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# More 'The Emails'—In-firm Education in Small Doses

**Peter J. Winders**

*"A little bull each day."* Milo of Croton

The thesis is, ethics can be effectively taught, sensitivity to risk and ethics issues can be increased, and an awareness of assistance available to resolve them can be raised by frequent messages in small doses. A more detailed explanation of the thinking behind these introduces the first series published in Volume 18, Number 2, at page 1 of *The Professional Lawyer*. These are representative emails sent to lawyers and staff at Carlton Fields with those goals.

**Problem**: to underline the importance of loss prevention decisions by emphasizing additional practical effects.

Subject: LOSS PREVENTION — THE EFFECT OF BAD LOSS PREVENTION DECISIONS ON THE JURY. 5/10/09

I write frequently on the importance of identifying and controlling conflicts of interest, on the risks of dabbling in an area other than your specialty, on unworthy or undesirable clients, but I almost always stop as if the only consequence is making a mistake or losing a client or its good will, or a claim against the Firm. There is more to it than that, at least if the mistake leads to a claim, as the effect of some loss prevention decisions can dramatically affect the persuasion process at trial.

- Experience and common litigation sense, backed up by a number of studies and countless jury polls, show that juries are likely to give a lawyer a break UNLESS there is evidence that he did not have the client's interest solely in mind.
- If it is possible that the lawyer acted for his own self interest, or in consideration of another client, or to cover up his mistake, etc.—CONFLICTS in other words—juries are VERY tough on the lawyer, both with regard to liability and damages.
- Moreover, acting other than with the best interest of the client is something juries understand. They GET it. It makes them mad.
- When the suit is an aiding and abetting claim (where the client's victim is the plaintiff rather than the client) the effort is instead to paint the lawyer as greedy, not caring what the client does as long as the lawyer makes money—and hopefully violating another ethics rule, such as truthfulness in dealing with third persons.
- In a dabbling situation, the complaint may quote the lawyer's website, where the firm asserts it has the best construction department in the region, but pointing out that the client's construction case was handled by a products lawyer not even in that department, with greed assigned as the motive—his hours and originations were down. In an "eat what you kill" compensation system, this can be an effective tool for the plaintiffs' bar. The conflict is not with the firm or another client, but with the lawyer's personal interest.
- **Plaintiffs' malpractice lawyers know this.** In one recent malpractice CLE conference, a plaintiff's lawyer explained this, and advised that he always tried to add uncovered claims as well as insured claims, to motivate the defendant lawyer to push his insurer to settle. This is not only a liability and jury strategy issue; it flows naturally into punitive damages, because when the case involves not only an allegation of the breach of the duty of care (negligence)

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## More 'The Emails'

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but also the breach of the duty of loyalty (fiduciary claims, conflicts) the alleged wrong by the lawyer is of a different degree. With both uninsured claims and with punitive damages (which are most often not covered by commercial insurance) an effect is to cause the insured defendant to pressure the insurer to settle, so the lawyer defendants will not face uninsured claims.

We make a big deal out of ethical issues because they are in fact a big deal—with potentially great practical consequence as well.

**Problem**: to increase awareness that exposure can be controlled by clearly defining who is and is not a client, and who may and who may not rely on opinions of the firm.

**Subject:** LOSS PREVENTION: LIABILITY TO NON-CLIENT LOAN PARTICIPANTS. 5/7/09

As the transaction lawyers well know, the very big loans are not handled by one lender alone. If a hundred million dollars is needed to build a large resort hotel complex, there will be a Lead Lender who puts the deal together, but Lead Lender will "syndicate" the loan, and "participations" will be sold to various banks, insurance companies and other institutional lenders. The Lead Lender may end up funding ten million dollars, with the other ninety million spread over twenty or thirty other institutions, and very often will thereafter be the "Agent" of the others in dealing with the borrower. If a law firm is engaged by the Lead Lender to help put the loan together, it might be quite important who the client is. If a lawyer mistake results in one piece of security being lost so that the collectibility of the loan is reduced by 40%, is the lawyer subject to suit by Lead Lender for its $4Million loss, or is he subject to suit by the 20 Participants as well for their $36Million share?

Two issues are involved in a case such as this. First is the frequently occurring loss prevention issue, who is the client? Is it the Lead Lender who engaged the law firm, or is it all Participants? Second, regardless of who the client is, who was entitled to rely on the law firm's opinion?

