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EVERESTS OF THE MUNDANE: CONFLICT OF INTEREST IN REAL-WORLD LEGAL PRACTICE

*Susan P. Shapiro*¹

INTRODUCTION

Perhaps the most fundamental difference between legal scholarship and social science is reflected in disagreements about what constitutes a “good” case and where to look for one. While lawyers usually turn to the decisions of the highest courts, social scientists are as likely to look at the lowest courts or, indeed, at agreements, injuries, misdeeds, and disputes that never make it to court—or even a lawyer’s office—at all. What is precedent in law, meticulously drafted in opinions, religiously cited by practitioners, enshrined in legal case books, and methodically dissected in the law school classroom, is deviance in science and relegated to courses affectionately called “Nuts, Sluts, and Perverts.”

While a law professor crafting scholarship, say, on conflict of interest in legal practice would probably sit in front of a computer screen, logged on to Lexis or Westlaw, this social scientist drove almost ten thousand miles across a single state to see conflict of interest as it is experienced on the ground. While I amassed many cases along my road trip, few of them look much like those analyzed by my counterpart collecting cases in the law library. Just as the social and natural world look different at the top of Everest than at the base camp, where explorers look for cases determines, or at least constrains, what they will find. It takes a lot to get to and survive on the top of the mountain, and many down below do not even aspire to make the climb. And others who do, never make it. In this Article, I share some sights from the base camp and reveal how discordant they are from the vast, intricate canvas meticulously crafted at the summit by legal academics.

You know, if we were absolutely pristine and followed the academic literature, we wouldn’t be in business.²

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1. Some material presented in this Article is drawn from my forthcoming book, *Tangled Loyalties: Conflict of Interest in Legal Practice*, published by the University of Michigan Press [hereinafter Shapiro, *Tangled Loyalties*].

Practicing lawyers do not make many positive statements about the prodigious literature at the summit, though they can usually cite one or two publications that they have found useful. The above quote from my interviews reflects a common sentiment among respondents that the literature is sometimes naive and frequently out of touch with what actually happens in daily legal practice. Many others expressed disappointment and frustration at how often they are unable to extract from the literature any practical guidance about how to deal with the difficult conflicts they face.

In this Article, I look at what respondents tell me were their "most difficult" conflicts of interest.³ Their stories represent the "cases" that I will examine. These problematic cases are the "Everests" of day-to-day practice—those that rise to the top—mirroring the cases that make it to the appellate courts and become the grist of the legal academy. Yet the mirror images are barely recognizable. As in a house of mirrors, the reflections cast by the two Everests appear misshapen and distorted. The distortions, of course, arise from what is considered a case and how such cases are collected.

Since I have argued that where one looks affects what one will find, I will briefly document the research design that determined where I would look for cases. Because of the dearth of basic empirical information on how conflicts of interest arise in legal practice and how lawyers respond to them, I planned an itinerary that would encompass the diverse settings in which private practitioners work. I restricted the journey to a single state, Illinois, to control for variations in each state's conflict-of-interest rules that might otherwise confound the results. I visited a random sample of 128 law firms, stratified by size

2. Interview #26 from a Chicago firm with more than 100 lawyers.

3. The fundamental tenet regarding conflict of interest is stated in Rule 1.7 of the Model Rules of Professional Conduct:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Prof'l Conduct R. 1.7 (1983). Of course, conflicts of interest are far more complex and nuanced than articulated in these simple rules. See generally Shapiro, *Tangled Loyalties*, supra note 1; Susan Shapiro, *When You Can't Just Say "No": Controlling Lawyers' Conflicts of Interest*, in *Social Science, Social Policy, and the Law* 322 (Patricia Ewick et al. eds., 1999).

and location,⁴ to insure that firms of all sizes in downtown Chicago, Chicago neighborhoods and suburbs, and in large, medium, and small communities downstate, as well as those that offer the only legal practice in town, would be represented in the study.⁵ A stunning 92% of the firms selected actually participated in the study. As a result, concerns about non-response bias—the possibility that firms included in the study are atypical (for example, have less to hide about their conflict-of-interest experience)—are minimal.

In each firm, I interviewed the person or persons with most responsibility for conflict-of-interest issues. In large firms, respondents were usually the Chair of the Conflicts, Ethics, Professional Responsibility, or New Business Committee. In smaller firms, respondents often served as Managing Partner, a member of the Executive or Management Committee, or a name partner. Interviewees were questioned about whether, how, and to what extent conflicts of interest arise in their practice, and how their firms identify and resolve potential conflicts. Their responses drew on their personal experience, as well as on experiences in their role as ethics or conflicts czar or firm administrator. Ninety-seven percent of the interviews were conducted in person, and more than three-quarters were tape recorded and subsequently transcribed. On average, interviews ran an hour and a quarter.

The interviews yielded a wealth of information, not only on conflict of interest, but on clients, the social organization and economics of law firms, firm governance and self-regulation, intra-firm conflict, malpractice insurance, legal careers and mobility, the marketplace for legal talent, social networks, social change, legal communities and

4. If I had selected my destinations purely randomly—say from a list of registered lawyers in the state—I would have spent almost three-quarters of my time in Chicago's Cook County and with either solo practitioners or lawyers practicing in larger firms, since that is how lawyers in Illinois cluster. See Attorney Registration and Disciplinary Comm'n of the Supreme Court of Ill., Annual Report, at 5 (1995); Barbara A. Curran & Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s*, at 83 (1994). Stratified sampling insured that significant, but less common, structures and loci of legal practice would be included in the study.

5. Because of this stratified sampling design, the sample is not statistically representative of the population of Illinois lawyers. However, the firms were selected randomly; those in a given cluster had an equal probability of being included. The sampled firms, then, do typify the population of firms in the various clusters from which they were drawn. While the 128 firms comprise less than 1% of the law firms in the state, they do encompass a much more sizable number of practitioners. About one fifth of the lawyers in Illinois work in firms included in the sample. My findings bear, then, on the experience of a sizable proportion of private legal practitioners in Illinois. Moreover, because a number of the larger firms have branch offices in other states or are themselves branch offices of national law firms headquartered elsewhere, I learned a bit about conflict of interest in other locations and under different legal regimes. I also conducted a number of pilot interviews in large law firms in two other Midwestern states. For more detail on the research design as well as on the ways in which Illinois may be atypical of other states, see Shapiro, *Tangled Loyalties*, *supra* note 1.

cultures, the structure of expertise, even substantive law. I learned in exquisite detail the varied ways in which conflicts of interest arise in different kinds of law firms and practices. I also learned about: how firms seek to avoid conflicts, how they identify potential or actual conflicts, evaluate them, resolve them, interact with clients and adversaries over them; firm self-regulatory structures to deal with conflicts; the distribution of expertise within the firm in ethics and professional responsibility; the influence of malpractice insurers; regulatory failures; the legacy of conflicts of interest on hiring, law firm growth, substantive specialization, intra-firm discord, and the like. I also gained perspective on how this has changed over time.

But here we explore only lawyers' descriptions of their most difficult conflicts.⁶ Of more than one hundred accounts offered in the interviews, only seven make questions of law or legal interpretation problematic. Four of these problematic accounts described cases that raised questions about who may be deemed a client, two concerned when a client can be considered a former client, and one addressed which of several sets of contradictory conflicts rules applies in a multi-state transaction. The other 95% of the cases involved clashing interests that aroused wrenching business or client-relations problems or irate colleagues, not questions of law. Two respondents explained:

The complexity of the conflict law is there and it presents a problem. And we're lawyers; we can deal with those things. You make decisions. Sometimes you're right and sometimes you're wrong, as the cases decide later. But you make decisions. The toughest part of the job is the personal part of the job—either from the client or from your partners—where they absolutely either do not understand or refuse to understand what's going on. In the substantive areas, though, there are areas that are tougher rather than easier because there's no clarity in the law. So, it's hard to advise your client or your partner. . . . The law is unclear in many areas of conflicts. And because it's unclear—like it is, maybe, with the Internal Revenue Code or any other substantive area, the Uniform Commercial Code—your job is made more difficult because you have to advise based on unclear principles. But that's what lawyers do. Again, my hardest job is not to do that. We can ferret out and make our judgments. My hardest job is to deal with the personalities and the individuals who just don't seem to be willing to regard that as a significant part of the practice of law—either the client or the lawyer.⁷

The most difficult ones tend to be the business conflicts rather than the ethical conflicts. The ethical conflicts are in a way easier to manage because you have the source to look to. And, once you

6. See generally Shapiro, *Tangled Loyalties*, *supra* note 1, for a complete discussion of research results.

7. Interview #11 from a Chicago firm with more than 100 lawyers.

have an answer, the lawyers . . . can't really argue with it. It's what the rules are and they're obliged to follow them. I know there are some instances where we might get an absolute disagreement and then maybe we'd have to get an opinion. The much harder ones are the business conflicts. Because you're trying to manage a business and enhance its profitability and we just have situations where it's very difficult to satisfy these competing interests.⁸

When firms must decline a new matter because it poses a potential conflict of interest, neither clients nor the lawyers who hoped to undertake the representation are especially happy. Ongoing clients often consider this a betrayal or a breach of loyalty, resent having to bring a new law firm up to speed to represent their interests, and suspect that their lawyers are somehow advancing the interests of their adversaries.

L1:⁹ My toughest conflict situation is the entrepreneur who cannot fathom why you cannot represent him and why you have to have him sign this letter that he cannot understand, and doesn't know what it means, and doesn't want you to explain what it means. And [he] says . . . "Joe Jones in my office has been my lawyer for twenty years. What do you mean, because you represent Prudential, he can't handle this loan that I'm getting from Prudential?" . . . He doesn't want to know about the concept of legal conflicts. He doesn't care about the concept of legal conflicts. The lawyer . . . dreads the possibility of losing his favorite client over this. And so there's great economic and personal pressure brought to bear on us. . . . That's the hardest thing for me to deal with, because you're dealing with a partner who is antagonized by it; you're dealing with a person who really refuses to understand the issue or see it from the ethical side and thinks that we're just blowing smoke. . . . It's a no-win situation somehow.

