When the Professional Becomes Part of the Story

Authors:

Andrea Schillaci
Hurwitz Fine, P.C.
The Liberty Building
424 Main Street, Suite 1300
Buffalo, NY 14202
AS@hurwitzfine.com

Louis J. Britton
Kightlinger & Gray, LLP
One Indiana Square, Suite 300
211 North Pennsylvania Street
Indianapolis, IN 46204
lbritton@k-glaw.com

Professionals sometimes find that a business deal they have structured or corporate matters in which their assistance was required devolve into litigation between the parties to that transaction. It has become increasingly common to see the professional pulled into the litigation along with those parties as direct or third-party defendants. These cases often involve messy fact patterns and difficult ethical issues both in the communications before and during the litigation and the issues presented in mediation or other settlement discussion. This panel will discuss their experiences and strategies for defending and navigating those claims from the perspectives of the defense and the claims representative.

Lawyers who assist companies with business matters are sometimes asked by those companies to assist with litigation that is related to those same business matters. One example would be where a minority shareholder believes that matter harmed the company/minority shareholder and litigation ensues. Often times such lawsuits are brought against an officer/directors/majority shareholder and the company. These suits can be direct, derivative or a combination of the two. A direct action attempts to recover on behalf of shareholder directly for the shareholder's damages. In such cases, the analysis of whether the same lawyer can represent the defendants is usually easier as both are aligned in defeating the minority shareholder's claims.

A derivative action allows a minority shareholder to sue on behalf of the company and thus if there is a recovery it flows to the company. This can present issues in deciding whether the same lawyer can represent both defendants. The following quote from the Supreme Court of Texas captures some of these challenges:

> Shareholder derivative actions provide a procedural pathway for a minority shareholder to sue on behalf of the company for wrongs committed against the company. Because the suit is to vindicate the company's rights, it is often said that the company is a "plaintiff" in a derivative action. Labeling the company a "plaintiff" does not tell the whole story, however. Most companies begin derivative litigation resistant to the minority shareholder's derivative claims. The resistance of the company's usual decisionmakers to the minority shareholder's claims is what causes derivative litigation in the first place. For this reason, in addition to sometimes being called plaintiffs, companies embroiled in derivative litigation are also commonly called "nominal defendants." Thus, companies in derivative litigation are simultaneously "plaintiffs" and "defendants," depending on how you look at it. Of course, if the company is literally both plaintiff and defendant, then no lawyer could ever represent it in derivative litigation because to do so would automatically place the lawyer on both sides of the case. Obviously, that is not the rule.

In re Murrin Bros. 1885, Ltd., 603 S.W.3d 53, 58 (Tex. 2019).

When evaluating whether the lawyer can represent both the company and the defendant officer/directors/majority shareholder, Rules 1.7 and 1.13 of the Rules of Professional Conduct are implicated. *Shah v. Rodino*, 2013 WL 12489650, at *3 (N.D. Ind. Apr. 22, 2013).

ABA Model Rule 1.13 states:

> 1.13 Organization as Client
> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
> ….
> (g) A lawyer representing an organization may also represent any of its directors officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13.

Rule 1.13(g) contemplates the possibility of dual representation. As noted by Comment 12, this section allows for the lawyer to represent the company and a principal officer or major shareholder, subject to Rule 1.7. Comment 14 provides further guidance on derivative actions:

> [14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

1.13 Organization as Client, Ann. Mod. Rules Prof. Cond. § 1.13 Comment 14.

Rule 1.7 states:

> 1.7 Conflict of Interest: Current Clients
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