A case in Minnesota involving exactly that scenario has been working its way through the courts. The loan was to a casino developer for a casino to be owned by the Akwesane Mohawk Tribe and operated by the developer. The law firm of Dorsey & Whitney (Dorsey) was outside counsel to Lead Lender. Dorsey apparently gave an erroneous opinion that the consent of the National Indian Gaming Commission was NOT necessary to make a pledge of gaming revenue (an important part of the security for the loan) enforceable against the Tribe. Developer did not complete the project, the loan went into default, and a question was whether the other 30 loan participants had a claim against Dorsey for the allegedly erroneous opinion. After **ten years of litigation**, the Minnesota courts and the Bankruptcy court in Lead Lender's case have decided that only the Lead Lender can make such a claim because there was no lawyer-client relationship between Dorsey and Participants.

A slight change in the scenario could make the result very different. If the opinion had arisen as a request by Lead Lender for an Opinion to be used in presenting the matter to participants to sell participations, it would not matter who the client was since the opinion would be designed to be relied on by others. If as often happens an opinion is requested from local counsel, for instance that the Florida mortgages are enforceable, that would be the likely interpretation if the lawyer knows the opinion is to be so used, or if the lawyer knows that there will be participants. In these situations, the question whether the participants are the lawyer's clients is not determinative—a lawyer can be liable to a third person if his opinion is intended to be relied on by others.

We can limit our exposure in situations such as this by a limitation in the opinion as to who we intend to be able to rely on it. But it is not that simple: it will often be the case that the client Lead Lender will not accept such a limitation—the client needs the opinion in order to market the participations. In that event, we need to decide whether to undertake the exposure associated with the opinion, and if we do, how much we should charge for it.

Regardless of who the client is, who was entitled to rely on the law firm's opinion?

It is easier to limit who is or is not our client, always an important part of loss prevention. Our engagement with Lead Lender should be clear that we do not represent any Participant. To the extent possible, it would be good to see to it that such a statement is made to all the Participants. This may not be possible, because we will not know from day to day who the participants are. But we can try to get Lead Lender to put something in the participation package. "Lead Lender's lawyers for this loan are Carlton Fields. Each Participant should obtain its own legal counsel." And it makes sense that the participants are not our clients—there is no way we intend to have as a client an unknown bank who buys in at the last minute, but as to whom we may have conflicts—we need merely to avoid treating them as such.

Based on similar considerations, we recently decided that we would be "lawyers for the deal"—our duty was not to give advice to any individual Participant, but instead we undertook to draft and negotiate the documentation, reporting to Lead Lender for client decisions, but Lead Lender as well would rely on separate counsel for due diligence and other advice not related to the documentation. If the relationship is clearly spelled out in the engagement letter, and known to any Participant, that seems acceptable also. It would be good to discuss any such arrangement with the General Counsel.

The lawyer's role in a sophisticated transaction such as this is an important part of the business of some of our practice areas. It can get complicated—witness the ten years of litigation involved in the Dorsey decision—and attention to the important but basic details of who is our client and who our opinion is designed for is important.

**Comment**: I liked this one because it produced the following discussions, among others:

> Office head: So, if we represent the Lead Lender on docs, but not due diligence and other questions—my question is: has any LL hired us on that basis?
>
> A: I was surprised also, but I circulated my first draft of this one to [transactional Practice Group Leaders] hoping to avoid saying something dumb. [Real Estate PGL said that recently we had done just that. Apparently some or all of the Participants were at odds, and this was a solution. I did not ask if they were at odds, why participate? But maybe it was in connection with some sort of workaround.
>
> Real Estate PGL: In our case, the borrower was alleging, among other things, that the LL had committed fraud. And the other participants were starting to claim that LL should pay more than its share of a new loan to be made. Everybody had counsel already, and our job was to create the modification documents, and basically to mediate the lenders' fight with each other. It worked very well. I think in some ways we represented everybody (they all signed the engagement letter), but we tried in the engagement letter to be pretty clear on the fact that we were not representing anyone in the dispute among the lenders. As a general matter, if we represent the LL as agent, I'm not satisfied that we could use Pete's defense that we're only liable to the extent of LL's share of the loan. That concept works well in an opinion letter addressed only to one lender, but not so well (IMHO) in this context.
>
> I'd like to see you get creative about why we shouldn't have liability to known participants if we do a crappy job of drafting loan documents. As to legal opinions, it's good for us to think about, but it has become the norm for LL's to insist on getting opinions addressed to participants. They used to talk to us about it, but now they won't.
>
> **Note:** even if my suggestion to limit the opinion is naïve (which it isn't) the chances should be improved that the issue will be thought about.

