Ethics Corner: We Did the Deal. Surely We Can Handle the Litigation.

From the Committee on Professional Responsibility, William Freivogel, Chair

Law Firm handles a transaction, including negotiating for Client, preparing the important documents, and the like. The closing is uneventful, and the parties begin performing their respective obligations. The sea is calm. Then, when the parties reach a major milestone, they find that they are in substantial disagreement about who owes what to whom. Client returns to Law Firm, says that only litigation will resolve the issues, and asks Law Firm to handle the litigation.

Should Law Firm have second thoughts about the litigation engagement? For much of history, law firms did this all the time. But, times have changed. Malpractice insurance professionals have been concerned about this scenario for the past 15 years or so. The concern is that if Law Firm loses the case, Client will claim that Law Firm had a conflict of interest and handled the case in a way to deflect attention from Law Firm's own work on the transaction. Indeed, we are aware of a number of cases in which this conflict appeared to make the malpractice case impossible to try. The conflicts were just too dangerous, and the cases were quietly settled. That explains, in part, why there have no reported malpractice cases with this scenario.

Until now.

Within the space of a week two opinions have appeared, one clearly relevant, and one possibly so. The first, and clearer, was *Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Field LLP*, 2007 N.Y. Misc. LEXIS 6543 (N.Y. Misc. Sept. 27, 2007). The reader should keep in mind that the opinion only addresses a motion to dismiss, and the court was required to accept the allegations of the complaint as true. The facts, when developed, may tell a very different story. Nevertheless, according to the complaint, Akin Gump advised and assisted its clients in setting up hedge funds to engage in certain trading strategies. Eventually, during the "late trading" imbroglio, the hedge funds captured the attention of the SEC, the New York Attorney General, and other agencies. The agencies conducted investigations, and Akin Gump represented its clients during the investigations. The investigations went badly, and the clients were forced out of business.. The clients sued Akin Gump, and in this opinion, the court granted most of the law firm's motion to dismiss. However, the court denied the motion to dismiss as to its alleged conflict of interest. Here is the court's characterization of Akin Gump's conduct, which the court held stated a cause of action:

> Plaintiffs allege that Akin Gump fraudulently failed to advise plaintiffs of the inherent and unwaivable nature of the conflicts of interest, and intentionally and purposefully acted to place its own interests above those of plaintiffs by, among other things, purposefully omitting to present and "sweep[ing] . . . under the rug" the advice of counsel defense, withholding evidence, waiving plaintiffs' privilege, and advising plaintiffs to do things, and make compromises that were not in plaintiffs' best interest, all in order to avoid being brought into question for its own participation in the underlying transactions.

Seven days after *Veras* was decided, the following appeared: *Brodie v. U.S. Dept. of Justice*, 2007 U.S. Dist. LEXIS 75191 (E.D. Pa. Oct. 4, 2007). This opinion really dealt with whether litigants could compel attendance at a deposition of an Assistant United States Attorney in a state court legal malpractice action, so the underlying facts are not at all well developed in the opinion. Certainly, no facts have yet been developed that the law firm in question did anything at all improper. According to this opinion, the firm had advised its clients on the Trading with the Enemy Act ("the Act"). Later, the United States Attorney charged the clients with violating the Act and regulations under the Act. The law firm commenced defending the criminal case and remained in that case until two weeks before trial. A jury convicted three of the clients. One was ultimately exonerated, and the other two pleaded guilty to one count each.

The clients sued the law firm for malpractice in state court, including with respect to the firm's conduct up until it withdrew from the criminal case. The complaint was not fully described in this opinion, but one might infer that the clients are complaining that the firm first advised the clients that they were not violating the Act, and then chose to defend the criminal proceeding that related to their advice.

Another event may also explain the conflict-of-interest claim. During the criminal proceeding, an Assistant United States Attorney assigned to the case had an allegedly improper conversation with her husband, a lawyer at the law firm, about the case. As a result of that conversation, the court removed the wife from the case. It was shortly after that ruling that the law firm withdrew from the criminal case.

Conclusion: Do these cases, and the unnamed cases mentioned above, which settled under the radar screen, mean that Law Firm should never take on the litigation arising out of its earlier work? Not at all. Malpractice insurance professionals recommend that, in this scenario, objective partners (not the partners involved in the underlying work) do a careful analysis of what Law Firm might have done in the underlying work. At one extreme, in some cases they will conclude that Law Firm simply cannot proceed. At the other extreme the dispute may have nothing whatever to do with Law Firm's underlying work, and that it may proceed. In between the extremes, other measures may be appropriate, such as sending Client to other counsel for advice as to whether Law Firm can continue. Of course, law firms in these situations must also be mindful of their possible duty of disclosure to their clients under their state's version of Model Rule 1.4.