

Who's My Client? Part I – The Intermittent Client

BY RONALD C. MINKOFF

When is a client no longer a client? This question may seem simple, but it is fraught with peril for lawyers and their firms. The existence of a continuing attorney-client relationship imposes any number of obligations on a law firm, including, for example, the obligations to keep the client informed about the progress of a matter, to provide update on important legal or factual developments, and to continue exercising reasonable care in handling on ongoing matter.

For purposes of this article, however, the most important obligation is the continued duty of loyalty. If a client remains a client, it is a current client for purposes of a conflicts analysis, and is thus entitled to the more stringent conflict waiver rules of DR 5-105 of the New York Code of Professional Responsibility and Rule 1.7 of the Model Rules. In New York, this means that, in the case of a current client, a law firm must be prepared to show that taking on a new representation will not impair the independent professional judgment of the firm's lawyers or involve the firm in representing differing interests, and that the conflict, if it does exist, is waivable. In the case of a former client, the firm may apply the weaker (and always waivable) rules of DR 5-108 and Model Rule 1.9, which allow the firm to take on the new matter unless it is the same or substantially similar to the former client's matter, or unless it requires the firm to use the former client's confidences or secrets.

Resolving the Issue: "Former" v. "Current"

It is particularly difficult to determine whether a client is a current or former client when it gives work sporadically to the firm, with long gaps in between. The intermittent client poses a problem for a law firm conducting a conflicts check, especially where the client has not given the firm work for several months (or even years), and an enticing new client who wants to sue the old client is waiting eagerly to pay the firm a large retainer. Faced with this dilemma, law firms often choose to declare the fickle old client a former client, decide that no former client conflict under DR 5-108 or MR 1.9 exists, and take on the new client. A recent decision in the U.S. District Court for the Western District of Washington, *Jones v. Rabanco Ltd.*, No. C03-3195P, 2006 U.S. Dist. LEXIS 53766 (W.D. Wash. August 3, 2006), should give these law firms pause.

In *Jones*, the defendant, Rabanco Ltd., moved in February 2006 to disqualify the Washington law firm of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim (GTH) from representing the plaintiff in a lawsuit it had recently started against Rabanco. Rabanco claimed that GTH had represented it and two of its subsidiaries, Regional Disposal Company (RDC) and Allied Waste (Allied), in a law suit over a contract dispute with an entity called LRI in Pierce County, Washington. The firm had billed more than \$500,000 in legal fees on the matter, had employed 24 of its attorneys on the case, and was listed as the notice party in the settlement agreement, which was not to expire until 2011.

By the time Rabanco's motion was made, the firm's lawsuit in behalf of Rabanco had long been settled (November 2002), the three lead partners on the matter had left GTH, and GTH had done no work for

Rabanco in more than three years. Rabanco nevertheless claimed that GTH remained its representative in Pierce County, that Rabanco was a current GTH client, and that GTH could not represent the plaintiff in the pending, unrelated lawsuit.

The District Court agreed. Though noting the fact-specific nature of its inquiry, the court cited a legal principle it viewed as basic: once established, a lawyer-client relationship does not terminate easily. Something inconsistent with the continuation of the relationship must transpire in order to end the relationship. Jones at *9.10 citing *SWS Financial Fund A v. Saloinon Bros. Inc.*, 790 F Supp. 1392, 1398 (ND. Ill. 1992). The Court held that on the facts here, Rabanco's belief that GTH still represented it was a reasonable one. *Id.* at *7.

Factors Considered by Jones Court

The court focused on several factors. First, GTH remained the notice party on the Settlement Agreement, and had actually received some notices post-settlement (though not for several years). Moreover, GTH had never sent Rabanco a formal letter closing the matter, which remained open on GTH's computer and filing systems. *Id.* at *8. GTH continued to store 49 boxes of documents from the old lawsuit, at its own expense, thereby making itself available to promptly respond to future requests for legal work. *Id.* The firm had assigned a new billing partner to the matter when the lead partners left. *Id.* at *10 Those actions, the court found, are consistent with the expectation by a firm that it would be representing an entity in future disputes. *Id.* at *1011. In words that should send a chill down the spine of any lawyer in private practice, the court stated: the Court does not find that three years of no contact between an attorney and client, without more, constitutes an event inconsistent with representation. *Id.* at *10

It would be easy to dismiss Jones as a rogue decision by a trial-level court, but many other courts have imposed the same presumption against the termination of the attorney / client relationship despite a gap in the representation. This is especially so where a long-standing relationship, covering many different matters, existed between the client and the law firm, making it reasonable for the client to expect that the firm would be available to perform services for it in the future. *See, the following:*

Board of Managers of Eleventh Street Loftominium Assoc. v. Wabash Loftominium, L.L.C., Nos. 1-06-0104, 1-06-1179, 2007 WL 2416817 at *8 (Ill. App. Aug. 27, 2007) clients, an interlocking group of managers of Chicago cooperative apartments, could assume a law firm continued to represent them after an ongoing, continuous relationship over many years;

Oxford Sys Inc. v. Cellpro, Inc., 45 F.Supp.2d 1055, 1060 (W.D. Wash. 1999) a 13-year client relationship was deemed to continue despite an 11-month gap in work assignments;

GATXIAirlog Co. v. Evergreen Int'l Airlines, 8 ESupp.2d 1182, 1187 (ND. Cal. 1998) after a three-year relationship, a law firm could not commence suit against a client 19 days after its last work assignment was completed, absent written notification that the relationship had ended;

