

Controlling Conflicts Between Old And New Clients

BY STEPHEN GILLERS

At first hearing, it may sound odd to learn that a lawyer's representation of a new client conflicts with duties the lawyer still owes to a former client, perhaps one for whom the lawyer has done no work in many years. We all know, of course, that lawyers have continuing obligations to former clients and it is but a small step to say that these can be inconsistent with responsibilities they may owe to new clients. Yet that small step, easy enough to take, tells us very little about the precise content of continuing duties to former clients, information was need to know in order to decide whether a new matter is in fact conflicting.

Perhaps most obvious is the rule, now memorialized in DR 5-108(a)(1) of the New York Code of Professional Responsibility, that forbids a lawyer to accept a matter that is materially adverse to the interests of a former client if the matter is the same as or substantially related to a matter that the lawyer (or, under DR 5-105(D), another lawyer is his or her firm) handled for the former client. Two things must be true for this rule to apply. The matters must be the same or substantially related and the former client's interests must be "materially adverse" to the interests of the new client in the new matter. No rule forbids a lawyer to accept a matter adverse to a former client if the new matter is unrelated to the earlier matter in which the lawyer represented the former client. And no rule forbids a lawyer to accept a matter that is adverse to a third party, even if the matter is the same as or substantially related to a matter the lawyer once handled for a former client, so long as the latter's interest are not materially adverse in the new matter.

Defining Adverse Interests

One intriguing question is this: What kind of interests count for purposes of deciding whether a former client's interests are "materially adverse" in a particular matter? Most obviously, of course, if the former client is a party to the matter, its interests are legally adverse in the matter and those interests do count. That is in fact the usual situation. But even if a former client is not a party to a matter, its interests may be adverse in the matter if someone closely aligned with it is a party to the matter. That will be true, for example, for spouses. *Rose v. Becker*, 586 N.Y. S.2d70 (4th Dept. 1992). Or it may be that the new matter will require inquiry into the very work that the former lawyer performed for the former client. *Anonymous v. Anonymous*, 691 N.Y. S. 2d 769 (1st Dept. 1999).

Insufficient to warrant disqualification is economic impact from the matter upon the former (or even current) client. In other words, the fact that a judgment in favor a lawyer's current client will have indirect economic effects on another current or a former client of the lawyer does not preclude the new representation. This is the clear import of decisions permitting law firms to act adversely to a company that is a parent or subsidiary of a firm client, notwithstanding that victory against the company will be

financially damaging to the client. ABA Opinion 95-390. *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 663 N.Y.S.2d 499 (Sup. Ct. Kings Co. 1997), affirmed 5679 N.Y.S.2 312 (2d Dept. 1998).

Conflicts Not Confirmed To Litigation

Successive conflict questions generally arise in litigation, but neither DR 5-108(A)(1) nor MR 1.9(a) is limited to conflicts in litigation. Neither mentions any particular legal service. Both contain the word “adverse.” A negotiation or other transactional matter can be adverse to the former (or current) client’s interest no less than litigation. Some are inherently so. A hostile takeover effort and a workout under threat of a bankruptcy petition are examples. Even where this degree of adversity is absent, a transactional matter can be adverse to the interests of a former client and substantially related to the former representation. Imagine a lawyer who did all the lease negotiations for the owner of a shopping center. A day after the owner changes law firms, the lawyer shows up to negotiate on behalf of prospective tenants. That won’t be allowed.

New York has added a second test, in addition to the substantial relationship test, for determining successive conflicts. Even if a former client cannot show a substantial relationship between the matter the lawyer handled for it and a new, materially adverse matter, the former client may be able to show that the lawyer in fact received relevant confidential information about in the prior matter and that here is a “reasonable probability of disclosure” of the information in the new matter. *Jamaica Public Service Col, Ltd. V. AILI Insurance Co.*, 707 N.E.2d 414 (1998). A motion to disqualify under this standard would rest on DR 5-108(A)(2), which forbids a lawyer to “use” a former client’s confidences or secrets absent an exception to the duty to protect these or where the information has become “generally known,” a term defined rather broadly in *Jamaica Public Service* to mean, in effect, reasonably discoverable, not notorious. The *Jamaica Public Service* court cautioned, however, that disqualification under this alternate route could not rest on “generalized assertions of ‘access to confidences and secrets.’” Although the former client “need not actually spell out the claimed secrets and confidences in order to prevail” —that is, after all, what it wants to protect—“it must at a minimum provide the motion court with information sufficient to determine whether there exists a reasonable probability that DR 5-108(A)(2) would be violated.”