. . . L2: . . . But let me tell you the flip side of that too, in terms of dealing with somebody who's very, very sophisticated. I had a situation—now, about a year ago—where one of our partners came to me and he says, "I have this problem. I represent a corporation—a national. . . international corporation—very sophisticated. They want to sell off a piece of property, and they found a buyer." There was some plant downstate somewhere and they wanted to get rid of it and they were happy to find a buyer. The buyer was all set, and we were going toward the closing and he lost his financing. The client wants to sell this property. It just wants to get rid of it. So the client said, "I'll help you find financing." They looked around and they found a sibling corporation that is also an international corporation—tremendously sophisticated, etc., etc.,—that is in the lending business. And they said, ". . . We will provide the financing,

8. Interview #7 from a Chicago firm with more than 100 lawyers.

9. In these dialogues, "L," "L1," and "L2" all indicate statements by a lawyer/respondent. "S" is the author.

if the seller corporation guarantees the loan.” So the seller corporation said, “Yeah, fine, we’ll guarantee the loan.” And then they come to my partner and say, “we want you to document that guarantee.” So he says [to me], “you tell me I shouldn’t be on both sides of a guarantee. Here I’m on it. What are we going to do?” So I said, “Well, let’s just tell them that we don’t want to end up representing a lender and a borrower, a guarantor and a guarantee type situation. We don’t want to be on both sides. And just tell them that.” He’s dealing, you know, with two in-house counsel—one from each corporation—and they’re both wholly owned by a parent corporation. So, he goes back and says, “. . . Tell the lender to get somebody else to represent them on the guarantee. We’ll do everything but the guarantee. And they can just have somebody do the guarantee.” And the lender comes back and says, “No, I think this is ridiculous. Why don’t you people do it?” You know, and this is a lawyer! And so we said, “We just like to avoid situations like this. We think there’s this conflict there and we’re questioning whether it can be waived or not. We just don’t want to do it. We want to avoid doing it.” So, he comes back to me and says—this is the lawyer from the lending corporation—he says, “well, there’s a whole slew of case law that, for purposes of conflicts, you should consider affiliated companies as one company. Therefore, how can there be a conflict because we’re all one company for conflict purposes?” And the bottom line was, I said to him, “listen, there is a reason you want this guarantee. And you can tell me ‘til you’re blue in the face that it means nothing; that we’re mere scribes; there’s no implications to it. To me, the very fact that you want this indicates to me that it’s of significance somewhere in this corporate structure of yours, and that there’s a conflict looming there.” Now, meanwhile, my partner’s going berserk. You know, “what are you doing? You’re hurting my relationship. . .” Everything. But, eventually, in-house counsel agreed they’d do the guarantee for the lender. And we handled all other aspects of it.¹⁰

We were approached to represent a corporation in an action arising from a water pollution situation. Our understanding was that we would represent the corporation in a CERCLA action by the government for the clean up. And the information that was transmitted to the partner postured the case that way. The underlying facts were transmitted in a phone conversation to that partner, the details of the engagement and the representation were to follow by correspondence. The partner took pretty detailed notes of the phone conversation—which is typical—and opened a general file for the client, who we had not done work for in the past. Work got to us by referral from another lawyer. We opened the file—that is, we created a repository and billing codes and all those kinds of things—and waited for the correspondence to come in. What came in was a fairly large package of information which the partner who took the phone call went through and found out that, in fact, the

10. Interview #11 from a Chicago law firm with more than 100 lawyers.

underlying Superfund case, while going on, was not what we were being engaged for. We were being engaged to represent the corporate interest against . . . other potentially responsible parties, one of whom was one of our clients. This action was intended to be brought quickly and quietly. And we were now in a pickle. . . . We had to just decline the representation. The trouble was, conversations—engagement conversations—never tend to go one way. And so I had to interrogate—almost like on deposition—my partner as to what he said to them. I was convinced he hadn't disclosed anything to the existing clients adversely. And then I told them that we would have to send this back and we wouldn't be able to take it on the other side. And I knew we would get it on the other side. So, I had to put that screen in place, and did. Then, I had to go back to the other client and nicely tell them that they had inadvertently misrepresented the engagement to us, but had put us in a conflict situation and we could not take the case. And then had to document the fact that the knowledge in our possession would be never disclosed and send everything back to them with assurances that no copies had been made. We then did get the call on the other side a few weeks later and told them we could not take it, without comment, just couldn't take it. They were not happy and suspected that we had something to do with the other side. And I thought we could not even disclose to them what those conversations were. We simply had to say that there was a conflict situation. Over time it got smoother. But it was not that smooth at the beginning. They were not satisfied with the answer, "We can't take on their representation." Because the question was "why?" And the pressure it got, it built, it went higher in the company and higher and finally the general counsel said, "why can't you do this?" And the other partner and I had a conference call and said, "because it would put, potentially, put us into a conflict situation with you which we think we need to avoid. Period."¹¹

Lawyers fear that a disgruntled client, sent to another firm because of a conflict of interest will never return.¹² They are especially unhappy when the inability to bring in this new matter and the risk that they will lose the client on future engagements will register negatively in their annual compensation—as it does in most firms.¹³

L2: The greatest problem for me . . . more so than the issues, are the people. Because they want the case and they want their fees and

11. Interview #27 from a Chicago firm with 50-99 lawyers.

12. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 9.

13. For an explanation of how law firms arrange their compensation systems, see: James D. Cotterman, *Compensation Plans for Law Firms* (2d ed. 1995); William Kummel, *A Market Approach to Law Firm Economics: A New Model for Pricing, Billing, Compensation, and Ownership in Corporate Legal Services*, 1996 Colum. Bus. L. Rev. 379; Joseph B. Altonji, *Bonuses and Thresholds, Accounting for Law Firms*, Sept. 1996, at 4; Jeff Coburn, *Even If It Ain't Broke, You Can Still Fix It: It's Time to Tune-Up Your Partner Compensation System*, 3 L. Firm Partnership & Benefits Rep. 1, 1 (1997).

they don't want to give it up, no matter what's at stake. And I'm on the low end of the totem pole, so that's why it's difficult, but . . . The issues are really not difficult at all.

L1: . . . There are no difficult conflicts. There are painful conflicts. When you have to tell a guy that he can't get . . . or you have to tell your firm that you can't have this case, which is going to generate, you know, you anticipate it's going to generate 3 or \$400,000 in fees. That is a sad day. But deciding it ain't easy . . . is not hard. . . . And you have to come to accept the fact that you're just going to have to say "no." And that may mean that you don't get 300 thou. But that's life. Tomorrow's another day.¹⁴

I mean, the difficult ones are when you have to tell someone that they can't do it, they just can't do it, that this is a matter in which, even if everybody agreed, you still couldn't do it. And lawyers don't like that. I'm not sure the clients much care for that. But we've had instances where people have wanted us to represent both sides of the transaction. Even where it's a relatively friendly transaction. . . . And we generally take those and we will simply not be on both sides of the transaction. It doesn't matter whether everyone's consented. As far as we can tell that's just prohibited by the rules, no matter what. And so that's the hardest to deal with because you're basically saying you must turn down this work; you cannot do it; you must go find someone else to represent your client; you must not be involved. And then there is sort of the internal bickering over, well, if you can't represent both sides, can we represent one side? And, in most cases, the answer is "yeah, we could do that." Then you go fight about which side it's going to be. And that's very difficult where the parties are both important clients. It may be even worse that we introduced them and so we brought about the transaction and now can't be involved in the transaction. In some cases—though those are rare—we've taken the position you can't be on either side because the clients involved were too important to the firm. Sort of backwards what you might normally think. . . . And, therefore, we could not really adequately represent either side . . . against the other. And so you had to back off totally. It's not the nature of the conflict itself that's more difficult to deal with. It's really the client relationships and attorney relationships that make those more difficult.¹⁵

Respondents lament that choosing between the client of one partner over that of another represents a major source of intra-firm dissension and conflict. While about a third of the respondents working in firms of less than one hundred lawyers described collegial discord stemming from conflicts of interest as at least an occasional problem, this was true of nine-tenths of those in firms of one hundred

14. Interview #6 from a Chicago firm with more than 100 lawyers.

15. Interview #28 from a Chicago firm with 50-99 lawyers.

attorneys or more, where conflicts of interest are much more common.

But, however painful the process and unpleasant the antagonisms, firms decline cases all the time.¹⁶ Though the majority of respondents echoed the sentiments expressed above and worried about handling the personalities of colleagues and clients when the occasional new engagement gives rise to a potential conflict of interest, few would characterize such cases as their most difficult. They are just too common. Conflicts become especially problematic when lawyers cannot simply walk away, however reluctantly, when the nature of the case or the structure of their practice paints them into a corner and moving in any direction detonates yet another conflict or antagonizes another client. Five scenarios came up frequently:

I. THE DENSITY OF FIRM CLIENTELE

A number of firms “enjoy” geographic, substantive, social, or cultural monopolies. They are the only lawyer in town or the only divorce or corporate lawyer in town; they are one of a handful of firms with expertise in a specialized body of law; or they are one of only a few attorneys representing an ethnic enclave in the community. As a result, their clients appear all over their caseload—they are adversaries, witnesses, victims, co-plaintiffs or co-defendants, creditors to the same bankruptcy; they hope to consummate transactions together or to undo them. Firms serving such dense communities of clients face continual conflicts of interest and enormous difficulty extricating themselves when the interests of one butt up against those of another. A few examples from the interviews illustrate the tension.

(1) A solo practitioner and the only lawyer in a town with a population of roughly 3,000 is also one of the only criminal defense lawyers in the region, representing most of its criminals, many of whom are repeat-players and often adverse to one another:

And our law enforcement in this area, their form of investigation—

16. Large law firms encounter dozens of conflicts of interest every week, some of which can only be resolved by declining the prospective engagement. The managing partner of a Philadelphia law firm of roughly 200 lawyers (not included in my study) observed: “My theory is that, of every three phone calls I get, I get to take one on as a client. I’ve always said that somebody could have a law firm about the size of [this firm] just taking on our conflicted representations.” Harvey Berkman, *Sidelined by Client Conflicts*, Nat’l L.J., June 2, 1997, at A1. Respondents from two very large firms in my study estimated that, because of conflicts of interest, their firm turned away a third to more than half of all cases; another two large firms are conflicted out of tens of millions of dollars of business annually. A few firms in the 35-100 lawyer range declined hundreds of thousands to a few million dollars in fees each year. Respondents from a few other firms of varying size estimate that their firms decline five to ten percent of their prospective business because of conflicts of interest. Even a ten-lawyer firm in a small town loses \$100,000 to conflicts each year.

and I shouldn't say all law enforcement, but the county officers' form of investigation—is to get a confession. Barring that, the crime is not solved. You know, it's really sad but . . . they get this confession by whatever means, and, after that, then they look for some corroboration evidence. Sometimes they do and sometimes they don't. And the problem is, because they rely so heavily on that, as opposed to other forms of investigative work, they are willing to trade with the criminal defendants for that. They'll often tell them, "well, look, if you'll do this for me, . . . we'll make you a deal on this case, or something like that." And, often times, I'm not even privy to that until after I'm already involved in representing [someone] in one case. Then this person says—after the fact—that, "gee, he's asked me to do this thing." And then I discover, while in the midst of this, that one of my guys is going to be giving a statement against another one of my clients. In a real rare circumstance, it almost comes too late to know. . . . I recently . . . was trying a murder case here. And, on the eve of trial, two of my clients that I had represented previously— . . . they'd been sentenced or were scheduled to be taken to the Department of Corrections—made statements against a third client of mine in the murder case. . . . I really found myself in quite a dilemma. Because I saw these young men being taken up there to get these statements. And I asked to speak to them and the officer wouldn't let me speak to them at the time. And then, when I'd go back up to the jail to talk to him, I'm advised that they don't want to talk to me. Now, you know, in the scheme of things, I guess I had mixed loyalties there. Because, on the one hand, I'm still in active representation of a client who's charged with murder, and that's a real serious concern for me. But, on the other hand, these guys are making statements—and they're headed to the Department of Corrections—that, if they make 'em, the likelihood of them coming out of the Department of Corrections alive is not great. And, obviously, law enforcement's not telling them that. But, you know, I was almost in a Catch-22 situation. I couldn't get to them to say, "Guys, it's probably not in your interest to say this." And then I almost have a conflict by saying that, because I'm really trying to help my other client. Really never materialized because. . . . I never got to see them anyway and they went ahead and made these statements.¹⁷

