CONFIDENTIALITY REGARDING PROSPECTIVE CLIENTS

A step in the client onboarding process may involve inquiries relating to why a prospective client possibly should not be represented by the firm. These inquiries can contain confidential information about the prospective client and various other parties. Firms should emphasize that these inquiries are confidential and should be treated by all firm personnel in the strictest confidence. In effect, for confidentiality purposes, the prospective client should be regarded as an existing client of the firm.

HIPAA AND PHI

There may come a time over the course of representing a client that an attorney will come into possession of information about an individual's health or medical circumstances. If that information is protected health information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA), any number of HIPAA-related confidentiality issues could arise for the attorney and the firm. If the attorney or any other firm personnel believes that the firm may obtain or has already obtained PHI in a proposed or existing representation, it is important for the firm to adequately address the possible HIPAA ramifications. Appropriate steps may include, for example, obtaining a business associate agreement and implementing related security measures.

(For resources that provide guidance on complying with US laws and standards that apply to the protection of individuals' medical and health information, see HIPAA and Health Information Privacy Compliance Toolkit on Practical Law.)

PAYMENT OF FEES

A client may incur fees under any arrangement to which the parties agree so long as they satisfy the governing rules of professional conduct. Among many considerations, counsel should take special care in situations where the fees are to be paid by a third party or by joint clients and in engagements involving retainers or other advance payments.

PAYMENT OF FEES BY OTHERS OR BY JOINT CLIENTS

Sometimes, a third party is paying the fees of a client or there is a fee arrangement among two or more clients that a firm is representing. Examples include:

- A stakeholder's payment of a fiduciary's or other representative's fees.
- A company's or company owner's payment of the expenses of a governing board, a board committee, an employee, or a service provider.
- An indemnitor's payment of fees pursuant to an indemnification agreement or other obligation.
- A family member's payment of fees payable by another family member.
- A trust beneficiary's or other interested party's payment of fees payable by a trust.
- A claimant's payment of fees in a derivative litigation.
- A party's payment for its allocation of expenses in a business arrangement, which may include legal fees.

Regardless of the context, where a third party is paying a client's fees or there is an arrangement among jointly represented clients for the payment of fees, counsel should consider the following:

- **Fee arrangements could raise ethics or conflicts concerns.** Counsel should review the rules of the applicable jurisdictions and consider potential ethics, conflicts, consent, and waiver issues.
- **Payment of fees by a third party does not cause the payor to become the client.** An attorney's duties of loyalty and confidentiality will generally run only to the firm's client. Therefore, the attorney must understand precisely who is the client. Confusion is more likely to arise where the client and the fee payor are not the same.
- **Special privilege or ERISA issues could arise if the advice relates to fiduciary matters.** Regardless of the applicable fee-related arrangement and regardless of the named client, potential privilege issues could arise based on who ultimately (even if indirectly) benefits from the advice. These issues could come up in any number of fiduciary or other stakeholder-type contexts, for example, in the case of fiduciary issues under the Employee Retirement Income Security Act of 1974 (ERISA), in situations involving mutual fund governance, or in the case of tribal lands. Additionally, any payments of fees by a plan that is subject to ERISA, regardless of whether the plan pays the fees directly or reimburses another payor (such as the plan sponsor), should be reviewed for possible ERISA issues (for more information, see ERISA Litigation Toolkit on Practical Law).
- **An invoice may contain confidential information.** Given that the information contained in an invoice may not be privileged, counsel should make sure that any invoices to third parties are properly sanitized and that confidential information is deleted. Depending on the facts and the jurisdiction, the attorney-client privilege could be compromised even beyond what is specifically detailed in the invoice to a third party.

RETAINERS AND OTHER ADVANCE PAYMENTS OF FEES

Sometimes an attorney will take a retainer or other advance payment of fees, and then it turns out that, arguably, the work done may not justify keeping the full amount of the payment. Before keeping any portion of the payment that is not clearly reasonable compensation for services rendered, the matter should be reviewed under applicable ethical rules of the relevant jurisdictions. Additionally, it is important that billing and administrative personnel know when a payment is in the nature of a retainer or other advance payment so that they can properly account for the payment and treat it correctly.

EXPERT TESTIMONY

Giving expert testimony or otherwise serving as an expert can be extremely rewarding on multiple levels for the expert and the firm. However, attorneys should be aware that conflicts and quasi-conflicts issues can manifest in different ways in the expert context. Additionally, before agreeing to serve as an expert, an attorney should consider:

- A review of whether the expert is acting as an attorney when giving expert testimony. (The expert retention will generally not give rise to an attorney-client relationship.)
- The proper identification of the client.
- Privilege matters.
- Reputational concerns.
- Possible business issues regarding existing clients and prospective clients.
- Possible impacts on whether the expert retention affects conflicts issues for other legal retentions.
- The engagement letter and other retention arrangements.

It would ordinarily be expected that, before an expert retention is finalized, a conflicts check would be run as though the retention involves an attorney-client relationship, with attention being paid to both the firm retaining the expert and the firm's client that is the ultimate intended beneficiary of the expert's services.