1.7 Conflict of Interest: Current Clients, Ann. Mod. Rules Prof. Cond. § 1.7

Most cases appear to focus on whether the representation would require the lawyer to take conflicting positions or a position that involves a risk of harming one client. Courts analyzing whether a conflict exists can come in the form a disciplinary matter or perhaps more often in the form a motion to disqualify counsel from dual representation. Courts across the country appear to be split on how to analyze whether a conflict occurs that prevents the same lawyer from representing the company and its defendant officer/director/majority shareholder. Some courts have held that such dual representation is almost always impermissible. see *In re Oracle Sec. Litig*., 829 F. Supp. 1176, 1188–89 (N.D. Cal. 1993) ("Here, because Oracle's special settlement committee lacked independent counsel, the derivative settlement reeks of collusion between derivative plaintiffs' counsel and the individual defendants, at the expense of the corporation."); see also *In re Conduct of Kinsey*, 294 Or. 544, 660 P.2d 660, 669 (1983) (requiring separate counsel unless the claim is "patently sham or patently frivolous"); *Rowen v. LeMars Mut. Ins. Co. of Iowa*, 230 N.W.2d 905, 914 (Iowa 1975) (holding that the potential for a conflict of interest is so great as to require representation by independent counsel).

Others generally consider that the interests of the company and its controlling officers are generally aligned in such cases. *Respler on Behalf of Magnum Hunter Res. Corp. v. Evans*, 17 F. Supp. 3d 418, 421 (D. Del. 2014) ("[I]n derivative actions, there exists no conflict of interest between a corporation and individual director defendants at the motion to dismiss stage."); *Marcum v. Scorsone*, 457 S.W.3d 710, 719 (Ky. 2015) (holding that common representation is not independent grounds for disqualification in a shareholder derivative suit); *Scattered Corp. v. Chi. Stock Exch., Inc.*, No. 14010, 1997 WL 187316, at *6–8 (Del. Ch. Apr. 7, 1997); *Robinson v. Snell's Limbs & Braces of New Orleans, Inc.*, 538 So. 2d 1045, 1048–49 (La. Ct. App. 1989) ("[T]here is no conflict of interest because there are really no adverse interests being represented.").

Others still recognize that conflict can occur in such situations but require evidence that the company has suffered some detriment due to the dual representation or that it would be apparent to the lawyer that interests were potentially adverse. *Shah v. Rodino*, 2013 WL 12489650, at *5 (N.D. Ind. Apr. 22, 2013).

Finally, other courts find that there is a conflict when there are serious allegations of wrongdoing on the part of the controlling officers. *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1316 (3rd Cir. 1993) (disqualification not required in derivative suit for firm who simultaneously represented corporation and individual manager defendants where there were no allegations of directors' fraud, intentional misconduct, or self-dealing).

As we know, litigation can often end with a settlement. In dual representation cases though, sometimes settlement of shareholder/company litigation is just the beginning of a new lawsuit. Take for instance, the curious case of *Duro, Inc. v. Walton*, 43 F.4th 648 (7th Cir. 2022). Duro was in the business of selling pallets and had three shareholders. Its president and majority shareholder, Rodino, ran the company. The two minority shareholders often disagreed with Rodino's actions in running Duro and filed numerous lawsuits against Rodino and Duro in state and federal court for over a decade. Rodino and Duro were represented by the same law firm in those suits (May Oberfell Lorber, or "MOL").

Those cases languished, partially resolved but eventually resulted in a federal court action, wherein the minority shareholders alleged that Rodino had engaged in money laundering and racketeering among various other wrongdoing. Their claims were primarily direct, not derivative, during the litigation. They sought to disqualify MOL twice and failed. They then amended their complaint to add a derivative claim for legal malpractice against MOL arising out of its handling of the shareholder litigation over the years. They added other derivative claims as well. After MOL's motion to dismiss was denied, MOL withdrew from representing Duro and Rodino.

The minority shareholders eventually settled their claims against Duro, Rodino and others. As part of the settlement, Duro redeemed the shares of Rodino and one minority shareholder leaving one remaining shareholder, Shah. The settlement expressly attempted to preserve any claims that Duro might have against MOL. Further, as a condition of the settlement Rodino was required to execute a waiver of the attorney-client privilege and work product privilege regarding communications, disclosures, advice and documents between himself and MOL.

In the days after the settlement, Shah took over Duro and transferred all of its assets (worth millions of dollars) to his own competing pallet company. Duro had no hard assets, income, revenue, employees or customers after Shah's actions. The only asset that remained was the legal malpractice claim against MOL.