**Problem**: unreasonable client guidelines or other provisions of client-authored engagement letters.

**Subject:** LOSS PREVENTION: Beware Client Guidelines and the like. Send me a copy to review. 6/10/2008

We are seeing a number of unusual and objectionable provisions in client-generated engagement letters, outside counsel guidelines, and the like. Similar provisions are appearing in contracts with consultants as well.

Among the most significant are requests for indemnification. "Law Firm warrants that its work will be done by competent attorneys within the appropriate specialty and experience, and that it will indemnify and hold Client harmless for any damages arising from any error or claim of error in the Work."

## How do these requests for indemnification come up?

Almost always, they arise in the engagement stage. They may be contained in a CLIENT-GENERATED engagement letter, or an engagement letter from a consultant or expert. We are likely to see them in an RFP for a MUNICIPAL OR GOVERNMENTAL CLIENT where the same ordinance or regulation controls the process of contracting for legal services as for construction or maintenance contracts.

## Why is this a problem?

All a part of thinking about what we agree to, one major thing is that this is a contractual undertaking, and we are not insured for contractual undertakings. If we negligently miss an instrument affecting title, our malpractice insurance covers the damages caused by the negligence. But if we contractually promise to hold harmless, the risk is uninsured, and may be different since it may include a duty to defend a third person's claim arising out of an alleged error. In addition, in our insurance contract we promise to do nothing to interfere with the insurer's rights of subrogation, which are non-existent in a contract situation.

## What should you do?

FIRST: Be very alert to unusual provisions in any engagement originated by a client or third person, particularly indemnity or hold harmless provisions. We have also seen requirements that the client be added as an additional insured to our malpractice policy, which also we cannot do.

SECOND: Call any such provision or request to the attention of your PGL and the General Counsel. These unusual provisions require consideration by the Firm, and should not be agreed to by an individual lawyer.

THIRD: Any time you receive CLIENT GENERATED GUIDELINES FOR OUTSIDE COUNSEL, send me a copy

for approval. I can help highlight provisions that might be the source of problems, particularly DEFINITIONS OF CONFLICTS OF INTEREST that far exceed the conflicts recognized by the Rules of Professional Conduct, and Indemnity provisions as described.

### What sorts of thing does the Firm do when faced with such a provision or request?

It varies, but among the things we have done to handle such matters are:

- Negotiate with the client (or consultant). It may be that client will ask for everything it would like to have, expecting to have some of it negotiated away. IT IS NOT INFREQUENT THAT WE WRITE IN RESPONSE TO CLIENT GUIDELINES SPECIFYING PARTS THAT WE CANNOT AGREE TO, or that we will agree to only if they are read in a certain way. Up front, before an actual problem arises, this is not as big a problem as some have assumed. Often they will respond to the proposition that the guidelines or request asks for both indemnity and a certificate of insurance, and since the indemnity vitiates the insurance, they cannot have both.
- Consult with the insurance carrier. SOMETIMES, the carrier will agree that an indemnity provision is nothing more than a promise to be liable for what the common law already makes us liable for, and agree that we can sign the engagement with such a provision, particularly with a governmental entity who claims its hands are tied. Or they may help us frame an indemnity clause that they will approve on that basis. BUT WE NEVER AGREE TO SUCH A PROVISION WITHOUT THE CARRIER'S AGREEMENT. Among other things, (1) our insurance covers malpractice and other tort liability occurring during the practice of law—IT DOES NOT COVER CONTRACTUAL OBLIGATIONS. When the indemnity is broader than the responsibility we have anyway, the obligation becomes contractual. Some broad indemnity clauses extend to third persons, which are clearly in excess of our professional responsibility, and (2) our policy ALSO PROVIDES THAT WE WILL DO NOTHING TO DILUTE THE INSURER'S SUBROGATION RIGHTS, which some indemnity clauses can do.
- Say no. A client who is so controlling of the relationship and at the same time so unsophisticated as to not appreciate the problems created by requests may not be a desirable client. Again, this is a FIRM decision, not an individual one.
- Decide to take the risk. There are scenarios that would make such a decision acceptable. But again, this is a matter of decision for the Firm—usually the President after analysis by the General Counsel and consultation with the Practice Group Leader involved—and not within the authority of an individual lawyer.

