

Insurance – Potential Conflicts and How to Handle Them

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Insurance – Potential Conflicts and How to Handle Them

- Insurance Policy
 - E&O Coverage
 - Coverage to firm? Coverage to Registered Representatives? Products Covered?
 - Retention
 - Policy Limits – per claim and aggregate
 - Type of Investment(s) at issue
 - Control Person allegations

Insurance – Potential Conflicts and How to Handle Them

- Initial Considerations
 - Representation of Broker-Dealer
 - Representation of Registered Representative and/or Control Persons
 - In-house counsel v. outside counsel
 - Division of retention between firm and registered representative
- Reservations of Rights Letters – covered vs. uncovered claims
 - A declaration by the insurer that it will defend the action, but reserves the right to contest the available coverage for all or part of the claim
 - Creates a conflict of interest
 - Commonly issued

Current and Future Claims; Multiple Reps

- Conflicts between current claims and future claims
 - Application of Retention
 - Desire of Insurer to Settle and impact on future claims
 - Assignment of insurance proceeds to investments that may have future claims
- Registered Representative Coverage
 - Registered Representative E&O coverage
 - Multiple claims exceeding policy limits – who gets the coverage

Avoiding Conflict With Insurers

- Although we are all on the same side, some conflict is inevitable, but doesn't have to be negative conflict
 - Submit claims in a timely manner
 - Be open about claims and potential claims
 - Ask questions about your policy
 - Be professional and courteous
 - Ask questions about reservation of rights letters
 - Keep the Insurer informed throughout the litigation
 - Express your concerns as to defenses or merits
 - Certain goals overlap
 - Have additional insurance policies

What Steps Can You Take to Be a Team Player with Your Carrier:

- Submit claims immediately and to all potential insurers
- Be proactive in providing support for your claim
- Be on the lookout for coverage issues and conflicts of interest
- Maintain copies of current and prior policies
- Evaluate whether it makes sense for the insurer to pay undisputed portions of a claim
- Request endorsements in addition to certificates of insurance
- Pay attention to insurance requirements and indemnity provisions

Conflicts of Interest and Best Practices

- When counsel represents the company and also represents employees there is an omnipresent potential for conflicts of interest, especially where the company cooperates with a government investigation or intends to do so
- Obtain a written conflicts letter/waiver (every conflict is not waivable)
 - OTR's
 - arbitrations
 - subpoenas
 - IRS summons
 - 8210 requests
- Regulators are becoming more focused on conflicts of interest

Conflicts of Interest and Best Practices

- Must review and analyze employment agreements and/or independent contractor agreements
- Firms need to understand that counsel must promptly withdraw from representation when it is clear there is a conflict
- The firm and counsel must preserve privileged communications/information occurring prior to withdrawal from representation
- Failure to promptly withdraw from representation when it is clear there is a conflict creates a variety of problems for the firm
- If it is determined that an employee or broker needs separate counsel, careful consideration should be given as to whether the firm should suggest a counsel and/or pay their fees (check bylaws, CBA)
- If a broker has retained separate counsel, ethical rules preclude interviews of those brokers without their counsel being present

Conflicts of Interest and Best Practices

- It may not be advisable for a firm to enter into joint defense or common interest agreement with the broker's separate counsel, as that could limit the firm's ability to cooperate with the government or regulators regarding disclosure of interviews if such cooperation is in the firm's interest. Potential issues/concerns:
 - Maintaining control of shared documents/information
 - Creating the appearance that an attorney formed an attorney/client privilege with other parties to the joint defense agreement who are represented by separate counsel
 - Failing to specify what happens to confidential information when a co-defendant's interest diverges

Conflicts of Interest and Best Practices

- Potential for disqualification:
 - Mutual joint defense agreement--promises of confidentiality if parties become adverse
 - Lawyers who are parties to the agreement when there are no present conflicts represents subsequently added parties. Trinity Ambulance Service, Inc. v. G & L Ambulance, 578 F.Supp. 1280 (D. Conn 1984)
- Some conflicts may not always be obvious

BUSINESS UNITS VS. COMPLIANCE CONFLICTS:

- What is a “conflict of interest”?
- Carlo V. di Floria (2012 Director, Office of Compliance Inspections and Examinations):
 - Defined “conflict of interest” during NSCP speech in October 2012.
 - “Where a person or firm has an incentive to serve one interest at the expense of another interest or obligation.”
 - Same definition can apply to conflicts between departments in a firm.
 - Business line has incentive to serve its own interest at the expense of the firm or other departments.
 - Compliance line has incentive to service its own interest at the expense of the firm or other departments.

BUSINESS UNITS VS. COMPLIANCE CONFLICTS:

- What does this definition really mean?
 - Serving the interest of the firm over a client.
 - Serving the interest of one client over another client.
 - Serving the interest of an employee over the firm.
 - Serving the interest of an employee over a client.
 - Serving the interest of a department over the firm.
 - Serving the interest of a department over a client.

BUSINESS UNITS VS. COMPLIANCE CONFLICTS:

- Examples of conflicts between business units and compliance:
 - Employee hiring / firing.
 - Product lines.
 - Supervision responsibility.
 - Client v. client conflicts.
 - Vendors.
 - Disclosures.

BUSINESS UNITS VS. COMPLIANCE CONFLICTS:

- Addressing conflicts requires multi-layered thinking by business units and compliance, collectively.
 - Legal requirements for conflicts.
 - Ethical conflicts.
 - Impact of conflicts without legal or ethical implications.
 - Impact on firm revenue.
 - Impact on employee morale.
 - Impact on firm reputation.
 - Internal.
 - Customers.
 - Regulators and industry.
 - Public.

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BUSINESS UNITS VS. COMPLIANCE CONFLICTS:

- How can business units and compliance conflicts be resolved?
 - Work together on addressing firm conflicts:
 - Ethics culture in firm.
 - Organizational structures.
 - Distributed model.
 - Centralized model.
 - No structure model.
 - Firm policies.
 - Firm procedures.
 - Incentive structures.