(2) Substantive or technological expertise provides a magnet to attract clients from related industries that often harm collectively—by dumping pollutants in the same place, producing dangerous products with related or integrated components, constructing precarious edifices together—and are accused collectively.¹⁸ Firms that defend parties implicated in construction accidents, for example, face the same local cast of characters from accident to accident, but often

17. Interview #126 from a firm with fewer than 10 lawyers in a small town downstate.

18. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 5.

defend different parties from one case to the next.¹⁹ Because large-scale construction projects—especially on the scale of Chicago-style architecture—require the contribution of so many tradespeople and contractors, an accident will typically collect a host of potentially responsible parties, many of whom are long-time clients of a specialist defense firm.²⁰ The social structure of construction projects creates repetitive and thorny conflicts for defense specialists. With some remorse, one respondent described the quagmire he faced when he chose to stop representing a company he felt did seriously substandard work, but continued to work on behalf of other construction companies. He found himself practically foreclosed from representing any co-defendant of the company from which he sought to part ways.

One of the things I do in my products work is I represent a lot of different construction companies. And I represented a company in a number of actions, where stuff that they had put on buildings had fallen off. One building collapsed, another building was in the process. . . . And I firmly believe that our job is to represent our clients' positions as best we can. But, the deeper I got into . . . one of the cases for them, the more I recognized that there was really. . . . Just from my standpoint, this was not a client that I was happy with the way they had done this. . . . It was clear to me that their work was substandard, to say the least. The attorney on the other side was maybe not the brightest person in the world, maybe not even the best lawyer. And, because of some technical mistakes that he made really during the trial, . . . we ended up paying nothing. . . . And so the company was very happy. I did not want to represent these people again. The more I looked at it, the more I became convinced that there really were some, if not criminal wrongdoing, it was very close. I didn't think it was my position—I was representing this client—to go into details about this and start doing investigations into. . . . That was somebody else's job. But I didn't want to represent them again. Well, a case came down the road—a similar type of construction—and one of the subs [i.e., subcontractors] wanted me to represent them. I got involved. At the same time this company again asked me to represent them and I refused. . . . Because I had so much information on them as far as their erection methods, they felt that that applied to all cases in the future. I did not. I mean, to me, when you [put] up a building, each building is different and. . . . However, we got into quite a little fight over that. . . . And first they tried to get me back involved in the case for them. Then they were willing to take—if I represented the other people, if I would represent them as well—they were willing to waive any potential problem there. And then, when I said I just simply didn't want to do it any more, then they got a lawyer and tried to disqualify me from the other, representing other people. I

19. *Id.*

20. *Id.*

refused to withdraw in that case for a lot of different reasons. And we got into quite a little fight over that. Those kinds of things can be difficult, particularly when you've decided you sort of reached the end of representing a client. Does that mean you're not going to represent anybody again in litigation that involves them? Particularly in the kind of work we do, that can be . . . Construction cases, it's all the same people, over and over again. . . . And that can be a problem.²¹

(3) Thorny conflicts of interest also arise for lawyers who concentrate on serving members of particular social networks such as ethnic groups. Many ethnic group members live together, cluster in the same industries, work together, transact business together, socialize together, and intermarry. Hence, the potential for disputes between group members is quite high. Where the supply of lawyers of similar ethnicity is low, monopolies develop that ensure that these attorneys will face an inordinate share of conflicts of interest. A few Chicago respondents serving ethnic communities from different corners of the globe acknowledged that they faced such conflicts. They explained how true adversities of interest were made even more difficult by engagements that threatened merely social rather than fiduciary ties and by rigid conceptions among clients of loyalty and exclusivity, coupled with the high visibility of their practice to ethnic group members. One respondent explained:

But, you know, in the [ethnic group] community, it's a small close-knit community of businessmen. . . . It happens, probably four or five times a year, at least, that we have existing clients doing business with each other. And, generally, the clientele we have is very insulted if we even suggest that they seek another lawyer. So, we have to be careful how we present things. And we usually end up referring them out if there's going to be a real conflict. If we're trying to structure a business conveyance of a restaurant or a banquet hall or a manufacturing company or something like that, then we're very careful. And we try to, at least, explain to them that there is this potential for a conflict. Sometimes, they just refuse to get other lawyers. . . . And they try to count on us to be fair, which is not something we ever want to try to do. But, it's an unusual situation. I don't think many other lawyers have that problem in

21. Interview #33 from a Chicago firm with 50-99 lawyers. The respondent describes the outcome with unusual misgivings:

. . . I guess in the sense that we ended up staying in the case, it worked out all right. But . . . it didn't in the sense that it was a very ugly little situation. And, probably, it should never have occurred, I guess, in retrospect. Maybe I wouldn't do it in the same way again. I guess I was vindicated but, you know, that kind of vindication, at the end, is sort of hollow. The question is whether you were doing the right things all along, and I don't know. . . . I guess you make your decisions as you go along. I really don't think there was a conflict. The court agreed. But it was certainly a situation where it probably could have been avoided.

their practice. . . . a lot of times, I have just refused to get involved in things, because I know that there'll be a line of demarcation drawn between two groups. And I'll have clients in both groups. And I won't want to put myself in the middle. And that happens frequently, too.

I'll give you a story. . . . Just so you can have a kind of. . . a little bit of an insight as to how they think—how the [ethnicity]-American businessmen think. I represent a guy I went to high school with who was born in [country of ethnicity]—an immigrant—from time to time. He buys out his partner in a restaurant. There is some fraud involved in concealing certain debts in the restaurant. The partner that he buys out, his daughter is a dentist. She and her husband are my clients. She is a good friend of my wife's. The two partners—the two brothers that eventually buy this other gentleman out—come to me and want to sue the withdrawing partner, the withdrawing shareholder. I tell them I really can't do it, because I felt I had a conflict because of the close relationship I have with that gentleman's daughter being a client and because of the amount of times I see him socially during the course of a year. Well, they went to another lawyer who eventually referred them to a person that's of counsel to our firm, who has the office next door. He went on vacation one time, and some emergency matter came up, and I went—even though there was no technical conflict—I went to court to help him out. My name appeared on the other firm's billing statement to the client. The client saw my name, told his daughter and his son-in-law that their lawyer was trying to hurt them by hurting him. And it created a little bit of a tense situation with existing clients. Eventually the of-counsel lawyer came to odds with the two clients he had. They came back to me looking for me to get involved in the case. To which, for the second time, I invested another three or four hours explaining why I couldn't. To which they were very unhappy with me.²²

(4) Many of the lawyers practicing in small towns face the same personal struggle created by their dense network of clients. Nearly all of them spoke at length of the difficulties of being entangled in disputes involving life-long friends, neighbors, the parents of their children's friends, the members of their church, and divorcing spouses. At an institutional level, they spoke of disputes between the city and other municipal institutions, the local bank, the local newspaper, the hospital, the doctors, the major businesses, many or all of which they

22. Interview #121 from a Chicago firm with fewer than 10 lawyers. This respondent did not characterize this example as a "most-difficult" conflict because so many of his conflicts of interest have the same features. Rather, he blames the dense ethnic network he serves, the fact that so many of the transactions, accidents, and disputes of his clients are with other members of the ethnic community, the inflexibility of his clients to seek other counsel, and the fishbowl-like existence in which he practices as the source of his most wrenching problems, of which there are many.

represent. Home-grown lawyers suffer a bit more when they add to the relational burden the depth of these ties, reflected in the fact that they went to high school with these people or were close friends since grade school, once dated their children or siblings, had dinner in their homes, or called them “aunt” and “uncle.” This embeddedness in the social networks of clients and adversaries is not unique to small-town life, of course; my interviews contain examples from Chicago practitioners as well. But the ubiquity of the problem is clearly unique as are the difficulties that result from the fact that, not only are lawyers more likely to be embedded in the social networks of their clients, clients are also more likely to be embedded in the social networks of other clients (as in the first example of the criminal defense lawyer).

How do small-town attorneys respond to this constricting web of social ties? Some took to the roads, fleeing the dense loyalties and relationships in which they were entangled:

S: Do you worry a little bit about—as your practice expands—that you’re going to be conflicted out of everything?

L: Um hm. . . . That’s why the attorneys in the smaller towns spread out and go to different surrounding counties. Like I’m trying to expand down into [adjacent county to the east] County and [nearby county to the west] County. And I do a lot of work over in [adjacent county to the north] County, where . . . I don’t know anyone. [Town about 25 miles away], the same way, and [adjacent county to the west] County and, you know, I don’t know as many people over there—I mean nowhere near as many people. And, if two people come in—or a person comes in to me—there’s probably a 90% chance I don’t know them, never heard of them, and don’t know the other side either. . . . a gentleman downstairs, he’s an attorney; he’s in sole practice. He lives in [a nearby town] and practices here in [this town] and enjoys it because he doesn’t have a lot of these conflicts like I do. Where, if he practiced in [the nearby town], it would be similar to me practicing in [this town].²³

After reflecting on these burdens, another respondent suggested:

Sometimes you think the perfect situation would be to live a hundred miles away from where you practice. I think maybe city lawyers have this advantage, where they can separate their social life much more from their practice to some degree. In many cases, they can, I suppose. Say you’re a high-powered anti-trust litigator in a Chicago law firm. You probably live in the suburbs somewhere. So you probably don’t have any connection at all in your social life—your children’s family life, etc.—with your practice. Whereas, in a

23. Interview #112 from a firm with fewer than 10 lawyers in a small town downstate.

small town, everybody knows you, and knows you're a member of that law firm, and it permeates everything you do.²⁴

(5) Aging provides another trajectory for amassing difficult conflicts. Older transactional lawyers, especially those who represent family businesses, often become entangled over the years in the social networks of their clients, just as if they inhabited a small town.²⁵ As family businesses and family members face crises and new opportunities, as clients marry, divorce, remarry, and reproduce, as they age, retire, and die, as businesses grow and undergo succession planning, lawyers come to represent additional branches of the family tree and new generations—some with incompatible interests. Neither of the following stories, told by two septuagenarians, was described as “*the most difficult*,” rather, they were recounted as archetypes of the difficulty the respondents continually face, given the nature of their practice. The senior partner of one of the largest firms in a large city downstate recounted the first story, with genuine angst.