Less than a year later, Shah filed another amended complaint. This time Duro and Shah asserted claims for legal malpractice, conflict of interest and for violating the Computer Fraud and Abuse Act ("CFAA"). The CFAA claim asserted that MOL assisted Rodino's deletion of computer files that would have incriminated him. Shah's individual claims on his behalf were dismissed by the Court as it was determined that Shah was never MOL's client. The conflict of interest claim was dismissed as well. The legal malpractice claim between Duro and MOL was based on allegations that Rodino breached his fiduciary duties to Duro with the advice and assistance of MOL. Additionally, it alleged that MOL failed to take adequate steps to protect Duro and prevent Rodino from engaging in unlawful conduct.

After discovery was completed, MOL moved for summary judgment on the remaining claims by Duro of legal malpractice and the CFAA violation. MOL argued that Duro had failed to obtain expert opinion testimony that connected MOL's acts or omissions to Duro's alleged harm. Additionally, MOL argued that while the legal malpractice claim was brought in Duro's name, in reality it was Shah bringing the claim. Shah owned Duro solely at the time the claim was made by Duro, Shah was a former litigation adversary of MOL and the settlement between Duro, Shah and Rodino served as a de facto assignment to Shah of Duro's claim. In Indiana, assignments of legal malpractice claims are impermissible. The court agreed and granted summary judgment on proximate cause and assignment as to the legal malpractice claim. The court granted summary judgment as to the CFAA claim as well.

Duro appealed the granting of summary judgment on the legal malpractice claim. The Seventh Circuit set forth the relevant Indiana law discussing the assignment of legal malpractice claims. The Indiana Supreme Court had previously held that assignments were against public policy for two reasons: (1) the need to preserve the sanctity of the client-lawyer relationship and (2) the disreputably public role reversal that would result during the trial of assigned malpractice claims.

The lawyer-client relationship could be damaged if assignment was allowed. If a client could assign such claims, the lawyer might be less motivated to engage in zealous advocacy if she knew the adversary could retaliate by buying the right to pursue a legal malpractice claim. Additionally, the Indiana Supreme Court determined that assignments could make the lawyer a bargaining chip in settlement negotiations. For instance, an adversary could offer financially strapped parties to settle if an assignment was made. How loyal could the lawyer be after realizing that was taking place in settlement negotiations?

Moreover, such assignments would threaten the duty of confidentiality. Ordinarily, when a client sues a lawyer, the lawyer can reveal confidential client information to establish a defense. The same is true with an assigned claim. However, the client can decide to drop the claim if continuing to pursue it would cause the attorney to disclose information the client would not want disclosed. If the claim is assigned, the client loses that power. Clients who think into the future might then withhold information from the lawyers that might be damaging out of fear of losing control of that information.

The Seventh Circuit then analyzed whether an assignment or de facto assignment occurred here. A traditional assignment did not occur here – Duro did not assign directly its claims to Shah. It was undisputed that Shah had no attorney client relationship with MOL and could not have sued them directly for malpractice. Instead, a different route to accomplish the same goal was used. Duro and Rodino gave complete control of Duro to Shah by redeeming the other shares. The parties to the settlement agreed to reserve Duro's ability to bring a claim against MOL and Rodino waived all privileges with respect to MOL's representation of him and Duro. Thereafter, Shah transferred all of Duro's assets to his competing pallet company.

The Court found permitting the de facto assignment would run contrary to Indiana's prohibition against assignment of legal malpractice claims[1]. The claim became the bargaining chip that the Indiana Supreme Court sought to avoid. It had the effect of pitting "Duro and Rodino against the lawyers who had represented them, but for the benefit of Shah." *Id*. at 654. "The parties to this suit were readily willing to 'merchandize' the legal malpractice claim and privileges when it was convenient for them to help secure a settlement, thereby weakening the lawyers' duty of loyalty in the process." *Id*.

Duro argued that the prohibition against assignment really only applied to assignments to former litigation adversaries. Duro asserted that Shah had never truly been Duro's adversary. The Court was dismissive of this argument and found that assignment was not limited to former litigation adversaries. *Id*.

