

# Passing the Baton When A Lawyer is Disqualified

BY MARY C. DALY

The event you most dreaded has just occurred. Your adversary has moved — successfully — for the disqualification of your law firm in an important matter involving a long-term client. After carefully considering the procedural and substantive hurdles involved in an appeal, you reluctantly advise your client against it. What now? Your client needs a new lawyer, wants your help in selecting one, and emphatically instructs you to give the successor counsel "everything you've got. Get 'em up to speed as fast as you can." From the client's perspective, that admonition makes a lot of sense. Disqualification causes delay and added expense. Close cooperation between you and your successor counsel will lessen those burdens. But efficiency is not necessarily an enshrined virtue in lawyer codes of conduct.

This article examines the ethical limits on the continuing contacts between a disqualified lawyer and client's new counsel.

Both the New York Code of Professional Responsibility and the ABA Model Rules of Professional Conduct are silent on this issue. While both sets of professional standards address conflicts of interest and imputation, they offer no direct guidance to the disqualified lawyer on how to proceed after new counsel appears. What little formal guidance there is, comes from the courts and the Restatement of the Law Governing Lawyers.

That guidance is inextricably intertwined with the four public policies that animate the ethics rules on conflicts and imputation: loyalty, confidentiality, client choice, and lawyer mobility. Though the courts respect the importance of all four values, they tend to emphasize the obligation of loyalty in cases involving simultaneous conflicts and the obligation of confidentiality in cases involving successive conflicts. Compare *Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976) with *Solow v. W. R. Grace & Co.*, 83 N.Y.2d 303 (1994). They treat client choice and lawyer mobility as important values, but as subsidiary to the other two.

## Two Hypotheticals Illustrate Dilemma

Thus, the duty of confidentiality plays a central role in determining the nature and extent of the contact between a disqualified lawyer and successor counsel. Two hypotheticals based on actual cases illustrate this point precisely. In the first hypothetical, Law Firm A is retained by its long-standing client, Employer. Its first assignment is to represent Employer in an EEOC investigation involving allegations of discrimination on the basis of sex. The second assignment is to defend Employer in an action brought by the EEOC involving the same underlying facts as the investigation. In the course of discovery, Law Firm A notices the deposition of one of the complaining employees. During the deposition, the employee reveals that during the course of its representation of Employer, Law Firm A had also represented her in an action to annul her marriage. That action is now over, and the file is closed. Because she was listed in

the firm's records under her married name but she used her maiden name in connection with the EEOC investigation, the conflict had not surfaced in the firm's conflict check. Faced with the new facts, the firm immediately isolates the files relating to the now completed annulment action and constructs an effective screen.

In the second hypothetical, Law Firm B is retained by a Liquidator to investigate possible accounting and securities law irregularities in connection with the collapse of related mutual funds. Aware that an existing client, an accounting firm, is a potential defendant, Law Firm B tries to isolate information relating to that accounting firm and avoid any action directly adverse to it. Ultimately, Law Firm B persuades the Liquidator to hire Law Firm C, a firm that represents other interested parties, to file an action against several defendants, including the accounting firm. Law Firm B continues to represent the accounting firm.

In the first hypothetical, a court disqualified Law Firm A because it violated the duty of loyalty by representing one client, Employer, in an action directly adverse to another client, the complaining employee, whom the firm had represented in the annulment action. The fact that the subject matters of the two representations are entirely unrelated and that there is little demonstrated danger of the disclosure of confidential information is irrelevant. *See, EEOC v. Orson H. Gygi Co.*, 749 F.2d 620 (10<sup>th</sup> Cir.1984). In the second hypothetical, Law Firm B will also be disqualified for acting disloyally to an existing client, the accounting firm. *See, Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1997).

Although the basis for the orders of disqualification is the same in both hypotheticals, the outcome as it affects the nature and extent of any relationship between the disqualified and successor counsel is not. In the first hypothetical, the risk of disclosure of confidential information relating to the prior client is remote. The predecessor firm should therefore be able to share its work product freely with the successor firm. *See, e.g., IBM v. Levin*, 579 F.2d 271 (3d Cir.1978) (refusing to overturn a lower court's order allowing a 60-day period of consultation between counsel.)

In the second hypothetical, the disclosure risk is much greater. Law Firm B has extensive knowledge about the facts involved in the alleged wrongful conduct by its client, the accounting firm. It has aggressively conducted a massive investigation in which materials related to the accounting firm have been isolated. Moreover, it has worked closely with successor counsel in the investigation's other ramifications. Exchanges between the two law firms should be prohibited entirely or closely monitored. At least one court has permitted discovery on the issue of the risk of disclosure of confidential information under similar circumstances. *See, Nebraska ex rel. FirstTier Bank, N.A. v. Mullen*, 534 N.W.2d 575 (Neb. 1995).

## **Protecting The Client**

Confidentiality is not the only value about which the courts have expressed concern in instances of successor representation. In the leading case, *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201 (7th Cir. 1978) (en banc), the court noted "The penalty for not having the work product made available to substitute counsel is against the client. The rule as laid down here by the district court [prohibiting an exchange] would destroy the work done by disqualified counsel irrespective of any fault on the part of the party litigant." *Id.* at 205. In short, if a court disqualifies a law firm for breach of the

duty of loyalty and the risk of disclosure of client confidences is minimal, the client of the disqualified lawyer should not be the one penalized. *See, generally, Doe v. A Corp*, 330 F. Supp. 1352 (S.D.N.Y. 1971), *aff'd*, *Hall v. A Corp.*, 453 F.2d 1375 (2d Cir.1972) (per curiam).

The final version of the Restatement of the Law Governing Lawyers does not contain a specific section devoted to the exchange of work product between predecessor and successor counsel. In earlier drafts, a provision entitled "Section 143. Access to Predecessor Lawyer's Work Product" addressed this issue: "If a predecessor lawyer is disqualified . . . a lawyer who succeeds the predecessor lawyer in representing the client may have access to the predecessor lawyer's work product except to the extent necessary to protect against improper disclosure of confidential information . . . ."

That Section was later dropped. In its place, Comment i was added to Section 6. Section 6 deals with judicial remedies available to a client or non-client for lawyer wrongs. Comment i provides: "A file of the work done on a matter before disqualification by a disqualified lawyer may be provided to a successor lawyer in circumstances in which doing so does not threaten confidential information of the successful moving client." The Reporter's Note identifies supporting cases and secondary literature. There is no consensus on how a court should proceed to determine whether such a threat exists. For an exhaustive review of the possible approaches, see *In re George*, 28 S.W.3d 511 (Tex. 2000).

In sum, resolving the dilemma of the disqualified lawyer as defined in this article's opening paragraphs is a challenging undertaking. In response to the client's instruction "Give 'em everything you've got. Get 'em up to speed as fast as you can," the lawyer must carefully examine the risk of disclosing the other client's confidential information. If the lawyer entertains any doubt about the propriety of an exchange of work product, the lawyer should seek judicial guidance before proceeding. If there is anything worse than being disqualified, it is "tainting" successor counsel, thereby causing the client to lose the services of still another law firm.

---

*Mary C. Daly is James H. Quinn Professor of Legal Ethics at Fordham Law and past Chair, Committee of Professional and Judicial Ethics, Association of the Bar of the City of New York.*