The Legal Profession and Conflicts: Ain’t No Mountain High Enough?
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On the eve of the Civil War, William Henry Seward (one of the 19th Century’s greatest statesmen), proclaimed that the issue of slavery represented “an irrepressible conflict between opposing and enduring forces.” In the legal profession, conflicts of interest may (or may not) be “irrepressible,” but they are often the bane of lawyers’ existence, especially for lawyers who practice in large, national or international firms. Notwithstanding that fact (or perhaps because of it), one of the leading professors in the field of professional responsibility and legal ethics has observed that big firm lawyers “are some of the biggest risk-takers that I run into” when it comes to conflicts issues.¹

As Don Corleone once asked: “How did things ever get this far?” This article will attempt to answer that (and related) questions.

**Two Leading Cases**

To put the current conflicts environment in proper context, two recent, leading cases are a helpful guide. The first involves the Pennie & Edmonds law firm.

1. **Pennie & Edmonds**

   In 1980, Pennie & Edmonds (P & E) - a leading intellectual property firm - began representing Pfizer; and in 1992, P & E also started representing Searle. Both Pfizer and Searle were in the forefront of developing a new type of drug: Cox-2 inhibitors (an anti-inflammatory drug); Pfizer and Searle entered into cooperative marketing agreements with respect to a specific Cox-2 drug called Celecoxib (P & E knew of this cooperative arrangement at least as of 1998).

   In 1995, P & E began representing the University of Rochester (Rochester) for purposes of prosecuting a patent application for Cox-2 inhibitors before the Patent and Trademark Office

(PTO). In March 1998, as P & E was proceeding with its Rochester patent prosecution, the firm circulated an internal conflicts memo which stated that Searle was retaining P & E specifically for Cox-2 patent matters. None of the Rochester partners at P & E responded to that memo; those same Rochester partners knew that Rochester (assuming the PTO granted the patent) intended to sue, or license, potential infringers, including Pfizer (and further knew that Rochester wanted P & E to represent Rochester for those purposes).

In April 2000, as P & E was advising Rochester on prospective litigation strategies, the PTO issued Rochester a patent for Cox-2; Rochester then brought an infringement action against Pfizer. Not surprisingly, Pfizer and Searle then sued Pennie & Edmonds.

The issue before New York Supreme Court Justice Charles Ramos was whether P & E violated DR 5-105 by representing two different patent clients in connection with related (but not necessarily identical) applications pending before the PTO, with knowledge that it was likely that one client would sue, or attempt to license the other.\textsuperscript{2} P & E defended itself on the ground that there was no conflict until “actual adversity” existed between two (or more) clients; it took this position (in the main) because by the time Rochester actually sued Pfizer, P & E was no longer Rochester’s counsel.

Justice Ramos rejected P & E’s defense, found that the firm’s conduct ran afoul of the “appearance of impropriety” standard, ruled that there had been a violation of DR 5-105 (C) by the firm’s failure to disclose the multiple representations and failure to obtain client consent to

\textsuperscript{2} New York DR 5-105’s counterpart in the ABA’s Model Rules is Rule 1.7.