Providing that information to the motion court might be done ex parte. *Petrossian v. Grossman*, 631 S.2d 187 (2d Dept. 1995); *Decora Inc. v. DW Wallcovering, Inc.* 901 F. Supp. 161 (S.D.N.Y. 1995).

Other Obligation To Former Clients

Apart from the instructions to refrain from conflicting subsequent matters, New York lawyers have certain other obligations to former clients worth noting. These are different from the obligations stated in the ABA Model Rules. DR 4-101 broadly forbids lawyers to use or to reveal the confidences or secrets of clients and former clients without regard to whether the use or revelation causes the client a “disadvantage,” unless an exception applies or, under DR 5-108, the information has become “generally known.” See also Ethical Consideration 4-6 (the obligations under Canon 4 continue after the professional relationship has ended). By contrast, ABA Model Rule 1.6 prohibits only revelation of client confidences; MR 1.8(b) prohibits only “use” of current client confidences “to the disadvantage of the client;” and MR 1.9(c) forbids only revelation of former client confidences and their “use...to the disadvantage of the former client.”

We have been discussing the protection of a former client's information. And that is indeed how lawyers generally understand their duty to former clients. But here is another duty, too. It is a duty of loyalty to a former client. This may sound oddest of all. What is its scope?

Examining The Duty Of Loyalty

Let's illustrate with an extreme example. The case is *Green v. Blue*. Gerren gets a judgment at trial. Blue appeals. Green hires lawyer Smith to represent her. Smith works solely with the trial record. Everything he knows is public knowledge. The judgment is affirmed. Blue then wishes to hire Smith to represent him on a further appeal. Can Smith do it?

Or take this example: A bill is pending in the state Assembly. A trade group hires lawyer Jones to testify that the bill violates the state constitution. Jones relies solely on the text of the bill and caselaw in giving her testimony. The Assembly passes the bill anyway. When the bill goes to the state Senate, another trade group wants to hire Jones to testify that the bill is constitutional. Can Jones do it?

In each case, the lawyer is assumed to have received confidential information from the first client. If the lawyer cannot take these matters – and I hope we would all agree that the lawyer should not be allowed to do so – it must be for another reason. That reason is the continuing duty of loyalty the lawyer has to the first client. This continuing duty has ill-defined borders, but it exists. Case law recognizes it, although the New York State Bar Association concluded in one opinion that there was no such duty apart from the duty to safeguard confidences.

Kasis v. TIAA, 717 N.E.2d 674 (1999) cites “policies both of maintaining loyalty to the first client and of protecting that client's confidences” (emphasis added); New York State Opinion 628. Notably, DR 5-108(A)(1), which governs successive conflicts, does not mention protection of confidences as its only goal. Nor does MR 1.9(a), from which it is derived. Admittedly the duty must remain narrow so as not unduly to foreclose a lawyer's legitimate interests in being available for future matters and the legitimate interests of other clients in employing the lawyer. A good test is to ask whether a new matter will require the lawyer to seek to achieve a goal that is directly contrary to the goal the lawyer was hired to achieve for the former client. In my two hypothetical situations, the answer is yes.

This brief excursion into a law firm's duties to former clients underscores the importance of investigating potential new matters to determine whether they present conflicts. In New York, DR 5-105(E) requires law firms to keep records that will enable its lawyers accurately to make that assessment. But one other lesson should be learned. Computerized records, wonderful as they are in identifying conflicting matters by searching for client names, are not a panacea. Computer searches will not catch a conflict where the new matter does not contain a former client's name. A firm must also circulate new business memos. Human memory still has a role to fill in the process of checking for conflicts.

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