

## Attorney Conflicts Of Interest — A Tool For Insurance Companies

In the legal industry, the trend in recent years has been toward consolidation, driven by two business goals. Some firms join or acquire each other in order to increase the menu of services available to clients, and to create cross-selling opportunities (the “one-stop shopping” model). Others set out to load so much single-practice-area expertise as possible into a single

DAVID P. BENDER, JR.  
WILLIAM G. PASSANNANTE

firm that the consolidated firm corners the market in a particular field (the “concentration of forces” model).

Some of the largest firms in the world are the amalgamation of many smaller firms, consolidated under the one-stop shopping model. Many of them enjoy enviable success linked directly to their ability to marshal resources from throughout the spectrum of legal services to address client crises rapidly and expertly.

One of the great challenges for these firms, due to their sheer size, is the clearance of conflicts: the process by which a law firm determines, before it accepts an engagement, whether any present or former client representations pose a conflict of interest barring acceptance of the new matter. If such a conflict exists, the firm may ask the existing client and the new client to

waive the conflict, and if they do, the new engagement may be accepted.

The conflicts issue is particularly salient in the insurance policy enforcement practice area. A firm may do no insurance coverage work for any insurance company, apparently clearing the way for it to aggressively pursue coverage for the new client adverse to a carrier. But large law firms (and, quite often, smaller ones) have important and lucrative tax, corporate and regulatory practices serving insurance companies. These practices have nothing to do with coverage disputes, yet they often create a barrier to entry into the policy enforcement field. Indeed, recent law firm history shows that insurance recovery practices at large law firms have become increasingly unwelcome. The practice area thus lends itself to “a concentration of forces” – that is, to firms devoted primarily to insurance recovery.

Large firms are chary of taking on insurance recovery work for political reasons. Insurance companies employ and engage armies of attorneys around the country to advise them on whether claims are covered, and to defend them when they are sued for enforcement of claims and attendant counts of bad faith and other tort theories unique to insurance disputes. These lawyers are insurance coverage

experts. They specialize not only in specific kinds of policies, but also, specific kinds of disputes under these policies.

An example is coverage for environmental contamination asserted under a Commercial General Liability (CGL) policy. Many insurance defense attorneys concentrate their practices not on CGL policies, but on application of CGL coverage and pollution exclusions to environmental losses. Virtually without exception, these insurance defense specialists represent insurance companies only. By contrast, a mere handful of law firms provides the same degree of issue-specific insurance coverage specialization to corporate policyholders. As a result, corporations who need the services of an insurance policy enforcement firm have very few resources available to them — unless they are willing to make compromises to their insurance companies at the very outset of a claim in dispute.

The reason for this phenomenon lies in client willingness to waive conflicts. Suppose that a corporation is sued in a California pollution liability action, and its carrier denies coverage. General Counsel consults Martindale-Hubbell (the preeminent directory of lawyers and their practice areas in the world) to find an environmental coverage lawyer in California to sue the insurer and enforce the claim.

Martindale identifies 7,541 attorneys and law firms in the state practicing environmental coverage. General Counsel calls a few of them and immediately realizes that all of them represent insurance companies, not policyholders.

When he goes back to Martindale to look for a policyholder-side environmental coverage lawyer, he finds none listed. Wondering how there could be enough environmental coverage work in California to keep 7,541 attorneys busy for insurance companies but zero for corporate policyholders, General Counsel asks around and learns the real story: No insurance defense coverage lawyer can represent a policyholder because insurer clients almost never waive conflicts. Well aware of this fact, this lawyer may not even ask for a conflict waiver, fearing that the request alone could hurt his or her relationship with the insurance company.

If insurance companies routinely waived conflicts, they would unleash their captive army of carefully-trained and specialized insurance coverage defense lawyers into the litigation marketplace, increasing the number of policy enforcement lawyers available to policyholder clients by the tens of thousands — virtually overnight. Insurance companies prefer to retain as much expertise as possible on their side of the bargaining table. Consequently, they rarely waive conflicts. And in those instances where a carrier indicates an initial willingness to make such a waiver, it usually does so because it feels it can deal better with requesting counsel rather than a lawyer with no loyalties to it or any other insurer. Or the insurance company may condition the waiv-

er on the lawyer's and client's agreement to prospectively abandon remedies such as bad faith. These tactics reflect a larger strategy by which insurance companies work hard to keep the stable of competent coverage counsel devoted solely to policyholder interests small.

This is why clearing conflicts for insurance policy enforcement is such a difficult job for large law firms. Such a firm wants to help its clients with policy enforcement issues, but may not want to risk asking for a waiver of conflict (legal or business) from the insurers its tax and corporate partners represent. Creative means of working around conflicts (like waiver of bad faith claims) can sap the policyholder's bargaining power in dealings with the carrier. Ignoring the conflict, on a theory that an insurance company client in Hong Kong is unlikely to realize that the same firm has sued it in New York, is a perilous path with potentially severe legal consequences.

As the consolidation trend continues, responsible large law firms clear conflicts as rigorously as they always have, while advocating the bar associations of the several states for more uniform conflicts rules that address the realities of modern multi-national law practice. The economy of scale they achieve through one-stop shopping mergers and acquisitions continues to justify the hard work necessary to avoid conflict pitfalls. At the same time, concentration of forces consolidations guarantee clients top flight, issue-specific resources where one-stop shopping firms cannot — by virtue of their size and wide scope of practice — serve certain needs.

---

*William G. Passannante is a shareholder and co-chair of Anderson Kill's Insurance Recovery Group. Mr. Passannante is a leading lawyer for policyholders in the area of insurance coverage. He has appeared in cases throughout the country and has represented policyholders in litigation and trial in major precedent-setting cases. David P. Bender, Jr. is a partner in the Ventura, California office of Anderson Kill. Mr. Bender has represented public and private corporations, financial institutions, private and public educational institutions, and boards of directors in insurance policy enforcement cases. Messrs. Passannante and Bender can be reached at (212) 278-1328 and (805) 288-1300, respectively.*

*Anderson Kill represents policyholders in insurance coverage disputes, has no ties to insurance companies, no conflicts of interest with no compromises in their devotion to policyholder interests alone.*

---

*The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.*