(For more on the use of experts in litigation, see Expert Toolkit (Federal) on Practical Law.)

AUDIT RESPONSE LETTERS

Attorneys may from time to time be asked by a client to prepare a so-called audit response letter. This is a letter written by an attorney generally in response to a request by a client made at the direction of the client's auditors (that is, the accountants examining the client's financial statements).

Some auditors repeatedly ask for information from the attorneys that the attorneys cannot ethically provide (see American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information). While a request to the attorney may nominally be coming from the client, it is essentially a request from the auditors.

(For a model audit response letter, with explanatory notes and drafting tips, see Legal Response Letter to Auditors' Request for Information (Outside Counsel) on Practical Law.)

PRIVILEGED INFORMATION AND THE DUTY OF CONFIDENTIALITY

Some have characterized the process of preparing an audit response letter (and any updates to previously delivered responses) as essentially a privilege exercise. Nothing an attorney states in an audit response letter should reveal confidential information or otherwise jeopardize the existence of the attorney-client privilege. The attorney should be providing information to the auditor only if, when, and as required, and only to the extent that the information is not privileged. The provision of privileged information may be not only unnecessary but indeed not permitted.

If an attorney is holding back information from the auditors because it is privileged, the attorney should not feel that the information is being unduly withheld or be frustrated that the auditors are missing meaningful details. The attorney has a duty to the client to maintain the confidentiality of this information, and the audit response process in no way trumps or otherwise compromises that duty.

IDENTIFYING THE CLIENT

A potential pitfall in an audit response letter is the misidentification of the client in the introductory portion of the letter (where the relationship between the attorney and the client is set out). While identifying the client is sometimes simple and straightforward, there are situations in which it may be more complex. Counsel should always make sure that the recitation of the client relationship in the audit response letter is consistent with what is stated in the firm's engagement letter with the client and the firm's client matter records, as well as with the overall understanding of both the attorney and the client regarding the retention.

CLIENT REVIEW

If a draft audit response letter contains any specific disclosure, counsel should consider running the draft by the client before sending it to the auditors. Arguably, the client should never be surprised by or otherwise unaware of what the attorney will be sharing with the auditors. Additionally, follow-up audit-related requests should be treated in all respects with the same care as initial requests.

ENDORSEMENTS AND TESTIMONIALS

Firms and individual attorneys may use endorsements and testimonials from clients in pitch materials and other communications. However, using these endorsements and testimonials could raise issues under applicable ethical rules and may require including a disclaimer or other qualifier. Therefore, the attorney or other firm personnel should review the rules of the applicable jurisdictions. Additionally, consent may be necessary or appropriate in connection with the use of endorsements and testimonials, particularly (but not only) in the case of current clients and pending matters. (In extremely rare cases, a state's rules may even proscribe the use of endorsements and testimonials altogether.)

RECORDINGS OF PRESENTATIONS

Attorneys are sometimes asked to agree to a video or audio recording of client and other presentations for additional dissemination. While these recordings often do not raise concerns, that is not always the case. At a minimum, counsel should inquire about whether the firm has any general policies addressing these types of recordings.

STATEMENTS TO THE PRESS

Interviews with and other comments to the press can raise business-related issues for a firm, as well as, in the unusual case, conflicts-related and other ethical issues. Before commenting to the press regarding a specifically identified entity or individual, or a specifically identified case or other controversy, counsel should explore possible conflicts in the same way as they would when opening up a new matter. A check should be run to see if the attorney's comments might relate to a client of the firm and to ultimately avoid embarrassment with the client or other potential client-relationship problems.

More generally, even where comments to the press would not relate to any specific client or case, counsel should consider whether the firm represents a client (or might one day want to represent a client) that could be unhappy with the reported comments. Further, counsel should consider whether they would be making a statement that could later be cited against the firm by a future adversary. Given these concerns, some firms may wish to implement a process for centralized clearing of contacts with the press.

POTENTIAL CLAIMS AGAINST THE FIRM

Firms should consider whether expressly to encourage attorneys to surface any basis on which it may be alleged that the firm has engaged in any legal or other applicable malpractice. Information of this type will hopefully allow the firm to consider whether it should be taking any steps to protect its right to make claims under the firm's malpractice insurance policies. This can be especially important in larger firms, where the relevant issues and information may get progressively more dispersed and difficult to obtain.

KEY TAKEAWAYS

The waters that attorneys must navigate as they establish, structure, and run their practices are murky indeed. While compliance with the various rules of professional conduct is required, baseline compliance may not always be enough. There are aspirational aspects to how attorneys may conduct their practice, with respect not only to the way in which they treat clients, colleagues, and adversaries, but also with respect to the practice of law itself. The foregoing discussion is by no means comprehensive, but rather is intended to flag some of the things that the author has seen over the years and to encourage consideration and development of best practices, so that attorneys and firms can get closer and closer to being all that they can be.