

OLD CLIENTS IN A NEW FILE:

Conflict and Other Ethical Issues When Changing Firms

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INTRODUCTION

- Lateral Conflicts
 - Issues
 - Identify
 - Resolving Conflicts
- Other Ethical Issues

Basic Conflict Rules

- Rule 1.6 Confidentiality of Information
 - (a) *A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation...*

Basic Conflict Rules

- Rule 1.7 Conflict of Interest: Current Clients
 - *(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation...*

Basic Conflict Rules

- **Rule 1.9 Conflict of Interest: Former Client**

- *(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.*
- *(b) A lawyer shall not knowingly represent a person in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client, (1) whose interests are materially adverse to that person; and (2) about whom the lawyer has acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation .*

Basic Conflict Rules

- **Rule 1.10 Imputed Disqualification: General Rule**
 - *(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, . . . 1.9 . . .*
 - *(b) When a lawyer has terminated an association with a firm , the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless: (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.*
 - *(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.*

Types of Conflict of Interest

- (a) Clients who come with New Attorney
 - (i) Create direct conflict under Rule 1.7 - Conflict clearance procedures same as a new client
- (b) Clients who remain behind
 - (i) No conflict if New Attorney did not participate in representation of Client and does not have any material confidential information regarding the representation - Rule 1.9(b)(2).

Types of Conflict of Interest

- (ii) Conflict exists if materially participated in representation and has material confidential information - Rule 1.9(c) (Former Client) and Rule 1.10(a) (Imputation to New Firm)
 - (1) New Attorney cannot represent client of New Firm against former client
 - (2) Imputation can be cured in limited number of states by setting up "Chinese Wall" to prevent contact between New Attorney of members of New Firm working on conflicting representation

Types of Conflict of Interest

- (c) Non-lawyers joining a New Firm that have confidential information - same conflict issues
 - (i) Chinese Wall from Non-Lawyers generally cures conflict problem

Issues Raised by Conflicts

- (a) Serious
 - Prevent lateral attorney from joining firm (or be fired)
- (b) Immediate disqualification in litigation
 - (i) "Jilted" firm likely to bring disqualification motion
- (c) Subject to declaratory action for disqualification in transactional matter

Issues Raised by Conflicts

- (d) Lose Work Product
 - Disqualified New Firm's work product may not be available to replacement counsel
- (e) Potential malpractice issue
 - Responsible for damages caused by disqualification caused by failure to properly screen New Attorney

Issues Raised by Conflicts

- (f) Malpractice issues can arise prior to New Lawyer joining New Firm
 - *Stanley v. Richmond*, 35 Cal. App. 4th 1070 (1995) (malpractice award, including emotional damages, available against attorney who accelerated settlement to join law firm on other side)

Searching

- (a) Lists to be Searched
 - (i) New Attorney's Book of Business
 - (ii) Search clients in addition to Book of Business for whom New Attorney represented and has material confidential information

Searching

- (iii) Search New Firm's clients for all matters adverse to Former Firm
- (iv) Search Former Firm's client list

Searching

- (b) Searching Issues
 - (i) Confidentiality – New Attorney cannot reveal confidential information regarding clients to New Firm
 - (1) New attorney provides name of client and matter - typically works for filed litigation
 - (2) Provide name of just client or adverse party if that preserves confidential information
 - (3) Provide all names in alphabetical order or rely on New Firm's conflict information

Searching

- (4) Search as soon as confidentiality no longer issue
- (ii) What Should be Searched - Must include clients that have been represented by New Attorney where New Attorney has received material confidential information
 - Smaller firms, may need to search all clients of Former Firm (difficult to prove New Attorney does not have confidential information)

Searching

- (iii) Time Frame of Search - Generally time frame that New Attorney at Former Firm
 - Long term, especially at large firm, query whether information retained by New Attorney remains confidential or material - statute of limitations issues

Searching

– (iv) When to Search –

- (1) Search as soon as possible - uncover “deal-breakers” before extensive discussions -
 - Potential malpractice issue for New Attorneys continuing work at Former Firm. Model Rule 125.
 - Potential merger between opposing firms must be disclosed when formal merger discussions begin
- (2) Confidentiality concerns limit initial search - use New Firm database as soon as possible - follow-up as soon as confidentiality concerns pass

Resolving Conflicts

- (a) New Attorneys' Book of Business
 - (i) Obtain consent to representation despite conflict
 - (1) When can get consent - cannot inform client prior to informing Former Firm
 - (2) Need consent on both sides - New Client and existing client of New Firm - Advance waiver issue

Resolving Conflicts

- (3) Access to attorneys
- (4) Chinese Walls - may be helpful in obtaining consents of clients

Resolving Conflicts

- (b) Former Firm's Clients - Curing Imputation
 - (i) Chinese Walls permissible in limited number of states:
 - Illinois, Kentucky, Maryland, Michigan, North Carolina, Oregon, Pennsylvania and Washington

Resolving Conflicts

– (ii) Chinese Walls may be permissible in certain additional states:

- California, Connecticut, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, New York, Ohio, Tennessee and Wisconsin

Issues: No rules and conflicting case law - representation vs. confidential information

Resolving Conflicts

– (iii) Chinese Walls not permissible (Chinese Walls always permissible with client consent):

- Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, D.C., Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wyoming

No Involvement or Confidential Information

Resolving Conflicts

- (c) Drop Conflicting Client
 - (i) Lateral (only if states where Chinese Walls are permitted) or New Firm
 - (ii) Ethical issues on Dropping Client
 - (1) Hot Potato Issue
 - (2) Firm may be able to withdrawal if no ongoing matters
- (d) Patience

Lateral Attorneys - Other Ethical Issues

- (a) Communications with Clients
 - (i) When can Clients be told?
 - (1) Before giving notice to Former Firm - Divided:
 - a. Cannot Notify. Pennsylvania Joint Opinion 99/100.
 - b. Can Notify. ABA Opinion 99-414.

Lateral Attorneys - Other Ethical Issues

- c. State law question - prudence is to wait
- (2) After giving notice to Former Firm - as soon as possible so client has adequate opportunity to choose future counsel. DC Bar Opinion 273.
- (ii) Who tells Clients?
 - (1) New Attorney generally has duty to notify clients of new location. ABA Opinion 99-414 (1999).

Lateral Attorneys - Other Ethical Issues

- a. New associate attorney may not have duty to notify client - Duty on Former Firm
- (2) Former Firm - if remaining lawyers represented client and departure effects representation, duty on Former Firm. Unclear if remaining lawyers did not represent client. *N.C. Opinion 200 (1995)*; *ABA Informal Opinion 1428 (1979)*.

Lateral Attorneys - Other Ethical Issues

- (3) Advantages of Joint Announcement -
No ethical issues; limit claims of solicitation and other matters; orderly, documented notice

Lateral Attorneys - Other Ethical Issues

- (iii) What can Clients be told?
 - (1) Prior to Notifying Former Firm
 - a. Even if state permits notification, clear such notification cannot include solicitation
 - (2) After notifying but Before Leaving Former Firm

Lateral Attorneys - Other Ethical Issues

- (2) After notifying but Before Leaving Former Firm
 - a. Notice can include name and address of new firm, date of departure, whether Prior Firm and/or New Firm are willing to represent client, statement that client can choose its own lawyer, description of conflict issues with New Firm
 - b. Generally, solicitation by New Attorney not permitted during this period

Lateral Attorneys - Other Ethical Issues

- (3) After Leaving Former Firm
 - a. Can Contact and Solicit Clients subject to
 - » (i) Ethical rules on solicitation (generally need prior professional relationship - can't contact Former Firm clients where there was no relationship)

Lateral Attorneys - Other Ethical Issues

- » (ii) No use of former firm resources for solicitation
- » (iii) Rules against disparagement
- » (iv) Former Firm must provide information regarding departing attorney

Lateral Attorneys - Other Ethical Issues

– (b) Files

- (i) What documents can lateral take?
 - (1) Prior Firm Documents (financials, recruiting and marketing information, client lists). Generally cannot take - may constitute theft of trade secrets. *Fred Siegel v. Arter & Hadden*, 707 N.E.2d 853 (Pa. 1999).

Lateral Attorneys - Other Ethical Issues

- (2) Client Files
 - a. General - Files are owned by Client - if Departing Attorney takes Client, Client's files should be transferred
 - b. Work Product (notes, memos, etc.) of remaining lawyers:

Lateral Attorneys - Other Ethical Issues

- (i) Majority - Work Product belongs to client and should be transferred. *Restatement of Ethics* ¶46. Majority states include: Arizona, California, Colorado, Georgia, Ohio, Oregon, New York, Pennsylvania and Texas.
- (ii) Minority - only end product (pleadings, letters, etc.) are owned by client - attorney notes owned by attorney. Minority states include: Alabama, Illinois, Iowa, Mississippi, Missouri and North Carolina.

Lateral Attorneys - Other Ethical Issues

- (3) Form Memorandum, Pleadings and other Forms
 - a. Generally, departing attorney can take forms departing attorney created but not forms other lawyers created. *ABA Opinion*, 99-414.

Lateral Attorneys - Other Ethical Issues

- (ii) What procedures should be followed in transferring files?
 - (1) Before transferring files, obtain written direction from client, maintain index of files and documents transferred and obtain receipt for transferred files
 - (2) May be able to keep copies of documents that are being transferred at Prior Firm's own cost. *Morgan Lewis v. Quantitative*, 55 Pa.D.&C. 256 (2002). Establish firm policy.

Lateral Attorneys - Other Ethical Issues

- (c) Soliciting employees and staff
 - (i) Prior to departure
 - (1) No solicitation - breach of lawyer's fiduciary duty to other partners while still working at Prior Firm

Lateral Attorneys - Other Ethical Issues

- (ii) Post-departure
 - (1) Free to solicit - *Pennsylvania Joint Opinion 99/100*