Duro argued if there was an assignment it should fall under the one recognized exception to the general prohibition. That exception is that assignments to a corporation's successor in interest are not barred. There are several factors that must be met to establish the exception, but Duro could not establish those factors. Moreover, Shah gained the legal malpractice claim via the settlement. He did not purchase Duro to continue its business – he transferred all of Duro to his other business. *Id*. 655.

Finally, Duro argued that there was not an assignment because Shah had previously pursued a derivative legal malpractice claim. Duro provided no case law to support the idea that a shareholder can pursue such a claim. The Court recognized as least one case that had expressly rejected that idea. *Id*. see *McDermott, Will & Emery v. Superior Court*, 83 Cal.App.4th 378 (2000) (reasoning that the shareholder could not waive the attorney-client privilege and thus the lawyer could not defend himself).

Because the Seventh Circuit agreed that Duro's assertion of its malpractice claim relied upon an impermissible de facto assignment, it affirmed summary judgment in favor of MOL. The Court also made sure to note that it was not implying that a different result would have been reached here if Shah had taken over Duro and continued to operate it. *Id*. at n. 3.

Just as lawyers may find themselves as part of their clients' litigation stories, so too, accountants are often pulled in to disputes. Often business divorce, whether initially amicable or hostile, can give rise to bad behavior and high emotions. Accountants often play a vital role in

[1] Other jurisdictions have favorably addressed de facto assignments as well. *Paonia Res., LLC v. Bingham Greenebaum Doll, LLP*, 2015 WL 7431041 (W.D. Ky. Nov. 20, 2015); *Kenco Enterprises Nw., LLC v. Wiese*, 291 P.3d. 261, 263 (Wash. Ct. App. 2013).

separation transactions as such transactions usually involve valuation or property and/or ownership interests, tax consequences, and reliance on company financial statements, whether audited, reviewed or compiled.

Long-term professional relationships may become a breeding ground for both conflicts and temptation to exceed the scope of the engagement. In other words, the old adage "No good deed goes unpunished" is a familiar theme as accountants attempt to "assist" their clients beyond a strict reading of their engagement parameters. Identification of the client may become confused and give rise to conflicts. Accountants with long-standing relationships to companies may blur the lines between the corporate entity and its management. The potential for liability may occur when accountants step beyond providing traditional professional services, become involved in corporate affairs, or attempt to perform work which is outside the scope of their experience.

Many of these elements were present in *Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Pub. Accts., LLP,* 164 A.D.3d 864, (2nd Dept 2018), which provides a cautionary tale. In that action, a shareholders agreement required shares to be valued "by the accountants servicing the corporation using normal and usual accounting practices." This language was unchanged through the years of the corporations' existence, despite the company's change of accounting firms, to a firm that was engaged solely for tax preparation purposes and which was not qualified to do business valuations.

For many years, there were three Trio shareholders. They had a long-standing relationship with their accountants, who primarily provided tax preparation services. When the first shareholder wished to depart, he recognized that the company accountants lacked the specialized expertise to value his stock for buyout purposes. For that reason, he agreed to waive the requirement contained in the shareholder agreement and agreed to accept a negotiated sale price for his ownership interest.

Later, however, when a second shareholder sought to sell his ownership interest, he insisted on strict compliance with the terms of the shareholders agreement. But strict compliance with the terms of the shareholders' agreement was impossible as the company's accountant was unable to perform a valuation and the departing shareholder refused to accept a valuation performed by an outside valuation firm.

Multiple actions were brought by the company against the departing shareholder seeking to compel him to accept the same valuation as was applied to the first departing shareholder's interest. Those actions were heavily litigated and, added to the complications presented by the language of the shareholders agreement, a series of inconsistent judicial rulings ensued. The last of those matters was ultimately dismissed. *Trio Asbestos Removal Corp. v. Marinelli*, 68 A.D.3d 1008, 1009, 892 N.Y.S.2d 419, 420 (2nd Dept 2009). An action by the departing shareholder against the accountant was similarly dismissed. *Marinelli v. Gabriel & Sciacca, CPA, LLP*, 94 A.D.3d 826, 941 N.Y.S.2d 527 (2nd Dept 2012).