L: I had a business where I represented them for, why, I'll bet you thirty, forty, fifty years. The principal stockholder wrote his will and rewrote his will, and everything else. And we worked up a way that the employees could buy out the business as they went along. And the man died. And it ends up that the executor decides we have a conflict and they retain another lawyer. And when we try to represent the business, why, they say that we've got a conflict because we know too much about it, and so forth. So we withdraw. We end up no longer having the estate, nor representing the business. And everybody on both sides are angry at us, because we haven't completed what we had done along the way. And you have a sense of, “gosh, it's a shame!” . . . And it was a matter where—over the past two years—the principal had been in the hospital thinking that he was dying and calling me up on the phone. And, “[names himself], I want to change my will. And I want to be sure that this is done.” And we're rushing up to the hospital to get his information and getting a codicil executed and that type of thing. And holding his hand and doing the whole thing. And then—there it's gone. . . . You see, that's the type of business that the lawyer could very well fall into in a community of this size—if you do represent a small business and you know the family and they look to you. You're their counselor. They tell the other members of the family, “There's a question? Call [names himself].” It's just that simple.

S: And were you to say—when they call—“I can't talk to you because I'm not wearing that hat?”

24. Interview #97 from a firm with fewer than 10 lawyers in a small town downstate.

25. Shapiro, *Tangled Loyalties*, *supra* note 1, at chs. 2, 4.

L: They'd be shocked. "You can't do that!"²⁶

The second account, from a small Chicago firm, involves a more complex family business, with three generations, multiple siblings, in-laws, and cousins, some in the business and some not, with very different needs and lifestyles, and a lawyer who has been serving the business and various members of the family for almost forty years.

L: . . . I have lots of conflicts when I represent family businesses and every member of the family. And they're all shareholders and sometimes two or three generations. And their interests are different. They're not really technically adverse, but occasionally they get to be adverse. . . . if there develops a real hostile situation, then I can't represent anybody. But, normally, I'm a sort of "godfather" and everybody knows that I'm representing the grandfather and the grandchildren and the business and so forth. And there's nothing very formal about it. I haven't had much trouble with it, mainly because there's been peace. Occasionally I'm put into family situations because there's a conflict—and I'm totally neutral. But, more often, it's a business that I've represented for thirty-five, forty years. Just per force they turn to me and, occasionally, conflicts. If it's ever a real conflict—in the sense of hostility—I don't serve anybody. I just say, "I'll represent the business if you want me to. You guys go get separate lawyers." It hasn't happened often. I represent one company where I represent every member of the family. I'm trustee of shares in a trust under a will. I'm trustee of a voting trust. I really am—for all practical purposes—control of the company. And I've never exercised it. And, if they have a fight, then it gets resolved that I'm representing the company. But, you know, their interests aren't all the same. Because, when you get down a generation, some of them need money, some don't need money. Some are rich, some are poor. Some want to see the company grow, some want more money out of the company. . . . Those are relatively hard situations. But I just simply don't act. I let them sort it out and work it out. . . . The members of the family are a mother and five daughters. The husband of one of the daughters runs the business. The amount of his salary and bonus is an inherent conflict because, the more he gets, the less there is left for the others. In fact, that's how I first got hired. They were in a fight over his employment contract—whether to pay dividends or leave the money in the business. It was a conflict in the sense that people have different needs. . . . Well, originally, they resolved it with a whole bunch of lawyers. And then they made peace and there's been peace ever since. When the mother dies and the "girls"—as I call them; they're all over sixty. . . . fifties and sixties—become the real parties in interest, they may have a fight. Some may want to sell out. Should the corporation buy? Should other shareholders buy? Some may think, "well, we'll get our best money by selling the whole business to somebody else."

26. Interview #54 from a firm with 20-49 lawyers in a large city downstate .

The husband of the one daughter who runs the business now has his son in the business and none of the cousins is in. There could be some tension. I don't know if there will be conflict.

S: And who would be your client at that point?

L: Well, my client, per force—just by time—is the business and the son-in-law who runs it, cause—and his son. Cause those are the people I deal with every day—every day. I could end up with no client. I'm sufficiently conflicted. And if any of the daughters object to my continuing to represent the company—because I'm really the president's lawyer... He had a separate lawyer 'til about three years ago, four years ago. He did all his personal stuff. But I'm terribly identified with him at this point, because I work for him. ... When the mother dies—this is the goose that lays the golden egg—for the first time, the girls will have significant income—which now goes to the mother mostly. And that cures lots of things. You know, a school teacher will have 50, 60, 70,000 dollars in additional income. Chances are, she's going to be pleased. But they may not. They may decide, "well, the other guy gets salary first. It should come out of his piece or her piece." It's easy to have problems. I'm hopeful we don't. They've been very successful with the operation. The problem with the business—it's kind of interesting—is the son-in-law—the head of the business—was brought in by his father-in-law. The father-in-law ran a [describes business]... almost a junk business. This guy has converted the thing to a [describes business]. Huge success. It has no relationship to what the father-in-law started. His reality is he made this business. The girls' reality is he fell into this business. Her father set him up in the business and, but for that, he wouldn't amount to anything. That's a conflict. And it surfaces all the time. I happened to be at [an] eightieth birthday party of the mother-in-law of one of the girls—who happens to be a client of mine—unrelated to this. And I'm very friendly with this daughter and her husband. So, I said to her, "is it more peaceful than it used to be?" (It clearly is.) And she said, "well, there's never going to be peace as long as he—the president—gets so much more than we get." And she's married to a lawyer... who is very successful and she doesn't need the money. I think she's half talking for herself, but mostly talking for two or three of her sisters who are—not poverty—but poor under any comparative basis, say, to the president and to this girl... So, you know, that conflict is not my conflict. But, as long as I'm sitting there, I could be conflicted if they get into a fight. You know, if this girl, for instance, said to me, "well, you represent the president. I really don't want you in this argument," I'd have to get out. No question about that. Whether I should on my own initiative... It just seems to me it's working so well. It's crazy. But I'm very, very conscious of that kind of conflict.²⁷

27. Interview #80 from a Chicago firm with 10-19 lawyers.

II. THE PASSAGE OF TIME

Just as conflicts become more intractable as lawyers age, they also do so as cases ripen. Conflicts almost always become worse with the unremitting passage of time. Things change over time, things about which lawyers may bear no responsibility or have any knowledge and that they never could have anticipated.²⁸ Though engagements begin with no actual or even potential conflicts in sight, something happens down the road, often far away from the purview or activities of the lawyers, that detonates an unforeseen conflict of interest. Organizations continually hire and fire personnel, add or lose members or partners or offices, change their owners and directors, expand or downsize, raid the competition, gobble up other organizations or get gobbled up themselves, divest less productive divisions, declare bankruptcy, make, break, and restructure alliances. Respondents offered numerous examples where personal or corporate marriages, divorces, and reconfigurations scrambled client interests and their firm was caught in the middle, championing incompatible interests with no easy way to escape. For example, midway through an engagement, a corporate client acquires or merges with another. Suddenly the law firm is sitting on both sides of the bargaining table or suing its own client.

L1: Last year, we had to, in a particular engagement, turn down a longstanding client of the firm—an ongoing matter—seek replacement of counsel. . . . This was a three to four month negotiation process between two longstanding clients of the firm . . . on a specific matter, where we've been representing one client in connection with a contract negotiation—basically with a contract which was falling apart. There was a potential for litigation. There was another corporate client on the other side. Wasn't originally on

28. In the "old days," law firms would probably know about major changes in the structure, operation, or interests of their clients, because they usually engineered these changes. Today, because clients are less likely to engage a single firm as their general counsel, instead parceling out their legal business to various law firms, their outside counsel are much less likely to be aware that the client contemplates or has even consummated a merger, moved into a new line of business or divested another, initiated or was named in a law suit, etc. See Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* 32-35 (1991); Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 4. Therefore, they face greater difficulty staying apprised of the interests of their varied clients and choreographing their caseload and commitments to avoid conflicts or those likely to detonate. Indeed, for this and other reasons, many clients have recently begun to reduce the number of outside firms. See William Kummel, *Law Firm Economics: Deconstructing Pricing, Billing, Compensation and Ownership*, 4 L. Firm Partnership & Benefits Rep. 4 (1998); David Rubenstein, *Many Outside Legal Budgets Increase; Fewer Firms Will Get More Work*, Corp. Legal Times, Jan. 1991, at 1; Mark Schauerte, *In-house Counsel Turn Back the Clock While Increasing the Hours for Firms*, Chi. Law., Aug. 2000, at 10; James D. Shomper & Peter Jenkins, *Partnering: Paradigm or a Passing Trend?*, N.Y. L.J., Nov. 23, 1999, at 5. See generally The Task Force on Conflicts of Interest, *Conflict of Interest Issues*, 50 Bus. Law. 1381 (1995).

the other side, but acquired the company with which we were dealing. And . . . suddenly a conflict arose a year and a half into the engagement. . . . We discovered it. We contacted the corporate client on the other side. They said, "absolutely not. We will not waive this conflict. Too bad!" They used conflict as a sword. Our representation of the two clients were totally unrelated—the parent company and the one was totally unrelated. But we were adverse to their interests and we attempted to negotiate a waiver. We attempted to negotiate something on the lines of, "well, we will only represent this client up to the point we go to litigation. If you go to litigation, we refer it out." They wouldn't do it. The client on the other side just had a policy, "we will not let any law firm that represents us be adverse to us. Period." Did we really have to withdraw in the representation? As an ethical matter, I can't say that we did. We, in fact, consulted with [an ethics expert outside the firm]. Got his views on it. He said, "well technically, you probably could proceed with this. This is more of a business question." Well, we ended up withdrawing. We ended up replacing counsel in connection with the side we'd been representing through this. Brought someone else in. We cut our fees and, in fact, we wrote off a substantial amount of our fees and brought somebody new in to represent the existing client. . . . [That] was the worst conflict situation I've ever seen. I personally met—even though I had no involvement with either client—personally met with both clients, discussed the matter with them. It was a very difficult situation with two longstanding clients of the firm, where the conflict had arisen after the fact. That was the worst conflict situation, because you were balancing internal politics between two very highly respected partners of the firm, two longstanding clients of the firm, an ongoing relationship with one client. Fees being written off. Everybody being unhappy with the result internally. The clients not being harmed, but being distracted by a conflict issue. That was the worst one I can think of.²⁹

In a second interview in the firm, a different respondent reflected on the same conflict:

L2: It's not just when a new matter or new client comes in. . . . it may arise when you're working for a client. And we've had a couple of those come up where we've run into a conflict sort of after things have started progressing down where we've discovered a conflict. And those have taken a long time to resolve. I mean, we've spent on one conflict trying to resolve it with clients, we've spent maybe 50 to 100 hours . . . trying to resolve [the conflict described by L1]—talking to both clients and trying to work it out and seeing whether there was some grounds that both clients would be satisfied with.

