

Business and the Law

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A Judicial Attack On Ethics Filings

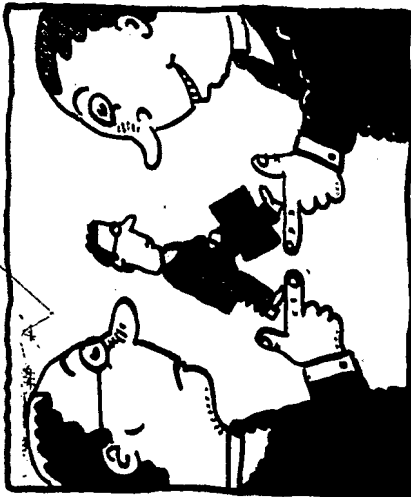
BREAKING-legal ground, a Federal court has decided that a law firm could avoid a conflict of interest charge by ousting a partner. The decision, handed down last month in Federal District Court in New York, is particularly important as the legal industry continues to consolidate around a few dozen rapidly growing firms, many of which pride themselves on opening branch offices and gobbling up smaller firms.

Some ethics experts view the ruling as an effort to blunt the proliferation of conflict-of-interest challenges that are employed as a strategy intended to wound opponents in litigation. Indeed, in his opinion, Judge John M. Walker Jr. said he had construed the ethics rules governing lawyers to discourage "an increased number of disqualification motions, born of little more than hardball litigation strategy sessions."

The case began last November, when the Hartford Accident and Indemnity Company sued RJR Nabisco. After Kohlborg, Kravis & Roberts completed its leveraged buyout of RJR Nabisco, Hartford Accident, like several other large Nabisco bondholders, sued Nabisco and charged it with violations of Federal securities laws.

The lawsuit was drawn up for Hartford by LeBoeuf, Lamb, Leiby & MacRae of New York. When it was filed, R. J. Reynolds, a unit of RJR Nabisco, was represented by a LeBoeuf partner in Boston. The partner, Donald J. Wood, had been retained years earlier to help represent Reynolds in its fight against a wave of product liability lawsuits brought by cigarette smokers.

In a clear sign of tension within the law firm, Mr. Wood wrote to Reynolds two days after the suit



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was filed, saying he had told his firm that he objected to the suit. For its part, Nabisco said it would not waive potential conflict charges. Instead, the company filed a motion, challenging LeBoeuf's representation of Hartford Accident.

In the ruling on the conflict-of-interest motion, Judge Walker said that Mr. Wood's relationship with LeBoeuf had proceeded to go downhill fast and that he had been told two months later that he would be dismissed from the firm. He left LeBoeuf in May, taking R. J. Reynolds with him.

In its defense against Nabisco's motion, LeBoeuf denied that the dismissal was in any way related to the litigation with Hartford Accident. But Judge Walker found that it had been only after the lawsuit was filed that relations soured between the Boston partner and the New York office.

Under the rules governing the ethics of lawyers, a law firm cannot sue its clients under any circumstances. Thus, if a firm represents two clients at odds with each other, it cannot get involved in the fight between the two. And as several courts have noted, a firm cannot, in effect, fire a client to avoid

a conflict of interest.

The reasoning behind the rule is simple: a client can expect the undivided loyalty of its lawyers, even if the firm lands a bigger or more lucrative client later.

But the legal profession's rules are not inflexible. They permit a law firm to sue a former client if the complaint is not "substantially related" to the earlier representation of that client.

In a judicial sleight-of-hand, Judge Walker found that R. J. Reynolds was a former client, even though LeBoeuf was representing it when it filed the lawsuit for Hartford Accident. He concluded that since Mr. Wood alone possessed confidential information from R. J. Reynolds and since that representation was not related to the securities litigation, LeBoeuf had not violated conflict rules.

"The court is saying that it's O.K. for a firm to fire its client as long as it fires its lawyers with it," said Roy D. Simon Jr., a professor at Washington University School of Law in St. Louis. "In that respect, lawyers do not only have to make a choice between their client and their partner. They also have to choose between their clients. And clients shouldn't be made to feel they are dispensible when a bigger client comes in."

"The ruling also encourages a kind of race," he added. "The client who thinks it's unfair has to get to the courthouse before the law firm gets rid of the partner that possesses the knowledge it doesn't want to have."

Professor Simon added that the case would also be viewed as a sign that courts will accept the notion of "Chinese walls," that can avoid conflicts by keeping the matters of different branch offices separate. Indeed, Judge Walker made a strong point of noting that Mr. Wood was in Boston and that he alone handled R. J. Reynolds matters.

But the ethics rule in New York, as in most jurisdictions, does not recognize Chinese walls, and explicitly says that if one lawyer has a conflict of interest, then so do all the members of the firm.