It appeared that things were at an impasse. The company accountant was unable to perform the required valuation and the departing shareholder would not consent to an outside valuation specialist filling that role.

The accountant, in an effort to overcome the problem and overcome the impasse, agreed to adopt the opinion of an outside valuation expert. This gesture was of no avail and only resulted in the accountant becoming a defendant in actions by both the departing shareholder and the company.

The action brought against the accountant by the company alleged professional malpractice, breach of contract, and negligence. The court found material issues of fact sufficient to defeat summary judgment motions by all parties. *Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Pub. Accts., LLP,* 164 A.D.3d 419.

The *Trio* case demonstrates the difficulties that can be created by companies who fail to follow – or update - their own corporate documents to the potential detriment of their accountants.

Causes of action for breach of fiduciary duty are frequently alleged against accountants with mixed success. As a general rule, an accountant is not a fiduciary of his client. *Bitter v. Renzo*, 101 A.D.3d 465, 955 N.Y.S.2d 332, 332 (1st Dept 2012). There are exceptions, however, including "where the allegations include knowledge and concealment of illegal acts and diversions of funds and failure to withdraw in the face of a conflict of interest" *Gerzog v. Goldfarb*, 206 A.D.3d 554, 555, (1st Dept 2022). In addition,

> "[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" "While it is true that the "[c]ourts do not generally regard the accountant-client relationship as a fiduciary one" except where the accountants are directly involved in managing the client's investments, where the allegations include knowledge and concealment of illegal acts and diversions of funds and failure to withdraw in the face of a conflict of interest, as in the case at bar, such a cause of action against an accountant will be permitted to stand." (internal citations omitted)

Mamdouh v. Leger, 34 Misc. 3d 1212(A), 943 N.Y.S.2d 792 (Sup. Ct. Kings Co. 2011)

Establishing a fiduciary relationship by an accountant, and breach of fiduciary obligations, requires a fact specific analysis, which can be quite challenging for a plaintiff. Take, for instance, a situation where a company's accountant becomes a mediator to assist in the buyout of a shareholder. While on the one hand, the accountant may be viewed as a neutral and trusted advisor, on the other hand, there is a grave risk of conflicts. The specific facts will determine if objectivity is present or even possible or whether a reasonable person would find a conflict between the accountant and her client. Points to consider include whether there is full disclosure of the role of the accountant and agreement by the parties to it, transparency of the role, potential existence of an undisclosed purpose, and any potential personal benefit by the transaction.

Causes of action for aiding and abetting breaches of fiduciary duties also commonly arise out of business transactions where a party feels that material information was withheld.

> "A claim for aiding and abetting a breach of fiduciary duty requires that (1) the claimant demonstrate a breach of fiduciary obligations to another; (2) the defendant knowingly induced or participated in the breach; (3) the plaintiff suffered damages as a result thereof'

Sherbrooke Smithtown Owners Corp. v. Merson, 2012 NY Slip Op 51892 [U] (Sup. Ct. Suffolk Co. 2012). In order to prevail on such a claim, a plaintiff must establish that the alleged aider and abettor had actual knowledge of the primary actor's breach of fiduciary duty. Conclusory allegations that the defendant "knew or should have known" are insufficient. *Bitter v. Renzo*, 39 Misc. 3d 1208(A), 971 N.Y.S.2d 69 (Sup. Ct.), *aff'd*, 101 A.D.3d 465, 955 N.Y.S.2d 332 (2012)

Even acting within the scope of a traditional engagement, liability can arise. In *Kolb v. LJ Rabinowitz, CPA*, 117 A.D.3d 978, 978, 986 N.Y.S.2d 523, 524 (2nd Dept 2014) a car dealership suspected irregularities and hired an outside accountant to review the dealership's books and records and to oversee the dealership's in-house controller. Finding nothing amiss, the accountant assured the plaintiff that everything looked fine. Thereafter, the plaintiff engaged the services of a forensic accounting firm whose audit revealed a $2.3 million discrepancy. The company's in-house controller was later indicted and pled guilty to Grand Larceny and, as part of the plea, consented to pay restitution of over $200,000. Ultimately, the appellate court affirmed dismissal of the cause of action for breach of fiduciary duty against the accountant, finding that the outside accountant were not, in fact, fiduciaries of the dealership. But in the meantime, the accountant was burdened by litigation.