In other instances, as clients acquire new operations and move into new lines of business, they gradually become direct competitors:

29. Interview #1 from a Chicago firm with more than 100 lawyers.

I think the toughest one involved the communications industry where we had two clients who were close to being equally worthy. And we had to decide which client we were going to keep and which we were going to send away. . . . there was no way we could continue to represent both. They were turning into direct competitors and they made it fairly clear we had to choose. And that involved partners who had strong feelings about, obviously, their own clients. And so it turned out, I think, to be more of the application of business judgment than strict conflicts rules. But those are where it's the most difficult.³⁰

Or they get into disputes with other clients.

The minute you have more than one client, you can conceive of undertaking something for client A that's going to be adverse to the interests of client B. Situations where a client may come in to have a trademark recorded. And then, subsequently, that client decides to ship merchandise to an entity that goes into bankruptcy, an entity who'd been borrowing money from a bank that the firm represents. A bank that might have some security interest in assets of the bankrupt—which would include the property that was shipped in by this client for whom you did the trademark work—can present some very interesting problems in adversity of interest. There are many situations where you cannot find out whether you have an existing client involved in a matter at all. And it subsequently surfaces. You can be into a matter for months—if not years—and then somebody stands up and starts screaming that you've got a conflict. Not because you're in litigation against them, not because you're negotiating a transaction with them on the other side of the table—none of that, none of the easy part of it. It's just you're doing something which they don't like. Those are your hardest conflicts.³¹

But clients are not the only things changing over time.

The problem, though, is that, every day that you work on a case, you learn more about it. It's an ongoing thing. You really don't know what a case is about when you first take it. So it is likely that problems will emerge that were difficult to identify at the outset.³²

Lawyers invariably learn more about their clients and about the matters for which they have been engaged as time goes by. They meet with their clients and question associates, witnesses, and experts. They study complaints, pleadings, and indictments. They examine records, documents and physical evidence. They conduct depositions and discovery, as do counselors representing co-parties and adversaries in the case.

As lawyers learn more about the social organization of the events alleged in a lawsuit, they often find that the network of co-

30. Interview #7 from a Chicago firm with more than 100 lawyers.

31. Interview #23 from a Chicago firm with more than 100 lawyers.

32. Interview #69 from a Chicago firm with 20-49 lawyers.

participants, facilitators, and victims is broader than they had originally assumed. Somewhere in the pesky web, an unexpected client—whose interests these lawyers also have an obligation to honor—has become entangled. Over time, attorneys on the other side may also discover new parties that are blameworthy or responsible for the events in question. Or, in order to pass, spread, or deflect the blame to others or to amass deeper pockets from which to secure compensation, these other lawyers may bring new parties into the litigation. Some of the ancillary parties or witnesses, recruited or dragged into the case at the eleventh hour by other people's lawyers, will be clients of the original firm, whose interests must be considered and honored. Matters that were originally conflict-free suddenly explode down the road when other people's lawyers—sometimes strategically to conflict their adversaries out³³—bring new parties into the case.

L1: Most of the time you're going to be. . . you might be too far into something to resign. . . . One of the biggest problems that you can face these days is representing somebody in litigation and finding out, after you've been working on a matter for a year, that they ought to sue one of your other clients in addition to the three parties they've already named. That can be very troublesome.

S: And what do you do?

L1: That's one where you might ask for a consent. First of all, you would try to dream up some theory of why they're not really a client. That it's only their subsidiary or a brother or sister company that you represented. You have a real problem. Because it would not be in the best interest of your first client if you pulled out of the case because you were already a year into it. And, in the second case, you can't tell them that they shouldn't sue a particular party. So maybe if you ask what are the most difficult problems you have, that might very well be it. . . . It's probably surprising that doesn't happen more than it does. Because you don't really know all the time at the beginning who all the proper defendants are.³⁴

Another respondent explained:

I think the most difficult. . . it seems to me that, if you are in litigation, and then, because of some subsequent development in that litigation, there is a third party action and . . . newly discovered

33. Such strategic behavior can be found in the arsenal of so-called "scorched-earth," "hardball," or "Rambo-like" litigation tactics. See generally Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values*, 59 Brook. L. Rev. 931 (1993). By conflicting adversaries out of a case, firms enjoy strategic advantage. Forcing legal counsel to withdraw at the eleventh hour protracts the litigation, increases its cost, and exerts extra pressure on the client to settle the matter rather than find and prepare a new, less experienced law firm to represent it. See generally Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 8.

34. Interview #3 from a Chicago firm with more than 100 lawyers.

facts which bring new players into the litigation—additional defendants, additional plaintiffs, what have you—and, particularly, after there’s been a substantial investment by the client in our services to that point. Coming up with a workable solution that forthrightly addresses the conflict and—if it involves then withdrawal—resolving it on a basis that’s equitable. For instance, you’re in a case that’s been going on for a year and a half. Now there’s a third-party action. You’ve got a conflict as a consequence of that third-party action. New counsel will have to come up to speed. You’ve got to turn over the file. Who bears the cost of that coming on? And who bears the cost of that transition? And what’s really fair to the protection of the interests of the client in that situation?³⁵

Though the fallout from a detonating conflict is usually more destructive in the course of litigation, other legal matters are not immune. Transactions sometimes grow as well with time, as additional investors, lenders, guarantors, underwriters, bidders, subcontractors, insurers, and others join or help to close the deal³⁶—parties with incompatible interests, which may be clients of the original law firm.

Other respondents complain that their most difficult conflicts arose when, over time, they discovered inculpatory evidence that placed the blame on another firm client.

If you get into the case . . . and, all of a sudden, the doctors say, “well, gee, the nurse didn’t. . .” or we discover the nurse didn’t follow the medication orders and you’re going to stick it to the nurse. . . That actually happened in a case we had. And the hospital [liable for mistakes by its nursing staff] got very angry at us because we represented the doctors. And one of our paralegals—she did a great job—she noticed that the . . . nurses do not follow the doctor’s orders—orders of the doctor being sued. . . I don’t think the plaintiff realized that he had a good claim against the hospital—which it was. So he was just pushing against the doctors. And then our investigation revealed, “hey, it’s the nurses screwed up.” And so we shifted all our defense—in the discovery depositions—against the hospital. Which, of course, the plaintiff was real happy about. And our doctor, he was happy we found out it wasn’t his fault, really. But then the hospital was kind of, “how come the law firm that we have used in the past—and might use in the future—is going to stick us for big bucks?” [laughter] We laughed about it years later. But, at the time, it was a little bit delicate.³⁷

The configuration of interests shifts in a case not only because clients change or attorneys unearth new evidence or bring in new

35. Interview #49 from a firm with 20-49 lawyers in a large city downstate .

36. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 6.

37. Interview #67 from a firm with 10-19 lawyers in a downstate medium-sized city.

parties or witnesses. As matters unfold, the relationships among the parties evolve and interests may begin to collide.

L2: Well, there are situations where you get involved with cases. There's no conflict in the beginning, but later—and you represent a number of corporations and individuals—and down the road, a year or so, you find yourself, when you're representing individuals, that there's a conflict amongst them—factually. Then you have to go to the person [in the insurance company] from whom you've received the assignment, tell them of this particular conflict and then say, "what are we going to do?" In our business, . . . you can split the defense and give certain individuals to certain other lawyers, or you say, "you know, . . . irrespective of the conflict, you're going to have to represent everybody," or you can settle the case.

S: This is, you mean, a situation where you have co-defendants whose interests diverge in the course of litigation?

L2: Correct, right. And you're representing them all. And, in those situations you have three choices and that's it. And it's very simple to . . . If they don't want to split the defense, then your job is to make sure there's a waiver³⁸ amongst all the defendants, that they know—there's a conscious waiver—that they know there's a conflict and they sign off authorizing you to continue representing them. . . . Or the case is settled.³⁹

When more than one of the parties is a client of the firm (whether or not the firm is representing more than one of them simultaneously in the particular matter), the collision may paralyze lawyers who cannot champion all of what have become incompatible interests. The collisions may occur at any point along the way or at significant transition points in the case. Because the legal process is so protracted, it provides a period of time in which the needs, priorities, resources, and interests of various parties diverge. A complex matter has myriad junctures requiring the exercise of discretion that continually test unanimity and consensus. Because reputations and fortunes embedded in tangled webs of collaborators are at stake, paranoia and disunity loom under the surface. When outcomes are zero-sum, they are inherently divisive. Finally, because costs or awards must be split, they provide an opportunity to fracture alliances yet again.

There are a number of critical turning points in the evolution of a case at which alliances are torn asunder, adversities become more

38. Rule 1.8 of the Model Rules of Professional Conduct states that clients, fully informed of the nature of a conflict, can consent to representation by a lawyer who has a conflict of interest, under certain circumstances, and thereby "waive" the conflict of interest. Model Rules, *supra* note 3, R. 1.8.

39. Interview #15 from a Chicago firm with more than 100 lawyers.

direct and virulent, and conflicts of interest explode. This happens, for example, when negotiations break down and litigation looms:

L2: We are a major financial firm representing a lot of banks. We're also a major corporate firm. Corporations are frequently borrowers, many times, from our banking clients—unrelated matters. When you're doing a new deal, everyone's very happy to see you on, say, the borrower's side, when, ordinarily, you're on the bank side or vice versa. Because everyone wants the deal to go through, the conflicts are rather easily waived. If the deal sours, if economic times become harder, if there's a difference of opinion that develops between the borrower and the lender, we then find ourselves in a situation where one side or the other may be increasingly uncomfortable with having us be there. Clearly, at the point of litigation, we'll have to exit without a consent. But the difficult issue is when there is sufficient adversity that we should be getting consents to continue—fresh consents—when the old consents for the deal going in don't any longer really apply. And it's a very difficult interplay of the conflict rules and client relation rules. Because clients then get a “fer-me or agin-me” kind of attitude when things are getting tough. The other area. . .

S: Could I just stop you for a second? What would be some of the red flags that would make you feel that we better think about some fresh consents or that the level of adversity is changing?

L2: Well, frequently, the clients give you their own cue that they're not comfortable having you on the other side. If it's an ongoing matter with ongoing discussions, you can pretty much gauge whether there is a continuing comfort level with your being on the other side, where they'll tell you that they think it's so adverse that you need to, that they want to set a limit on how far you can go. The only other way is just very fact-specific judgments about what it is you're doing on the matter.