### What is the take-away from this?

Always involve the Firm in any unusual conditions to any engagement agreement. ALWAYS READ CAREFULLY ANY ENGAGEMENT LETTER DRAFTED BY SOMEONE OTHER THAN THE FIRM. Never sign or agree to an engagement with an indemnification or other unusual provision with client, consultant, auditor or others without involving the Firm through the General Counsel and the PGL. If not easily worked out, they may very likely involve the President. These are important Firm decisions, not decisions that can or should be made by any individual alone.

In a few days, I will send another email listing other unusual provisions or areas of concern.

**Problem**: acceptance of and training on improved business intake procedures

**Subject:** LOSS PREVENTION — Good News. Steve [a very busy senior lawyer and rainmaker] is currently in METASTORM TRAINING! 4/15/09

Thanks to all who are responsible for getting him there. This was a team effort.

**Comment:** "Metastorm" refers to a brand new paperless business intake system invented by our Conflicts and Business Intake Manager, despite what the software vendor tells you. I have avoided the emails with "inside humor"—as everyone has experienced, although often very funny, the setup has taken decades. But it should require little effort to substitute a name on this one. That I received a number of responses about how funny this was shows that we have been somewhat successful in raising awareness of the importance of the project because you have to get that also. That one of those was from Steve is a victory of another order.

The best response was from one of the office managing shareholders: "it takes a village . . . ."

**Problem**: reminder about dabbling in unfamiliar areas

**Subject:** LOSS PREVENTION — PROGRESS AND REMINDERS-DABBLING. 11/24/08

We are increasing our insurance coverage this year, and the applications are more detailed. As part of the process I have had to review our history of claims and "circumstances"—situations that could lead to claims, over the last 10 years. A number of them could not have occurred under our current systems. Some would have been caught and prevented by our business intake system, but remember our intake system depends on the Practice Group, which was not our organization 7 years ago.

Some of our claims arose because a lawyer "dabbled" in an area of law that he was not thoroughly familiar with. We haven't circulated a dabbling reminder in a while, so here goes.

State and local taxation is the one area of the law where form is more important than substance. David ____ is the PGL in this area. About once a year, he will send out an announcement that he has a method for avoiding certain state taxes. Invariably, I will get 5 questions from litigators about whether such super-technical, form-over-substance thinking isn't criminal tax evasion or worse, or hoping that we do not engage in such sharp practice.

While it is true that a trial lawyer would get into loads of trouble responding to discovery on the basis of a definitional nicety ("that depends on what the definition of 'is' is"- completely inappropriate in any context other than state taxation), and a lawyer selling FEDERAL tax advice with the same reasoning could be in a world of trouble, the U. S. Supreme Court has affirmed that the 'angels-on-pin' approach is the way things are done in the state and local tax area, and the Florida Department of Revenue knows it—its response will be to change the law or regulation to prevent its happening again, not to challenge the transaction on "intention of the statute" grounds. We are experts at this, and offer a valuable service to clients in this area.

**Business considerations frequently predominate over ethical ones as we continue to improve the quality of our client base.**

Among the simplest examples is the documentary stamp tax. This is a little out of date, but in essence the tax is due, and stamps are to be affixed, to any note or certain other documents signed or delivered in Florida. Thus the tax can be avoided by closing out of state. A business goes to the Bank in Florida, arranges a $20 million loan, and avoids $60,000 in stamp taxes by setting the closing at the Bank's Atlanta office. Everybody who practices real estate law or banking law knows that after a couple of months in practice. Does every litigator?

10 years ago as a holiday weekend approached, a bank officer was frustrated in being unable to find any of the real estate or banking lawyers he was used to dealing with. A good customer needed to refinance, involving only a new note and an additional guarantor, and it needed to be done soon. He finally reached one of the litigators who was still around, who accommodated—how hard can it be to copy what was done in the file 18 months ago, only with a different amount?—and completely out of a desire to give good client service and cover for his partners who had left early, drafted the new note and supervised its execution and delivery to the bank. The bank officer, fired promptly thereafter, was very grateful, but the $50,000 in doc stamps that had to be paid by the customer or the bank tended to cancel the client relations benefit. The moral: (1) No good deed goes unpunished. (2) A lawyer should not dabble in an area of the law he is unfamiliar with.

