

Prior Work Conflicts in the Age of COVID-19

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It is always the case that lawyers and law firms must stay attuned to the possibility of prior work conflicts: conflicts of interest that arise when a firm's interest in protecting its own prior work, or protecting the firm against a potential malpractice claim associated with that work, is in tension with the firm's obligations to its client arising from its continuing representation of the client in related matters. Special vigilance is warranted now, however, because the COVID-19 pandemic has created particular ways in which prior work conflicts are rearing their heads.

For example, there is now a great deal of scrutiny surrounding force majeure provisions in contracts. Where your firm is representing a client in a dispute surrounding the force majeure provision in a contract that your firm previously drafted or negotiated, a prior work conflict may exist. This is particularly true where the client suggests that the firm may have made a mistake by not drafting the force majeure language more carefully. But even where the client has not made that suggestion, a conflict of interest might still exist depending upon the facts and circumstances.

Disputes surrounding insurance coverage under business interruption provisions in policies are also being drawn to the fore by the COVID-19 situation. Those situations can give rise to prior work conflicts where, for instance, a law firm advised an insured that purchasing a certain business interruption policy would provide coverage in the case of a pandemic, the insurer now disputes that coverage exists, and the firm is asked to handle the dispute with the insurer.

In light of the risks associated with prior work conflicts, law firms should encourage their lawyers to consult with their General Counsel's office or otherwise seek legal ethics and risk management advice in situations where a client asks the firm to handle a dispute involving a matter on which the firm previously worked.