Ferguson Elec. Co. v. Suffolk Const. Co., Civ. A. 96-5885-E, 1998 WL 140101 (Mass. Supet March 20, 1998) terms of engagement letter precluded claim that attorney-client relationship had ended when a specific assignment was completed two months before taking on conflicting engagement; *Mindscape v. Media Depot, Inc.*, 973 F Supp. 1130, 1132 (ND. Cal. 1997) (to same effect);

Shearing v. Allergan, Inc., No. CV-S-93-866-DWH, 1994 WL 382450 at *2 (D. Nev. April 5, 1994) — attorney-client relationship was found to continue despite one-year gap in work assignments; firm had continued to solicit business from client and had stated in a letter that relationship would continue indefinitely;

Kabi Pharmacia, A.B. v. Alcon Surgical, Inc., 803 F. Supp. 957, 961-62 (D. Dela. 1992) a lull in law firm's work for a client does not end attorney-client relationship;

SWS Financial Fund, supra -- a two month gap between end of prior assignment and retention in adverse matter not enough to terminate client relationship).

A Different View

There is, however, another line of cases that take the view that law firms are not presumed to represent clients indefinitely. In one such case, *Artromick Int'l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991). A member of the Schottenstein law firm had represented Artromick and its President, Romick, for two years, performing general corporate work for the company and estate planning for the individual. Then, Romick refused to pay a \$785 bill, and the Schottenstein firm refused to do any more work for him, though it continued to solicit his business. After a year of receiving no work from Artromick or Romick himself, the Schottenstein firm undertook a litigation against Artromick, originated by another firm partner.

When Artromick moved to disqualify, the court called it a former client, and denied the motion. The court noted that the attorney-client relationship is consensual in nature and, absent any ethical restraints imposed by the Code of Professional Responsibility, may be terminated by either party. *Artromick*, 134 F.R.D. at 229. Noting that it had to analyze the facts to determine if the parties had the mutual subjective intent to end the attorney-client relationship, the court held the law will imply an end to the relationship where it would be objectively unreasonable to continue to bind the parties to each other. *Id.* at 230. The court found that Romick's failure to pay his bill, his decision to give no work to the Schottenstein firm while hiring other law firms, and the law firm's failure to pursue either collection of the bill or more work from Romick showed a mutual intent to end the relationship. *Id.* at 230-31.

Several courts have reached similar results, though some of their decisions are not for publication and of limited utility. *See, e.g., Fenik v. One Water Place*, 2007 WL 527997 (S.D. Fla. Feb. 14, 2007) (four to six month gap in work assignments sufficient to end attorney-client relationship); *Spinello Companies v. Metra Indust. Inc.*, 2006 WL 2882490 (0. N.J. Oct. 6, 2006) (attorney's representation of Metra Industries in two discrete and concluded matters several years ago (in 2001 and again in 2003) does not indicate the existence of a current client relationship) (not for publication); *Voicenet Coinmuns, Inc. v. Papert*, 2004 WL 870790 (E.D.Pa. April 5, 2004) (18 month gap after completion of discrete transaction sufficient to end attorney-client relationship); *Airis SEQ LLC v. City and County of San Francisco*, 2006 WL 2949329 (Cal. App. 1st Dist. Oct. 17, 2006) (law firm not disqualified from suing one city agency even though it had ceased doing work for another city agency just four months before, and was still being solicited for work by that agency) (not for publication); *National Medical Care, Inc. v. Home Medical of America, Inc.*, 15 Mass. L. Rptr. 256, 2002 WL 31068413 (Mass. Supet Ct. 2002) (four month gap after completing work described in engagement letter is sufficient to end attorney-client relationship).

The New York View

And what of New York? The answer is unclear. Some criminal cases have applied standards similar to Jones and SWS Financial, supra. See *U.S. v. Levy*, 25 F.3d 146, 156 (2d Cir 1994) (questioning whether counsel's representation of co-defendant ended after co-defendant fled to Israel, since counsel never formally withdrew); *People v. West*, 81 N.Y.2d 370, 372, 379-81, 599 N.Y.S.2d 484, 490-91 (1993) (representation deemed to continue three years after defending client at a line-up; police could not assume passage of time ended relationship); cf., *Quinones v. Miller*, 2003 WL 21276429 (S.D.N.Y. June 3, 2003) (Report and Recommendation) (attorney-client relationship ends after two years, where lawyer did limited work for client and client absconded without contacting lawyer).

But those cases often spring from the Sixth Amendment right to counsel, and impose a stricter standard to ensure that the right is protected. In the civil arena, our research has disclosed just one New York case that comes close to addressing this issue, *Abbondanza v. Siegel*, 209 A.D.2d 1023, 619 N.Y.S.2d 896 (4th Dep't 1994). In *Abbondanza*, however, the client whom the law firm chose to sue had not only had a 25-year relationship with the firm, but was continuing to receive advice from a firm partner even as the lawsuit proceeded.

The uncertainty of the law in this area of the intermittent client requires lawyers to protect themselves from being held to unwanted client relationships. The necessary steps include limiting the scope of representation in the initial retainer agreement, making clear that no new work will be undertaken for clients without a new and separate retainer, and making clear in writing, at the end of an assignment, that the lawyer's work for the client has terminated.

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