It has been a while since we had a 'dabbling' issue. But a reminder now and then shouldn't hurt.

**Problem**: To assure that conflicts resolution is based on business judgment as well as the technical conflicts rules.

**Subject:** LOSS PREVENTION—CONFLICTS MANAGEMENT—BUSINESS DECISIONS. 1/16/2008

IN GEORGIA the rule is that if you represent a corporation, its wholly-owned subsidiary is also considered a client for conflicts purposes (and vice versa). You can take a matter against the subsidiary only with consents.

IN FLORIDA the rule is that the representation of a corporation does NOT mean the corporation's parent or subsidiary or sister corporations are clients for conflict purposes, and a lawyer does not need consents to be adverse to those members of the corporate family that he is not currently representing. Exceptions exist where the entities are virtual alter egos, where the same legal department is involved to the extent it is difficult to keep track, etc.

But those are the ethics rules, and they certainly do not constitute the whole landscape. **Business considerations frequently predominate** over ethical ones as we continue to improve the quality of our client base. For example, even under the Florida rule:

- **CLIENT TYPE X-1.** Regardless of the rules, some clients believe that the attorney client relationship should extend to the whole corporate family, and are offended when a law firm takes a position adverse to a member that is not represented, per the Florida rule. Some of those are so offended that they will exercise the choice that any client has—NOT to employ that firm in the future, or to terminate the existing representation.
  - **CLIENT TYPE X-2**. Within that group of clients, the work the firm does get would be outweighed by the conflicts with the unrepresented subsidiaries. Acceding to the wishes of the client in this regard means the overall loss of business to the law firm UNLESS the client can be persuaded to increase the business to the law firm from all of the related companies.
    - **CLIENT TYPE X-3.** Within that group of clients, there are those who in addition require their firms to agree by contract to follow, in effect, the Georgia rule, even in Florida
      - **CLIENT TYPE X-4**. And within that group are clients who are unreasonable in denying conflict waivers, even as to subsidiaries never represented, and totally remote from the work the firm does for the group.

So the question "is this a disqualifying conflict" in corporate family situations in Florida is just the beginning. If it is not a conflict, we have an option we do not have in

Georgia: to take the new matter adverse to the unrepresented separate entity whether it angers the existing client or not. But it does not follow that we should pick that option. The other steps in the process include at least the following:

**CLIENT TYPE X-1**. (Or for that matter, practically any client closely related to the potential new adverse party whether we know them to be particularly sensitive or not). The client contact lawyer should be involved and should communicate to the existing client (calling is Best Practice). Remember, this is the situation where the existing client has no veto power preventing the new representation, but he certainly can take his business elsewhere. For that reason, an evaluation (at a Firm level—Practice Group Leader(s) is most appropriate) should determine whether the new representation is worth the loss of the old client if he decides to leave. It should be obvious that it would be stupid to undertake a representation against a subsidiary of a client responsible for millions of dollars of fees just because it is permitted by the ethics rules.* It is equally stupid to turn down a huge representation against a remote subsidiary or sister corporation of a one-time client when the ethics rules permit us to take it without the consent of the existing related client. If we do not want to lose the business of the existing client, the communication should be in the nature of a request for consent. If as a business matter it is decided that then new representation is worth losing the existing client if necessary, it is important that there be no request for consent, but an informational call—"There is no conflict, and where there is no actual conflict we feel obliged to take a matter one of our other good clients asks us to, but obviously we wanted to explain this to you beforehand"—that sort of thing.

**The ethics analysis is often not the end of the conflicts issue.**

(*Actually when a subsidiary of a major client is involved, there may be a "punches pulling" conflict even if there is no "directly adverse" conflict. Rule 4-1.7(a)(1)—direct adversity conflict; Rule 4-1.7(a)(2)—punches pulling conflict.)

**CLIENT TYPE X-2.** No difference, but where acceding to the wishes of a client who does not represent much business to recognize conflicts where none exist, and where there are many such conflicts, the decision should be a no-brainer. We cannot afford that kind of client.