L1: I would just add to that, that, even with consent, the ethical rules say you have to be comfortable that you can rigorously and vigorously represent the client that you're choosing to continue with—the client in other areas on the other side. And sometimes you can't honestly say to yourself you're going to give your all because the client on the other side is simply too important. . . . It's a subjective test. You go back to your client and say you just can't do this any more.

L2: And that actually segues to the other area which is very difficult where, at the outset, no matter, you have no conflict. And, through nothing that you as a firm have done—or nothing inappropriate—you get hired by the party on the other side on an unrelated matter or whatever or there's a corporate reorganization, acquisition, divestiture. All of a sudden you find yourself in a conflict position. And, as innocent as we may feel that this was just sprung upon us, it

can be very difficult to sort out what the appropriate thing to do is with the clients.

L1: . . . the problem can arise when there are multiple defendants who you think are aligned on the same side. And, as the case develops, they turn on each other and. . .

L2: And frequently, that's X number of years down the road. . . and exiting at that point is enormously difficult. Because one client has already invested a lot of time and effort in getting us up to speed, paid us a lot of fees, etc.

L1: And getting advanced consents⁴⁰ are equally difficult because, usually, when these cases start out, everyone wants to present a united front and not let another defendant know that, "if worse comes to worse and we lose, it's really their fault. They're 90% to blame and we're going after them." No one likes to think of those things. They're all gung-ho to beat up on the plaintiff, if they're all defendants. And these issues sometimes are not addressed as quickly as they should be. Or no one can foresee the facts as they develop. Everyone may think that, if we take down defendant A, defendant B really was a passive bystander in this whole process. And we don't understand why they were even joined by the plaintiff as a defendant, and maybe they don't either. But a year goes by, and in discovery, smoking guns come out of the woodwork, and they're clearly to blame, and there's no advance consent, and all hell breaks loose.

L2: It's a wonderful mixed metaphor.

L1: Thank you. [laughter]⁴¹

Conflicts can also detonate when consensus erodes and co-parties begin pointing fingers at one another, or when one of multiple parties is offered a deal that is not offered to the others:

I represented multiple business entities as defendants. And the plaintiff's lawyer offered to settle the case with some of my clients and not the others. That was after the case had been pending like four years and we were a year away from the trial. You can see that, on the surface, if I'd accepted that offer without thinking about it—because I thought it might have been a good thing for those who were being offered a settlement—I'd be funding the fight to continue against my other clients. So, I— . . . not alone, but with two other lawyers—dug into the facts and the law and the rules of

40. Variably called "advance consents" or "advance" or "prospective" waivers, clients agree that they will not seek to disqualify the firm for taking advantage of future opportunities that are adverse to their interests, but unrelated to the matter for which they engaged the firm or any of the confidences they shared with their lawyers. *See generally* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-372 (1993).

41. Interview #5 from a Chicago firm with more than 100 lawyers.

ethics and decided that it was not in the best interest of those offered a settlement to take it. That was both a legal and a factual thing. I then disclosed to everybody what had happened and told those who had been offered the settlement that, if they disagreed, to let me know. And I gave the reasons why I thought it wasn't a good settlement. That was very difficult. . . . And we did have a letter, by the way, which I had drafted at the beginning that, if there were conflicts, that I could withdraw from, as I remember it, from some, but not the others. But, if I had concluded that it would have been in the best interest of those who had been offered the settlement to get out, I certainly could not have continued in that representation of the whole group. . . . I would have had to [withdraw]. Because there was obviously going to be a conflict then. That one stuck in my memory as the most troublesome one because it took us, maybe it was four or five days before we could really feel comfortable with the rules of ethics and the facts in the law that our conclusion was correct. I happened to have been vindicated, because the case did go to a jury and all of the defendants were found "not guilty." But . . . you don't know what's going to happen, when you're making that decision.⁴²

Settlement negotiations represent another turning point. Some parties may be more risk averse—and more willing to settle—than others, better able to afford financing continued litigation, less willing to admit culpability or responsibility, better insured or better able to withstand a monetary contribution to a settlement.⁴³ A final turning point comes after a verdict, when guilty parties cross-claim or seek contributions from others, or victorious co-plaintiffs disagree about how to allocate the judgment.

About three years ago I represented a group of homeowners. We were plaintiffs in that action. Everything went fine until I settled it and then it was an issue of how we were going to split up the proceeds. I maxed out on both defendants' policies. I had a total of . . . it's either nine or eleven clients. And the issue was, "okay, how are we going to divvy this stuff up?" Because we couldn't really break it up based upon a per capita basis. It had to have some relationship to the loss that had been sustained by each of these parties. And, basically, what I did was I called everybody in. . . . I ordered some pizzas and some beer. The beer was had after the agreement was reached. . . . And the deal was, "look folks, here are a few alternatives. If you can't agree, I'm going to have this money paid into the court and the court can decide it. Now, does that really mean you each need to retain alternate counsel? Well, it might, you know, for that stage of it. You've all agreed that you wanted to settle this thing for this amount." And, you know, at that point, "here's what I suggest." And there were a couple of alternatives. And truly, I said, "we can do it based on the number of units. If

42. Interview #4 from a Chicago firm with more than 100 lawyers.

43. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 4.

you're a unit owner. . . " And, there were a total of five units that were represented. So there must have been nine people. And I said, "we can take the total amount and divide it by five. That would mean that one person was actually getting a double share." . . . Another way was to say, "okay, there are nine people; divide the total amount by nine. Another way is to base it on your total amount of your loss— . . . the proportion that held to the proceeds." When we ended up, we settled it based upon splitting it five ways in equal shares. Why? Everybody's loss was speculative. And everybody had actually been reimbursed through insurance for, really, 100% of their loss. And what we ended up with was "gravy," so to speak. So, they all decided to do it that way. . . . Let me just put it this way: if I had it to do all over again, I could have represented one or two of those people, gotten the same amount— just on one. Because, seriously, I should never have taken all of them. . . . You know, honestly, I had never been in that circumstance before. And, what I did was I went over to the law library and tried to see what I could find as far as any research on the issue. There isn't much, as you know. And what I came up with, was I called around to some of my friends who were senior members of the bar. And they said, "why don't you try this, [names himself]." And, basically, I winged it.⁴⁴

As this last respondent suggests, lawyers are not always blameless when conflicts detonate in the middle of a case. As, in several of these accounts, firms sometimes elect to represent more than one party or to participate in engagements in which other clients are co-parties, even though they are represented in the case by a different law firm. And many attorneys know the cast of characters that typically populates the world in which they practice—the polluters, asbestos producers, construction companies, lenders, component manufacturers, insurers, and so on, some of them clients, some with deep pockets, some probably culpable—all standing on the sidelines, likely to be dragged into the case at some point. When clients realize that their counselors could have foreseen the conflicts that have suddenly disrupted their case and paralyzed their lawyers, they are even more irate and uncooperative than in some of the examples cited above, in which conflicts arose through no fault of the lawyers.⁴⁵ The difficulties of extricating themselves, while honoring their obligations to clients and respecting the rules of legal ethics⁴⁶ can be formidable.

44. Interview #86 from a Collar County firm with fewer than 10 lawyers.

45. Shapiro, *Tangled Loyalties*, *supra* note 1, at chs. 8, 10.

46. These rules include the confidentiality rule in Model Rules, *supra* note 2, R. 1.6, and the so-called "hot-potato rule." Enunciated in a series of state and federal court opinions, the "hot-potato rule" directs that "[a] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client," and that conflicts of interest cannot be cured by severing the relationship with the pre-existing or less favored client. *Picker Int'l Inc. v. Vairan Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989); *see also* Flatt v.

Some firms, therefore, try to avoid these difficult conflicts by reading the tea leaves, anticipating the potential cast of characters likely to be dragged into the case at the eleventh hour, assessing the likelihood that the evidence will inculcate some co-parties more than others or that they will eventually turn on one another, and so on at the outset. When lawyers anticipate the possibility that a conflict will detonate down the road, they can choose to decline the case or refuse to represent more than one party, disclose the risk to the prospective client so that it can choose to find representation elsewhere, disclose in advance how the firm will respond to various potential contingencies, or secure waivers.⁴⁷ Many other firms scoff at such fortune telling, however, indicating that the risks are too ethereal to estimate and that making such disclosures to clients at the courtship stage will simply scare them away or undermine the new relationship. They tell me that they will deal with conflicts that, because of the passage of time, will become more difficult, if and when they arise.

III. POSITIONAL CONFLICTS

L: The hardest ones are when they're not really conflicts, but they're institutional conflict issues. What cases should we not get into, or should we get into, what sides of issues? And this has just arisen the last three or four years—what I would call “issues” conflicts, institutional policies, not taking certain types of cases. That's not our tradition. Our tradition is we're cowboys—whoever wants to hire us to shoot, that's what we do. And this is very much counter-culture to us.

S: And what accounts for the change?

L: Well because the nature of the practice changes and, as we represent larger and larger institutions, corporations, we are more identified with the establishment. And, therefore, anti-establishment types of lawsuits are bad for us. For example, taking a high profile case before the United States Supreme Court in favor of punitive damages—that's very much against the interests of most of our clients. That's not to say that if [large corporation in the Military-Industrial Complex] wanted to sue Ms. Shapiro and wanted to collect millions of dollars in punitive damages—they don't care, that's fine. But to have the constitutionality of punitive damages sustained by the United States Supreme Court is very bad for [that corporation] and all the manufacturers. They don't like it. Certain rules relating to expert witnesses: the more loose the rules are as to who's an expert and on what subject, that's bad for defendants—and we represent defendants. So that would be a bad institutional issue. Telling corporations they can't cut down trees is bad. . . . Well, you

Superior Court, 885 P.2d 950, 957-59 (Cal. 1994); *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1057 (1992).

47. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 9.

lose clients, I mean, you just lose clients. . . . That's the thing that's vexing us. . . . It won't be the wild west anymore. It'll be sad. But there you are. . . . I think it hurts us. But it's reality.⁴⁸

Respondents in many of the largest firms identify "positional" or "issue" conflicts,⁴⁹ in which lawyers advance a position in the representation of a client which is inconsistent with the interests of other clients who are neither parties to the case nor have any direct stake in it, as among their most difficult. Positional conflicts are world-class business conflicts, especially when the positions in contention are deeply held by large, powerful, repeat-playing institutions—the staple of large law firms. Again, the difficulties engendered by positional conflicts are rarely legal ones; they are about business, client relations, and intra-firm politics, about how to serve the needs of important clients without undermining or alienating others.

