

# MINNESOTA LAWYER



## Quandaries and Quagmires: Trending: legal ethics and risk management

By Chuck Lundberg July 29, 2019

Two blockbuster news stories in the past few weeks illustrate some important principles of legal ethics and risk management.

### Operation Varsity Blues

The shocking, sensational Varsity Blues scandal broke back in mid-March.

"The 2019 college admissions bribery scandal, nicknamed Operation Varsity Blues, exposed a criminal conspiracy to influence undergraduate admissions decisions at several top American universities. It was disclosed on March 12, 2019, by United States federal prosecutors, and at least 51 people are alleged to have been part of it, a number of whom have pled guilty or agreed to plead guilty. Thirty-three parents of college applicants are accused of paying more than \$25 million between 2011 and 2018 to William Rick Singer, organizer of the scheme, who used part of the money to fraudulently inflate entrance exam test scores and bribe college officials."<sup>1</sup>

In early July, Law360 dubbed a preliminary court ruling in the case — on disqualification issues based on conflicts of interest — "the biggest legal ethics decision of 2019." In June, federal prosecutors in the case had flagged several potential conflicts for the BigLaw firms who are representing multiple parents in the scandal, including Boies Schiller Flexner LLP, Latham & Watkins LLP, Nixon Peabody LLP and Ropes & Gray LLP.

One example of the problematic and potentially disqualifying conflicts cited was the fact that Latham & Watkins represents (1) "Full House" actress Lori Loughlin (or "Aunt Becky" as *Above the Law* refers to her<sup>2</sup>), (2) her husband, Target fashion designer Mossimo Giannulli, and (3) the University of Southern California — *the school they are charged with defrauding*.

In the first ruling on the issue, a Boston federal court decided to allow Boies Schiller Flexner LLP to continue representing two parents charged, even though one of the parents was cooperating with the government while the other was not.

The U.S. Magistrate Judge ruled that Boies Schiller had taken the necessary steps that would keep the two parents' cases separate, and that both parties appeared to fully understand the situation.<sup>3</sup> It's a good case study for how to oppose a DQ motion brought by opposing counsel, including the use of supporting

affidavits by the clients expressing knowing conflict waivers and fervent demands for the right to representation by counsel of one's choosing.

Some commentators suggested that the judge might come down differently on other potential conflicts. One lawyer opined that the judge probably would not have allowed Boies Schiller to continue with both clients if there was a strong chance that the cooperating client would be called to testify against the other.

In mid-July, prosecutors took another bite at the apple, urging the Boston federal judge overseeing the Varsity Blues case to hold a "rigorous inquiry" into conflicts of interest at BigLaw firms representing parents and the University of Southern California. They pointed out that defense lawyers at various BigLaw firms have candidly conceded that some conflict workarounds would be necessary to represent their respective clients (including retaining conflicts co-counsel to question any USC witnesses). But, the prosecutors argued, the potential that adversity between the defendants and the school may arise in the case is serious enough to require disqualification, or at least to raise stark concerns about the lawyers being limited in what they can do for their clients – what ethics nerds call a "materially limited" conflict, see Rule 1.7(a)(2).

As one prosecutor's brief put it, "Pursuit of such defenses will entail not only cross-examination of U.S.C. witnesses but likely also discovery aimed at U.S.C., and effective presentation of those defenses will necessarily extend beyond witness testimony to opening statements and closing arguments . . . . The use of conflict counsel to handle the cross-examination of U.S.C. witnesses does not even purport to address these manifestations of the conflict."

But on July 23 a Massachusetts federal judge said she would allow Nixon Peabody to represent one of the Varsity Blues parents although it also represents the school, who objected to the conflict. And on July 24 a federal judge in Boston gave Duane Morris and Todd & Weld the go-ahead to represent a husband and wife who were both charged in the Varsity Blues college admissions scandal.

To be sure, dealing with alleged conflict situations like this is a recurring issue for lawyers. Significantly, conflict allegations are all too common in legal malpractice cases. And all too dangerous — a conflict allegation can turn a simple, vanilla malpractice case into a serious matter, aggravating compensatory damage exposure and potentially implicating punitive damages. So I imagine that the esteemed BigLaw defense counsel in the Varsity Blues cases at a minimum (1) had outside ethics counsel check the potential conflicts every which way before undertaking the representation and (2) retained independent outside counsel to advise each client about the risks and benefits of waiving the conflict.