**CLIENT TYPE X-3**. When you see the reminders to send every new client's "outside counsel guidelines" or the client-generated engagement letter to the General Counsel for review, this is a main thing we look for. These things are negotiable in the first place, and we should evaluate in advance the practical effect of them by discussing the conflict waiver policy of the client as well as the amount of business contemplated. If the client is going to give us a lot of business, the "punches pulling" conflict rules make it unlikely that we would take a case against a subsidiary anyway.

**CLIENT TYPE X-4**. This is the nightmare. Prestigious company. Huge. A lawyer should be proud to represent it. But it spreads its business around so that we get only a little of it, but insists that its lawyers not be adverse to any member of the gigantic corporate family. And it never waives conflicts. We have had some that cost us $2 in conflicts for every dollar in fees, and I am proud to say that we have fired such clients when we thought the situation was irredeemable. What would redeem the situation? Even with such an arrogant client, if the client gave us a very large amount of business, the value of the client would make us unlikely to accept a representation adverse to the unrepresented sub anyway, and if inclined we would not do so without consent.

As mentioned, the ethics analysis is often not the end of the conflicts issue. Business decisions are usually made at Practice Group Leader levels. When it is a close call or where different PGLs have different views, the General Counsel often mediates. Parenthetically, it speaks well of the Firm and its genuine dedication to a team approach that I haven't been involved in a case where anyone was advocating a personal interest as opposed to what is best for the Firm since 2000. And of course the President and CEO makes the decision if an immediate one is required or if consensus is not reached.

Adding the obvious, this is just a small aspect of the business intake process, where our systems give us an opportunity to assure ourselves of the quality of our clients, and of the client base as a whole.

**Problem: Take a business client for a single case, avoid importing all his conflicts.**

**Subject:** LOSS PREVENTION—CONFLICTS PLANNING AND MANAGEMENT. 1/11/2008

It is not good business to accept a small matter from a big client. You have a little bit of his business, and ALL of his conflicts.

A few years ago, the insurer employed us to represent Power Company to defend an electrocution case—(painter's ladder contacted power line). Power Company used this routine personal injury representation as a ground to move to disqualify us from representing a contractor in a huge dispute at its nuclear power plant.

A few years later, a conflict of interest brought us in to a Miami construction matter defending a contractor. That one-time representation (that client is very closely connected with another large firm) prevented us from taking the Owner's representation in a huge unrelated project in Tampa, when the Miami one-time client refused to consent.

A couple of weekends ago, we identified another insurance defense representation of a member of a rival consortium to a prospective client bidding on a billion dollar construction project. Consent may be required (meaning the

insurance client may have a veto of our representation of his competitor for the construction contract.)

These three illustrations alone involve a couple of million dollars in potentially lost business. Due to peculiar circumstances we were able to extricate ourselves from the first by terminating the Power Company representation and persuading the judge at the disqualification hearing that we could analyze the conflict using "former client" standards. But we did our relationship with the insurer no benefit. And we might actually get a waiver in the present situation, showing that some clients do in fact only refuse waivers where the reasons are legitimate.

WE INVENTED THE SOLUTION TO THIS PROBLEM 3 years ago when the ADVANCE WAIVER became acceptable. Sample engagement letters or engagement letter language is at the following places on CF Net:

(Details omitted)

Thus, in ANY ONE TIME REPRESENTATION OF A BUSINESS CLIENT (EXAMPLE—INSURANCE COMPANY HIRES US TO DEFEND BUSINESS CLIENT) (EXAMPLE—WE ARE ASKED TO REPRESENT BUSINESS BECAUSE ITS REGULAR FIRM HAS A CONFLICT) include language such as the following in the engagement letter:

> "It must be clearly understood by the insurer and the insured client that Carlton Fields accepts the engagement to defend the insured in this action on the condition that this engagement will not disqualify Carlton Fields from representing other clients adverse to the insured on matters that are not substantially related to this matter, including representation in litigation. A lawyer cannot represent one client adverse to another even on unrelated matters without consent. In view of the facts that Carlton Fields does not generally represent the insured, but represents other clients in matters throughout Florida and Georgia in a wide variety of legal problems unrelated to this matter which might be adverse to the interests of the insured, it is understood that insured consents to any such unrelated adverse representation. Where appropriate, ethical screens will be erected to protect confidential information."