By far the most nettlesome positional conflict faced by firms in the sample had been resolved long before I conducted my interviews. But the wounds were still healing, and virtually every respondent from a large law firm recounted the same story, if not the same resolution:

Our firm represents the insurance industry. The firm was beginning to represent corporate America on Superfund environmental issues. It took a while for the bell to ring. Superfund matters kick out a lot of parties. On a single site, we might be representing the insurer and [a chemical company]. There has developed a war between corporate America and insurance companies over environmental coverage issues. It's a multi-billion dollar issue. . . . There's no legal conflict, but a business conflict. We had lots of discussion about this within the [New Business] Committee and eventually the process crystallized. The firm decided not to take Superfund cases. Period. As a result, a group of lawyers left the firm. This is a problem that I understand other firms are facing as well. This was by far one of the thorniest issues in my experience. We had to remove ourselves from these cases and that was hard to do. These were huge cases.⁵⁰

But, though the war over environmental coverage disputes has abated,⁵¹ with some firms maintaining fidelity to corporate America and others to those who provide insurance coverage for environmental pollution—and collections of lawyers who represent the losing side forced out of the firm as a result—conflicts over other sorts of issues and positions continue to bedevil large law firms, as the plaintive ex-cowboy lamented. Moreover, since the continued

48. Interview #30 from a Chicago firm with more than 100 lawyers.

49. See generally John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (1993).

50. Interview #22 from a Chicago firm with more than 100 lawyers.

51. See generally Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 5; M. Elizabeth Medaglia & Peter A. von Mehren, *Beyond Asbestos and Environmental Litigation: Coverage Disputes in the Twenty-First Century*, 33 Tort & Ins. L.J. 1023 (1998).

representation of entire industries is often at stake, positional conflicts are especially likely to roil, if not fracture, law firms, as colleagues, arrayed on both sides of the divide, are forced to turn away new business or watch their clients flee because of the positions championed by those on the other side.

But there are some kinds of work which may—in and of themselves—be inconsistent. It is very difficult to have a substantial environmental practice in representing corporate America in connection with their environmental problems—on the one hand—and have any kind of a substantial insurance company clientele. The coverage issues are huge. And it is very difficult to be known and affiliated with the financial institutions of this country in helping them with their loans and their problem credits on the one hand, and be representing debtors in bankruptcy proceedings on the other. This is done. It can be accommodated in the right situation. But I think it's these overall "positional problems" that are the most pervasive, and in some ways insidious. Again, it goes to the fact that a lot of clients believe that once they become a client, they're a client on all issues, rather than just looking to the law firm to protect that client's interests within the scope of the engagement that was given. I mean that really—that should be the law. If a client comes in and wants trademark work done, that's what they want done. And it is the request of the client that defines the scope of the engagement and defines the scope of the responsibility that goes with that engagement. If you're doing everything for a client as general counsel, it creates one set of responsibilities for the law firm. But if somebody comes in the door and hires you to do one type of work or one small project, that client should not be in a position to foreclose its agent—in effect—from handling other matters that are unrelated to the agency. And maybe the law will get there some day. It isn't exactly clear, but there is some support for that proposition. And it's the biggest problems of all—are these positional conflicts. Which clients believe that once they become a client of the firm, that they've got a right to keep you from asserting.⁵²

IV. LATERAL HIRING

Lawyer mobility exacerbates conflicts of interest. As attorneys travel through the job market,⁵³ passing through revolving doors and from firm to firm, they accumulate the confidences of and duties owed to each collection of current and former clients they encounter along the way.⁵⁴ Career mobility not only multiplies the conflicts of interest faced by these migratory lawyers, but, because of the imputed

52. Interview #23 from a Chicago firm with more than 100 lawyers.

53. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 7.

54. Model Rules, *supra* note 3, R. 1.6 & 1.9.

disqualification rule,⁵⁵ those of everyone they affiliate with as they move from job to job. They become so-called “typhoid Marys”,⁵⁶ conflicting out thousands of their colleagues and forcing their new firms to turn away substantial amounts of prospective business tainted by their prior affiliations. It is not surprising that several respondents recalled that their most difficult conflicts of interest arose in the context of lateral hiring. Once again, the difficulty was not about the legal rules surrounding imputation or about evaluating whether the lateral hire would create a conflict of interest; it was over the wrenching negotiations about what to do when a conflict was unmistakable. In many instances, the conflict was identified before the lateral hire was consummated and, with some acrimony and chagrin, the offer was rescinded, just as new business that portends conflicts of interest is painfully declined.

Well, there’s one that I’m aware of that had to do with a possible opportunity to hire a lateral who. . . We had lengthy discussions with this individual and thought that there was going to be a real opportunity to put together a deal with this person. And kind of at the eleventh hour, he made it known to us that his client—his principal client that he was going to bring into our firm—had some very ongoing, bitter litigation with another company that we were doing some pretty minor work for. And so we talked about that, and we said, “well, we don’t know that we see this as a problem.” Well he did and said he thought maybe the only way we could get it resolved was, not through the consent route, but rather, we might have to consider turning back the work that we already had. And we looked at that and thought that we would possibly be subject to criticism for doing that, cause this was business already in the firm. And there’s a couple of cases that seem to suggest that you just can’t willy-nilly dump work back in order to favor your firm with more lucrative stuff. So, as a result, we lost this lateral opportunity, because of what appeared. . . I guess it was a legitimate conflict. But it was fairly minor—minor in terms of the small amount of work our firm was doing for this other company, so. . . That was a call that our Executive Committee, I think, had to make. And we just said, “we just can’t do that.” So that deal fell apart for us.⁵⁷

In other accounts, the laterals were already on board and conflicts arose between cases and clients that they hoped to bring with them and clients of their host firm.

55. The imputed disqualification rule states that: “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . .” *Id.* R. 1.10(a). Therefore, the conflicts of any one lawyer in a law firm—no matter how large the firm or how far-flung its offices—are imputed to all lawyers in the firm, regardless of whether they have had any contact with the particular client or were privy to any of its confidences.

56. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 321 (2d ed. 1990).

57. Interview #15 from a Chicago firm with more than 100 lawyers.

The most difficult one that I had—and it's the only one in four years that I've taken to the Executive Committee. . . . And by utter coincidence, it's the only . . . formal vote I've been involved in in the Executive Committee for four years. We felt we should go on record, so that people would know how we voted on this. And it was a close vote. It was dealing with a trade association, a few of whose members were going to be joined in some litigation—it was in the nuclear energy field—joined in some possible litigation in southern California, where we had been asked to represent private parties suing certain utilities. And we have been general counsel forever for the [names a trade association]—a very, very active trade association. Then that gets into “who's the client?”—these individuals or the Association? And we had to ferret through contacts with the individual utilities. . . . Because you're not automatically deemed to be the attorney for the members of an association. That doesn't necessarily follow. And so you have to gather some facts. So, that was a very difficult issue for us to sort out. And we concluded that there was a conflict, because we had—over the course of many years—we had done a fair amount of work for individual members, including some of the target defendants on the west coast. And when it came to, “should we ask these members of the Association for a consent,” we voted not to. And that's where we went to the vote on “was there a conflict?” Yes, there was. “What should we do about it,” was the much more difficult issue. And there we voted “no” for a good reason. The issues that were being raised were gut issues for members of the Trade Association. And to have the lawyers—who have been the Trade Association's lawyers for twenty years—be on the other side of a gut issue for the Trade Association and, therefore, its members, would have been bad. . . . The group of lawyers . . . on the west coast who were urging us to seek consent, were brand new to the firm. So we had a business issue internally. . . . So we had the more peculiar business setting of a group of lawyers who had just joined the firm, who felt very strongly, “Gee how, how could you? We're just. . . . We want to prove ourselves in [names firm]. We've got this great opportunity. Just ask for consent. That's the least. . . .” And we say, “well yeah, but you don't understand.” “Well, why didn't you tell us that when we joined?” “Well, we didn't know that you were going to have this.” So that was a particularly thorny issue. That was complicated. It wasn't complicated intellectually; it was complicated in the personal relationship. And that's where I felt that—in fairness to the new attorneys who had joined us on the west coast—that the decision should not be made by our Committee or by me. . . . I've taken it to the highest counsels of the firm. Full presentation, opportunity to think about it, and then we went to a vote. Which is what we did. So, I think that was the most difficult one that we've handled.⁵⁸

L1: Actually, I think the toughest . . . one that they went to the

58. Interview #16 from a Chicago firm with more 100 lawyers.

Executive Committee on. [names, I believe, the lawyer involved.]

L2: Yeah.

L1: That was a pretty close question. Although, I think we both agreed. Yeah, the issue in this one was whether... We were representing a party in a piece of litigation. And the case had come in through a lateral hire—come with someone who had joined us laterally. And another partner in the firm had—about four years ago—consulted with a former attorney on the other side to act as an expert witness. Had a very brief meeting; learned two or three little facts and was ultimately not hired as an expert. And that, I think, was the issue. And we concluded that...it was enough of an apparent conflict so that we had to withdraw. Now, that was pretty close. We did a lot of research on that and...

L2: I think that was a conservative stance...

L1:...the attorney that brought in the case was very unhappy and...

L2: Because it was a very good client of hers.

L1: Yeah, very... Yeah. And she was not happy. But, you know, I'm convinced we were right. And the Executive Committee agreed with us and ultimately she calmed down.

L2: That's one we had researched. I mean we had...

L1: Yeah, very heavily...

L2:... a formal memo prepared.

L1:... a rather lengthy one. But, that was a pretty close question.⁵⁹

Other respondents described, as their most difficult case, a disqualification motion that was brought for a conflict of interest that arose from the amalgamation of new interests occasioned by a law firm merger.

I suppose the toughest one I've ever faced was this case I got disqualified. And that was a former client substantial relationship problem. And I had filed a lawsuit before we merged with [names current firm] and [names current firm] had represented the defendants in another matter that related to the same business problems. And all of the same words were there. I was convinced there was... I'm still convinced that it was not a substantial relationship, that, while the words were there, we were really on the same side of the issue. ... But, well, couldn't make the judge in California understand it.⁶⁰

59. Interview #37 from Chicago firm with 50-99 lawyers.

60. Interview #2 from a Chicago firm with more than 100 lawyers.

V. TRIANGULAR RELATIONSHIPS

Geoffrey Hazard coined the term "triangular lawyer relationships"⁶¹ to denote those relationships in which the party who pays the legal fees is different from the party being represented. Such triangles are most common where insurance policies provide for the defense of liability claims against policyholders, but are also found where parents pay for the representation of a minor, or where litigation is supported by a public defender or public interest group.⁶² Conflicts of interest, of course, surge through these triangles, as lawyers are torn between their fiduciary obligations to their client and the often-incompatible interests of those who pay their bills and with whom they often have long-term relationships. Indeed, the most common Freudian slip committed throughout the interviews occurred when respondents erroneously called these benefactors "clients." (Only a few caught and corrected themselves).