In my view, however, an even more important law firm risk issue was raised at the very outset of the Varsity Blues case. At 6:30 am on Tuesday March 12th, the day the scandal broke, Gordon Caplan, the co-chairman of megafirm Willkie Farr & Gallagher, was arrested and charged with criminal conspiracy to bribe college admissions officials to gain college admission for his daughter. He allegedly agreed to pay \$75,000 to have one of the FBI's cooperating witnesses proctor his daughter's college entrance exam and correct the answers after she finished it. The taped recordings of his conversations with the cooperating co-conspirator were embarrassing, to say the least. In one recorded conversation, Caplan said: "To be honest, I'm not worried about the moral issue here. I'm worried about the – if she's caught doing that, you know, she's finished."

Willkie Farr placed Caplan on indefinite leave the day after he was arrested, but that did not prevent the firm from receiving scathing criticism and sustaining serious reputational damage. *Above the Law* immediately ran a story headlined, "Willkie Farr **Finally** Speaks About Their Partner's Role in The College Admissions Cheating Scandal." (emphasis added).<sup>4</sup> "Finally?" This was barely 24 hours after the story broke.

On the same day, Law360 also ran a critical story, quoting several ethics experts and crisis management and PR strategy consultants, all saying that the firm's response was too little, too late. One said the law firm's first misstep was the fact it took a whole day to respond publicly to news that was generating enormous media attention. Others said the law firm's statement did not go far enough in condemning the alleged behavior. Some even went so far as to say placing Caplan on leave was not a strong enough response from the firm in light of the allegations, and that a resignation would be better when it comes to preserving the firm's brand. "From a spin control standpoint, the sooner he is referred to as a former co-chairman and attorney at the firm, the better," said one of the consultants.

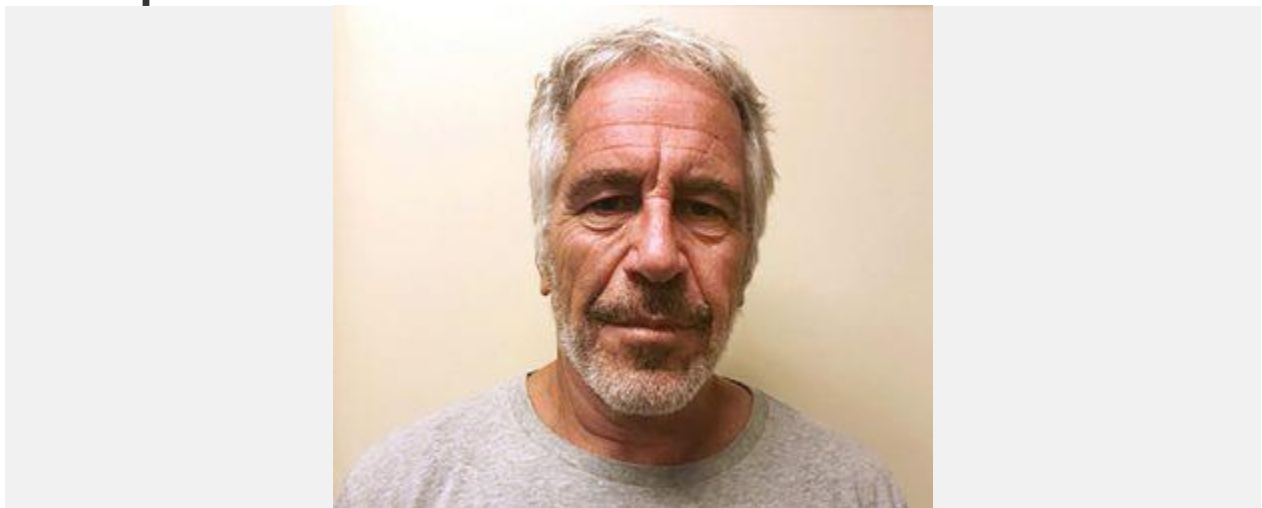
Now, the Willkie Farr firm obviously had no reason to expect that their managing partner was going to be arrested that morning for criminal conspiracy. But that just illustrates the real point for law firms – you always have to be ready to respond to a totally unexpected crisis. Indeed, the "Unexpected Firm Crisis" is now a Thing — the topic of a national legal malpractice program next month by the ABA Standing Committee on Lawyers' Professional Liability:

*"Planning for the Unexpected Firm Crisis"*

"An unexpected crisis within a law firm, such as illness, accident or death, the sudden departure of key attorneys and personnel, a malpractice claim or data breach, or other adverse event can cause massive disruption to the everyday life within a law firm. This session will explore ways law firms can prepare for the unexpected and create a plan of action to follow in the midst of chaos to help guide firms through a tumultuous time without leaving clients in the lurch. This session will address succession planning issues, ethical considerations, and relevant Model Rules of Professional Conduct ..."

By the way, Caplan pleaded guilty to a felony in May, an automatic disbarment offense in New York.

## The Epstein case



This 2017 photo provided by the New York State Sex Offender Registry shows Jeffrey Epstein. (AP file photo)

Another recent blockbuster news story, the Jeffrey Epstein prosecution for child sex trafficking, presents a very different kind of risk management issue: Can a lawyer be criticized for negotiating too good a deal for the client? Put differently, would a legal malpractice claim alleging that one's lawyer got the client "too good a deal" state a claim for relief? Consider the following commentary:

*"Daily Dicta: Why Jeffrey Epstein's All-Star Defense Team May Be The Victim of Its Own Success:"*

"[W]hat about the lawyers who represented Epstein? They include Kirkland & Ellis partner Jay Lefkowitz, as well as Kenneth Starr, Alan Dershowitz, white collar giants Roy Black and Gerald Lefcourt, and former U.S. Attorney Guy Lewis.

"They can't be faulted for trying to get the best deal possible for their client. That was their job, and they did it well.

"Maybe too well.

"Because they so thoroughly steamrolled Acosta and federal prosecutor A. Marie Villafaña, the non-prosecution agreement could still be invalidated 10 years later."<sup>5</sup>

*"Delaying Is a Lawyer's Best Friend, Isn't It?:*

"Particularly given how easy Epstein had it after accepting the plea deal, serving only 13 out of 18 months in a special facility, with his own private security, and 12-hours a day work-release, his lawyers got him a deal that should have seemed too good to be true."<sup>6</sup>

*"How Epstein's 'Sweetheart Deal' Might Have Actually Left Him Worse Off:*

"The irony is that it may well be that Epstein's lawyers the first time around were simply 'too good.' Meaning, had the federal case against him not been declined outright and had he been required to plead guilty in federal court and serve, say, two or three years, it is extremely unlikely that the feds in New York would have picked up the ball and initiated a new prosecution against him for similar conduct to which he hadn't pleaded guilty (and therefore wasn't covered by a double jeopardy bar)."<sup>7</sup>

In any event, the 33-page written record of the long negotiations in the Order vacating the non-prosecution agreement is fascinating to read and should be an instructive story for many lawyers.<sup>8</sup> One imagines that at least one of Epstein's Dream Team of lawyers had the presence of mind to tell him, "Jeff, I just want you to know that there's a possibility that the whole settlement could be vacated years from now because we got the feds to agree to too much, including not to tell the victims about the agreement. Are you sure you want to take that risk?"

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## Endnotes

1. [https://en.wikipedia.org/wiki/2019\\_college\\_admissions\\_bribery\\_scandal](https://en.wikipedia.org/wiki/2019_college_admissions_bribery_scandal)
2. <https://abovethelaw.com/2019/07/latham-watkins-fighting-to-stay-on-aunt-beckys-case-amid-conflicts-concerns/>
3. This part of the story has been surprisingly well reported. Google < varsity blues lawyer conflicts >
4. <https://abovethelaw.com/2019/03/willkie-farr-finally-speaks-about-their-partners-role-in-the-college-admissions-cheating-scandal/>
5. <https://finance.yahoo.com/news/daily-dicta-why-jeffrey-epstein-062720798.html>
6. <https://blogs.findlaw.com/strategist/2019/02/delaying-is-a-lawyers-best-friend-isnt-it.html>
7. <https://lawandcrime.com/opinion/how-epsteins-sweetheart-deal-might-have-actually-left-him-worst-off/>
8. <https://assets.documentcloud.org/documents/5745926/Epstein-Order.pdf>