The advance waiver preserves the option of the Firm to optimize its client base and should prevent a one-time client from damaging our ability to represent our established clients and our ability to establish new ones. If the one-time client refuses to abide by its agreement, we have grounds to terminate the relationship and test the situation against the much easier "former client" conflict rules.

And remember, as with any conflict situation, the key to resolution by consent or waiver is that the consent be "informed". The advance waiver must be supplemented with information and explanation if the situation actually comes up.

**Problem**: Control over sanctions motions.

**Subject:** LOSS PREVENTION—CONSULT ME REGARDING ALL MOTIONS FOR SANCTIONS. 11/27/2008

All our lawyers who don't really need to already consult me before filing a motion for sanctions. Make your own list of the Firm's most capable and experienced litigators. Those are the people whose judgment on an issue as delicate as sanctions motions can be trusted, and those are the people whose judgment is that they should run the matter by the Firm's General Counsel first. It has become an informal policy. But everybody should follow the practice. Every lawyer has a private list of persons he or she runs a difficult or delicate decision past as a reality check, or 'bounces off' an idea or problem a little out of the norm. Add me to your list when it comes to motions for sanctions under federal Rule 11, Florida Statute 57.105, or other parallel provisions. Sanctions practice tends to have elements of personal involvement, and a disinterested look is always helpful. Certain motions may be justified but of doubtful big picture utility, and there are lawyers who are pretty good at starting a distracting side play that delays the client's main goal of handling the case efficiently. A short discussion will ordinarily be helpful.

NOTE THAT IF WE RECEIVE A MOTION FOR SANCTIONS, FORMAL POLICY DOES IN FACT REQUIRE THAT I BE INFORMED, AS WITH ANY OTHER POTENTIAL CLAIM. See Policy: Loss Prevention and Claims Against the Firm on CFNet.

**Problem**: the dangers of "forms".

**Subject:** LOSS PREVENTION -FW: Another warning about "forms"—4/10/2009

See Ed's memo to the Real Estate PG below. I wanted to pass it on firmwide for the good of the order. Looking at somebody else's form or example is like having half a checklist. If it is a very good piece of work, it is still just what that lawyer thought of in that transaction, less what the client told her to leave out. Plus, if an element is in the form that does not mean it is applicable in all such transactions. An ambiguous product can be created by including inapplicable provisions, just as by leaving out applicable or better ones. Forms can give a complete novice—a litigator—some feel for an area, but there simply is no substitute for actually knowing what you are doing.

**From:** [Real Estate Practice Group Leader]
**Sent:** Friday, April 10, 2009 10:32 AM
**To:** Real Estate- All
**Cc:** Winders, Peter J.
**Subject:** Another warning about "forms"

We have had another issue recently with people relying on "forms", and I think it's time for all of us to be reminded about the dangers.

First off, a document that you retrieve from the system is not a "form", and you can't rely on something just because it was a lease used by David _____ or a deed used by Vinnie _____. There are many, many reasons they may have saved a document that was either incomplete or inadequate for your purposes. Among other things, some of our documents are client specific and just won't work when we represent another person. Also, some of our clients are very risk tolerant and they ask us to take out provisions that would normally be considered necessary.

The recent issue is with no lien affidavits on the system. For some reason, not clear to me, there are affidavits on the system that don't have representations as to the "gap" and don't have gap indemnities. These affidavits are just inadequate for almost all of our deals. If we use them, we create significant risk to our client, the title companies for which we are agents, and the firm if there is something recorded in the gap.

The bottom line:

1. Don't use a no lien affidavit unless it has a gap representation and preferably an indemnity, and be sure in insured deals that the title company has approved the form of affidavit. If they require an "indemnity" and we give something less, we could have liability for something that is recorded in the gap. (I'm assuming the same concerns apply in Georgia, but I defer to our Georgia partners on that). I'd like all of our paralegals to reply to this email to confirm that they understand this issue and the great risk that can be created if we don't get representations about the gap. Obviously, the risk is much greater in times like this when liens and other claims are being asserted so frequently.

2 Just don't use someone else's "forms" unless you both have the experience to review them and are willing to spend the time to review.

