

Ethics Corner: Conflicts of Interest - a Primer - Part I, Current Client

From the Committee on Professional Responsibility, William Freivogel, Chair

Since we started “Ethics Corner,” some months ago, we have assumed that the audience for eSource comprises primarily good business lawyers who have neither the time nor inclination to read or study ethics rules. But, we also have assumed that there are certain basic principles to which all good business lawyers should have some exposure.

Near the top of the list would be conflicts of interest. The basics start with the distinction between current client conflicts and former client conflicts. Closely following that distinction is the concept of conflicts waivers (“consent“ is used interchangeably with “waiver;” we prefer “waiver“), which has application to both current and former client conflicts. In this issue we will discuss current client conflicts. In the next issue we will discuss former client conflicts. Following that will be a discussion of waiver basics.

Current client conflicts. The rule is ABA Model Rule 1.7(a)(1), of which all states have a version. It provides that a lawyer, or law firm, may not take on a matter that is directly adverse to a current client. The rule does not care whether the new matter against the client has any relationship whatever to the other matter being handled for the client. In the blink of an eye we have glossed over two important concepts: (1) what is “directly” adverse; and (2) what is a “current” versus “former” client. Before getting to those concepts, let’s discuss the relationship point.

No relationship. Law Firm’s Newport Beach office represents Ajax Corp. in a property tax dispute with Orange County, and that matter is pending. Now NJ Bancorp asks Law Firm’s Newark office to represent it in a major loan transaction in which Ajax Corp. is the borrower. The matters could not be more unrelated. Yet, Law Firm would have a current client conflict that could only be cured with a waiver. Many fine lawyers think that rule is silly. Tough; that’s the rule.

Current client. As we will discuss in the next installment of this series, the above rule changes if the client is a former one instead of a current one. Then, relationship, or the lack thereof, matters. So, is the client current or former? Suppose the Orange County tax dispute was resolved a few months before the NJ Bancorp loan came in, and Law Firm has no other matters pending for Ajax Corp. We would love to give you some guidelines for this, but we cannot. State and federal courts around the country have wildly disparate views of what is “current” and what is “former.” For example, in *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999), the law firm had done nothing for the client for a year. Yet, because the client pretty much limited what it did have to that law firm, the court held the client was current. In contrast, in *Artromick Int’l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991), about a year had elapsed since the law firm had done any work for the client. A small invoice remained outstanding. The firm sent at least one piece of promotional material to the client during that year. Nevertheless, the court refused to disqualify the firm when it showed up on the other side of a case.

Direct adversity. Handling a lawsuit on behalf of Client A against Client B is obviously direct adversity. Likewise, sitting across the table from a current client in a major and contentious workout negotiation is direct adversity. Beyond those clear examples, things can be fuzzy. For example, Law Firm represents Family Patriarch in a variety of matters, including his estate plan. At the same time Law Firm represents the Patriarch's son on a variety of matters, some of which are pending. Patriarch, disgusted with his son over something, asks Law Firm to remove the son from his will. That seems "direct," doesn't it? Yet, the influential ABA Standing Committee on Ethics and Professional Responsibility, in its Formal Opinion 05-434 (December 2004), held that in that precise situation Law Firm would not have a conflict and would not need a waiver from the son.

Lesson: "don't try this at home." This is about issue spotting. Hopefully, when you are confronted with these issues you will have access to personnel who have a better handle than you on the nuances of conflict-of-interest law.

Next: former client conflicts.