In contrast, the court in *New York State Workers' Comp. Bd. v. Fuller & LaFiura, CPAs, P.C.* denied a motion to dismiss and allowed plaintiff's cause of action against the accountant to survive.

> Plaintiff alleged that Fuller held itself out to have the requisite skill and expertise to maintain the trust's financial records, provide auditing services and—importantly—provide advice to the trust regarding the trust's financial status. According to plaintiff, Fuller breached its fiduciary duty by knowingly and consistently concealing the trust's true financial condition and failing to properly advise the trust regarding its solvency, causing over $8 million in damages.

146 A.D.3d 1110, 1112, 46 N.Y.S.3d 266, 270 (3rd Dept 2017).

The most common claims against accountants involve allegations of professional negligence. These claims may also assert failure to identify the actual client, performing functions outside of the scope of the engagement letter, and/or performing services which are outside of the scope of the professional's experience.

Other perils involve third-party reliance on an accountant's work product. Breach of an alleged contract with a third-party lender arose from a compilation engagement in *Ris v. Finkle*, the court stated that

> the Court of Appeals has held, an accountant may be liable to the lender on a theory of negligent preparation of a borrower's financial statements and rendering a report therein, even an uncertified one, where, even though the engagement is pursuant to a contract entered into between the accountant and the borrower, there is "evidence of a relationship sufficiently approaching privity between the lender and the accountant" [*William Iselin & Co., Inc. v. Mann Judd Landau,* 71 N.Y.2d 420, 422–423, [1988]. In determining whether there is a bond " 'so close as to approach that of privity' ", the Court of Appeals has "spelled out the following criteria for liability: (1) awareness that the reports were to be used for a particular purpose or purposes; (2) reliance by a known party or parties in furtherance of that purpose; and (3) some conduct by the defendants linking them to the party or parties and evincing defendant's understanding of their reliance"

148 Misc. 2d 773, 777, 561 N.Y.S.2d 499, 501–02 (Sup. Ct. NY Co. 1989).

What is surprising about this decision is that the court found sufficient evidence to sustain a cause of action for breach of contract against the accountant by a third party based on a compilation engagement with full disclosure of the limitations based on a functional equivalent of privity, at least in response to a motion to dismiss.

Lawyers often have a difficult time with the differences in nuances of conflicts in the accounting world versus in the legal world. The AICPA Code of Professional Conduct is clear: "In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others" (Code of Professional Conduct Rule 102). As with lawyers, some conflicts can be waived, others cannot. Of paramount importance is recognition of the identity of the client. This is the benchmark for determination of any potential conflict.

Conflicts most often arise in the context of corporate engagements as the entity only acts through its agents and the agents are distinct from the entity. "A client is any person or entity other than the member's employer that engages a member or a member's firm to perform professional services or a person or entity with respect to which professional services are performed" (AICPA Code of Professional Conduct §92.03). A reasonable person standard is applied in making a determination of conflict. Conflicts can arise in the context of divorce, where the accountant has provided financial planning or tax planning services to both spouses, where an accountant has a financial interest in a client company, or where an accountant recommends a client invest in a business in which the accountant has a financial interest as part of tax or financial planning services.

Business clients often look to their accountants for assistance with matters that are outside the scope of engagement without ill intent or even realizing that the ask may be improper. Accountants truly want to assist their clients and do not always recognize when they are stepping outside of boundaries, or the legal risks they may be undertaking. Many times this is because all the parties are initially getting along. However, we live in a litigious society, and when something goes wrong or a party feels aggrieved, it will be the accountants who find themselves in a lawsuit.