Countless hours of interview time were consumed with stories from many quarters about the tensions, frustrations, and temptations that arise from the conflicts of interest inherent in insurance defense work. What is interesting, however, is that many examples of the *most difficult* conflicts faced by the respondent or his⁶³ firm could be found within these triangles. Each respondent prefaced his story by explaining to me that, in days of yore, blatant conflicts of interest were commonplace in insurance defense work. For example:

Good Lord, you know, thirty-four years ago, one of the first cases in that was where the attorney representing the individual, deliberately—at his own client's deposition—asked some questions which, in effect, voided his coverage. And then told the insurance carrier and they disclaimed coverage. And nobody saw that as a conflict until that time. Well, obviously, it is.⁶⁴

But, the respondent continued, all of that changed a decade or two ago in a series of opinions that clarified lawyers' ethical obligations in insurance defense work and provided a series of road maps that helped them maneuver safely through this ethically-charged triangle. The conflicts now are no-brainers. Even insurance companies and adjusters understand and comply.

But, if the legal issues are clear, why are some of them still so difficult? For the same reason that many of the other stories recounted above are difficult—because they threaten significant social and economic relationships. Lawyers are obliged to ignore—indeed,

61. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15 (1987); see also Brooke Wunnicke, *The Eternal Triangle: Standards of Ethical Representation by the Insurance Defense Lawyer*, 31:2 For the Defense 7 (1989).

62. Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 4.

63. More than nine-tenths of the respondents were male.

64. Interview #66 from a Chicago firm with 20-49 lawyers.

sometimes even flaunt or undermine—the interests of those responsible for a substantial amount of future income in favor of the interests of fly-by-night clients wielding no sanctions or incentives to insure fidelity and whom lawyers will most likely never see again.

Our biggest problem is really not real conflicts. . . . You know, I have a very strong belief that whatever client you're representing, that you represent them to the best of your ability. And you should do all those things necessary to win—within certain parameters. Once you're in those, I mean, gloves, pretty much, are off. . . . I mean, once you get to the courtroom, it's a fight. And the question is: who fights their way out of it the best? And sometimes what happens is not a conflict. But, let's say, for example, you have a client where three companies have asked you to represent a different client. And now you're in the middle of a hell of a fight. There's no conflict per se. But, companies that send you a lot of business. . . . Insurance companies can become very disenchanted with the fact that you're kicking one of their insureds in a fight, where now the defendants have decided that they've going to fight with each other. That happens. And, fortunately, most companies recognize the fact. And even when they get upset, you tell them, "Well, if I were representing you here, would you want me to back off merely because that other person also sends me business?" Well, they always answer that "No." And most of them recognize that. But that's an ongoing problem that all firms that do our kind of work face. And that is that it's rare that, . . . in the cases we're in, that the other defendants that are in the case are probably not assigned to attorneys that that client—that is, the insurance company—also assigns you business. . . . It's inevitable almost every case we're in. Then the question is: how do you handle it? How do you get into a situation so you don't annoy the other client? Well, I think what you've got to do is you represent the client in the case, who is the insured, not the insurance company. And you have to do your best.⁶⁵

A downstate lawyer elaborated on the difficulty:

I have terrific conceptual problems with insurance defense-type cases—terrific problems. I may have a problem of how far I can go in pressing the insured's interest against the party who is paying my bill? A problem of how far can I hammer another insurance company that I also represent? Taking plaintiff's cases against defendants who I know are going to be represented by insurance companies that I represent. Professionally, I can divorce those questions pretty easily because I know what the law is. It is the gray area. . . . When you get in that gray area, that's when it becomes a tough question. And, obviously, you just do the best you can and you probably err on the side of staying away from the—what even

65. Interview #33 from a Chicago firm with 50-99 lawyers.

may appear to be—the conflict. Just because you just don't want the hassle. You don't want the problem. I don't want the problem.⁶⁶

Potential conflicts among the interests of insurers, insureds, and lawyers surface at several junctures in the defense of a liability claim: (1) disputes about insurance coverage (which, though a bit more subtle than in the days of yore, still exist); (2) disputes about litigating versus settling the charges, especially when the claim exceeds the amount of coverage; and (3) disputes about the expenditure of funds for the defense of the insured. Respondents expressed difficulty with all of these, especially with the last. In an age of belt-tightening and cost controls in legal services,⁶⁷ lawyers face a tension between their obligation to provide—and the client's expectation of—a painstaking, vigorous defense and the insurer's preference to minimize defense costs. Though this downstate respondent did not identify the following account as his most difficult, he was certainly very exercised about it:

But where you get into a problem... is when the insurance companies—because they're so cost conscious—will send you a file and they'll say, you know, "protect the interest of the insured. Follow the appropriate pleadings, motion, whatever." And the next sentence says, "do not start any discovery until we notify you." Or they'll say, "minimize the amount of discovery." I know they're looking at the cost side of it. Well that puts you in a real box. Because your duty is owed to the client, not to the insurance company at that point. And, yet, if you send a bill say, to the insurance company, and you show, say, a thousand dollars of interrogatories, some paper chase or some depositions—and you aren't authorized to do it, but yet you feel you have to do it to learn things about the case, that can cause a conflict. And we've just gone ahead and did it. We just go ahead and do what we think has to be done. We get these letters and I look at them and say, "that's interesting, but I'm the one to be sued [for malpractice], not the insurance company." So that's what we do. . . . I'm sure any lawyer that does defense work has gotten these letters from insurance companies. "Cut down costs, cut down costs." And things like, "don't use any more than ten hours of legal research." Right! [laughter] . . . And we'll send a bill in. And somebody up in never-never land—with a red pencil—goes through these. He will audit my statements and says, "Ah ha! I see ten point five hours of legal research. [laughter] We're going to dock you for point five hours." So, you think, "geez, you know, come on!" So that's a conflict. . . . You owe your duty to your client to do as much as you can, what

66. Interview #54 from a firm with 20-49 lawyers located in a large city downstate.

67. See generally Committee on Lawyer Business Ethics, *Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 Bus. Law. 175 (1998); Jonathan P. Bellis & Rees W. Morrison, *Inside, Looking Out*, Nat'l L.J., Dec. 2, 1991, at S1; Rubenstein, *supra* note 28; Shapiro, *Tangled Loyalties*, *supra* note 1, at ch. 4.

you think is appropriate. And someone else is trying to put a dollar bill on that and say, "don't do it." So, yeah, that comes up with clients sometimes.⁶⁸

CONCLUSION—WHERE'S THE LAW?

The accounts quoted above represent only a small handful of problematic cases and wrenching dilemmas that lawyers shared with me during the interviews, some of which they identified as "most difficult" and many of which they did not. What is striking as one reads the thousands of pages of interview transcripts chronicling difficult and mundane conflicts alike, is how infrequently respondents struggled with legal doctrine and interpretation. They complain that the rules are anachronistic; they berate the bar associations for providing so little practical guidance; they criticize the literature for being useless, naive, and out of touch with their reality. But, when you ask them about their major challenges they talk like economists, psychologists, and sociologists.

Could it be that legal scholarship is largely irrelevant to the Everests of everyday practice? And, if so, why? Several compelling hypotheses come to mind. Perhaps respondents felt that a non-lawyer would not understand or be interested in legal doctrine and technicalities, and they dumbed down the interviews for my benefit. While that may be true for some, many respondents cited ethics rules and court opinions ad nauseum and quite a few confused me for a lawyer, asking about my practice and expressing some shock when I explained why I did not have one. Surely this alone cannot explain the rarity with which the lawyers wrestled with purely legal questions.

Maybe the tapestries woven on Everest are not irrelevant; they have simply done their job very well—seamlessly, in fact. Perhaps legal education has become so effective and legal cases, opinions, commentary, and scholarship have become so accessible to lawyers that legal analysis is relatively unproblematic—at least to the conflicts czars and firm leaders who I interviewed. Or perhaps the legal calls are made easily because firms consult with experts on the difficult ones. A good number of respondents indicated that, from time to time, their firm had hired a well-known law professor or called the bar association, their malpractice insurer, an ethics advisory service, or a respected member of the bar when they sought greater expertise. (Though frequently they hired experts merely to demonstrate to a client or the court that they were trying to do the right thing in a contentious conflicts case.⁶⁹) Perhaps the law of conflict of interest is not that difficult. As one respondent observed:

68. Interview #67 from a firm with 10-19 lawyers located in a medium-sized city downstate.

69. And, invariably, it seemed that the experts would either validate the

Any eight year old, usually, can tell ya when you're on thin ice and doing what you shouldn't be doing vis a vis clients. I mean, it's, you know, pretty common sense.⁷⁰

Maybe the culprit is in the terminology. As is apparent from the examples, respondents use the term "difficult" in different ways. For some, it is their worst case. For others, it pertains to a generic category or tension. For some, it is where the expenditure of time to unravel the tangled loyalties was inordinate or the consequences most draconian. And for others, it is the most painful or embarrassing experience, arousing the most irate clients or most fractious intra-firm discord. Perhaps, then, some respondents interpreted the word "difficult" to apply to the social rather than to the substantive.

But the hypothesis that rings most true to me was offered at the very beginning of this piece by the big-firm respondent who suggested:

The complexity of the conflict law is there and it presents a problem. And we're lawyers; we can deal with those things. You make decisions. Sometimes you're right and sometimes you're wrong, as the cases decide later. But you make decisions. . . . that's what lawyers do.⁷¹

In short, interpreting legal doctrine is what lawyers do; that is their craft. It is what lawyers are *not* trained to do—to predict the future, read minds, make peace, calm irate clients and colleagues, make business decisions, and avoid entanglements—that many find most problematic. To a mountain climber, the most difficult part of ascending Everest is not climbing the mountain. It is predicting and responding to the weather, reading the mountain, knowing when to ascend and when to turn back, fixing malfunctioning equipment, rescuing an ailing comrade, motivating the sherpa, fighting altitude sickness, and struggling with one's demons. Successful mountain climbers have mastered such ancillary skills though, of course, the cost of failure is quite a bit higher than in legal practice.

The view from the base camp yields two lessons. First, just as we do not send neophytes to climb up Everest without teaching them something about the weather, perhaps it is time to develop the ancillary skills that lawyers find most challenging. Our traditional cases, through which we train lawyers and reveal the law to practitioners, do not reveal enough. Cases should include not just the facts, but also social context, history, social change, personalities, relationships, power, competition, markets, social networks, generations, community, ethnicity, career, mobility, social organization, law firm culture, structure, expertise, sophistication,

respondent's opinion or dismiss the problem as a business rather than an ethics question.

70. Interview #66 from a Chicago firm with 20-49 lawyers.

71. Interview #11 from a Chicago firm with more than 100 lawyers.

insurance arrangements, compensation, economics—all of the seemingly innocuous and idiosyncratic color of a case that often make it so difficult.

Second, because the difficulties are rarely about legal questions, few Everests of the mundane make it to the summit. Or if they do, the irrelevant and weighty baggage of social context is typically stripped away by the time the grueling ascent is completed and documented in a legal opinion. As a result, scholars who exclusively search for cases in this rarified environment are blind to so much of the reality of legal practice and, oblivious to the issues for which practitioners cry out for expert guidance, are unable to offer their counsel.

Notes & Observations