Law Firm Risk Management Alert

PULLMAN & COMLEY

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The Client Engagement Letter and the Dangers Of the "Accidental" Client

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A recent legal malpractice decision from the United States Court of Appeals for the Sixth Circuit provides a stark cautionary tale about the dangers for a law firm when the firm either neglects to send an engagement letter at the outset of representation, or does so without identifying which of the client's affiliated entities the firm will and will *not* represent. *Cohen v. Jaffe, Raitt, Heuer and Weiss, P.C.*, 2019 WL 1504393 (6th Cir. April 5, 2019)

The Background

Cohen and Chaffee are in the business of purchasing and selling distressed businesses. They began looking into possibly purchasing an outfit called LSI. In investigating the target company, they discovered that LSI had a potentially significant liability: an underfunded pension plan. They were justifiably concerned that if they purchased LSI, the company's existing pension liability might, under ERISA, be imputed to them as the new owners, or possibly to other companies they owned.

In consulting counsel at the defendant law firm about the potential purchase of LSI, Chaffee explained in an email message to one of the firm's lawyers one of his specific concerns about the deal: "We also want to be sure that we aren't personally liable" for LSI's pension obligations "or put our other assets/ companies at risk."

The firm's intake lawyer agreed to help the clients. He then assigned the matter to his firm's ERISA partner. That partner set up a corporate structure for Cohen and Chaffee enabling them to purchase LSI. In agreeing to take on the representation, however, the firm never sent a written engagement letter. Among the obvious consequences of that failure was the absence of any written confirmation of a critical component of any engagement agreement: identification of who exactly are the clients and therefor to whom the law firm

owes its professional obligations.

The Client's Affiliate Gets Tagged For A Pension Liability Of Several Million Dollars

Based on the incomplete intake information, the firm structured the deal to save Cohen and Chaffee from *personal* ERISA liability. Cohen and Chaffee then acquired LSI.

It turned out that Cohen and Chaffee were unable to turn around the fortunes of the distressed LSI. Worse yet, the federal government appeared on the scene, demanding a significant pension contribution from each of them personally. The government demanded an even bigger contribution to the unpaid pension obligation from a different company owned by Cohen and Chaffee called SSL Assets, Inc.

Claiming that the pension liabilities for which SSL was being tagged were precisely the types of exposure from which they asked their lawyers to shield them, Cohen and Chaffee sued the law firm for legal malpractice.

The Jury Finds the Law Firm Owed a Duty to the "Accidental Client"

At trial the law firm's defense was straightforward: not only had it never expressly agreed to represent Cohen and Chaffee's company SSL, the firm's lawyers had never even heard of it. But unfortunately for the firm, Chaffee pointed to the email message in which he had specifically advised counsel of his goal to protect "our *other* assets/companies" Not surprisingly, Cohen and Chaffee contradicted testimony of the firm's lawyers that the firm had never formed an attorney-client relationship with SSL. But even more significant, the firm's version of "who is the client" was unsupported by what every juror expects a law firm to have: confirmation in writing.

In affirming a jury verdict against the law firm, the Court of Appeals specifically noted that the firm "never sent a written engagement letter setting out exactly whom the firm represented." And that failure highlighted a separate risk management failure: by not making the effort during the intake process to learn the names of the client's affiliated entities, including SSL, the firm did not structure the deal in a way that could have protected the clients from the seven figure pension liability that the clients, in turn, successfully, laid at the feet of the law firm.

Law Firm Risk Management Lesson

In initially consulting with a client who may have ownership interests in various entities, make sure to identify each affiliated entity as part of the intake and conflict search process. Then, in the written engagement letter expressly confirm which of the entities will and will *not* be considered clients for the engagement covered by the letter. The absence of this critical component of any client engagement letter could very well lead to being saddled with professional obligations for an "accidental client."

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