**Problem**: The email scams are getting better.

**Subject:** LOSS PREVENTION—EMAIL SCAM DIRECTED AT LAWYERS—COLLECTION MATTER. 5/18/09

I assume most of you by now have received an email usually from an Asian company explaining that they have collection problems with their U.S. customers, often related to the currency exchange rates. They need a U.S. lawyer, and you come highly recommended. Some mention a Martindale rating. Some describe how easy the work will be, promise a retainer, and so forth. The newest flourish is that the reference comes from a U.S. lawyer who vouches for the client but cannot handle the matter in this jurisdiction. The set up, frankly, is getting more and more believable. It has drawn in some lawyers across the country, probably more than have admitted it. Do not be fooled.

The scam works like this: After the lawyer agrees to help, the "client" sends the contact information on his biggest delinquent customer. The customer is a genuine publicly traded company. Lawyer sends a demand letter or email to the address provided and by return mail gets a cashier's check on a big bank for the $200k debt, and a letter of apology about the delay. Cashier's check is a nice touch. Lawyer deposits in his trust account, 3 days later calls his bank and is told that the check hasn't been returned it is safe to draw on the funds.

While the customer is a legitimate corporation, as is the bank issuing the cashier's check, the address given for the collection letter is wrong and the check is counterfeit. Not only that, the bank routing number—the string of numbers at the bottom of the check-is one digit off, so it either goes to the wrong bank in the automated check processing process or it is kicked out and has to be traced by a person, which delays the process. (Variation—the phone number of the Bank on the check is phony, so a call verifies the check). The check comes back to the lawyer's bank on day 6 identified as fraudulent. Of course there is no way to get the wired funds back from Korea, where the money has been withdrawn and the account closed.

If your are ever tempted to respond to one of these out of the blue emails, particularly one with someone you don't know praising your integrity and offering something too good to be true, but the more believable ones as well, ask me or David _____ to check on the legitimacy. The IT staff, particularly Steven _____, is adept at testing the legitimacy of the inquiry. We don't want to be the example on the next one.

**Problem**: The practice gurus tell us that clients like lawyers who give business advice.

**Subject:** LOSS PREVENTION—BUSINESS ADVICE

Assume the following two statements are true. The first is what all the studies show, and the latter is based on four decades of close observation, with no evidence to the contrary.

- Business clients value most the lawyers who provide business advice
- You are not competent to advise in business matters*.

(* And if you were, you would be a rich businessperson, not a lawyer.)

From a loss prevention point of view, the most profitable part of the annual shareholders meeting last month was a brief discussion with [a consultant] in which we decided that these two truths do not present an unsolvable problem. What the business client really values is a lawyer who attempts to both understand the client's business goals and explain how the legal project may impact those goals and possible unintended consequences.

A client is upset because his best salesperson has been lured away to a competitor. "I know you have been telling me to get a non-compete for these guys. I want you to draft the

best, toughest, most far reaching covenant not to compete and I am going to require all our sales staff to sign one." It might be good to advise him that you could draft a covenant so onerous no good salesman would sign it and no good judge would enforce it. And is he really prepared to fire anybody who doesn't sign? Is he going to fire his second-best salesman? The competitor is hiring. Emphasize, of course that you are not giving him business advice, just outlining areas of risk that you are aware of from the study of other cases, and that risk decisions are matters for the client, not the lawyer.

A better example is the fairly frequent situation that can occur when a business client has a problem and is unaware that there is a readily available legal solution. We have been emphasizing among other things that we should visit our best clients at their places of business regularly. That is such good advice that by simply doing it you are likely to develop an underserved rep as a marketing genius. A majority of such visits will result in your awareness of a need in the business or a problem that someone in the Firm will have an answer for. The client will recognize this as helping his business, when in fact you are merely identifying a legal issue.

I remain firmly of the belief that it is very important risk management that we continually emphasize and observe the different functions of lawyer and client. Business risks are the decision of the client. Identification of risks is a part of the lawyer's job. Methodology in litigation is the lawyer's decision as is analysis of the chances of success. Settlement decisions are of course those of the client. The client decides his risk tolerances, the lawyer serves as a source of professional judgment independent of the risk. The form of engagement letter that emphasizes that we are lawyers, not business advisors or psychoanalysts is favored. But that does not mean that the lawyer advises on abstract problems. The real life problems the client faces may need to be translated into legal issues that can be answered. That is where we can add real value with our advice, analysis and product. And if that is what is meant by the value of business advice, all is well.

Keep up the good work.