

Ethics Corner: Conflicts of Interest - a Primer - Part II, Former Client

From the Committee on Professional Responsibility, William Freivogel, Chair

The most recent installment of this series discussed conflicts of interest with current clients. The most important rule with respect to current clients is that a lawyer may not be directly adverse to a current client even though the adverse matter bears no relationship to matters the lawyer handles for that client. The core rule on this concept is ABA Model Rule 1.7.

The rules shift subtly when the lawyer is asked to take a position adverse to a *former* client. When does a current client become a former client? We discussed that in the previous installment. What we learned is that courts vary dramatically in their analysis of the current-vs.-former client issue.

Let us assume that the client in question is clearly *former* rather than *current*. That takes us to ABA Model Rule 1.9(a), which provides that a lawyer may take a position “materially adverse” to a former client if the matter is not “substantially related” to what the lawyer had done for the former client. More has been written about what is “substantially related” than just about any issue under the ethics rules. While it is easy to oversimplify, let us just say that the substantial relationship test is about *information*. Did the lawyer learn something from, or about, the former client in the earlier representation that would give the lawyer an advantage in opposing the former client in a current matter?

A clear case: Lawyer is representing Client in a contentious merger negotiation with Opponent. After many weeks of wrangling, Client becomes fed up with Lawyer and fires Lawyer, saying, in effect, “I never want to see you again. Here is your fee. Goodbye.” A month later Lawyer shows up on Opponent’s legal team in that same negotiation. Lawyer obviously learned much information from, and about, Client in the earlier phase of the negotiation that would be enormously useful to Opponent. That is precisely what Model Rule 1.9(a) was designed to prevent.

A less clear case: Lawyer has handled dozens of acquisitions for Mammoth Corp. The most recent one was 18 months ago. After the last closing, Mammoth Corp. dismissed Lawyer and her law firm. Mammoth recently commenced a new series of acquisitions with a new law firm. One of Mammoth Corp.’s new acquisition targets is Small Corp. Small Corp. wants to hire Lawyer to handle the Mammoth Corp. transaction. Lawyer’s earlier work for Mammoth did not involve Small Corp., but rather a number of different targets. However, the in-house lawyers and corporate executives at Mammoth working on the Small Corp. acquisition are the same people that Lawyer worked with while Lawyer was representing Mammoth. Lawyer knows how they think and knows their negotiating strategies very well. Lawyer, in effect, has their “playbook.” Courts are inconsistent about whether playbook information should disqualify a lawyer from being adverse to a former client. A recent case holding it should disqualify the lawyer is *Hurley v. Hurley*, 923 A.2d 908 (Me. 2007). However, in *Vincent v. Essent Healthcare of Conn.*, 465 F. Supp. 2d 142 (D. Conn. 2006) the court refused to disqualify a lawyer in the face of playbook arguments. There are many cases on both sides of this issue. For a

superb discussion of the “playbook” view of the substantial relationship test, *see* Charles W. Wolfram, *Former-Client Conflicts*, 10 *Geo. J. Legal Ethics* 677 (1997).

A word about waivers: We will devote the next installment of this *Primer* to a general discussion of conflicts waivers. However, we should make one observation about waivers in the former client context. Do not assume that a waiver is feasible in such a case. Suppose a lawyer has doubts about whether a matter is substantially related to an earlier matter. She asks the former client for a waiver. The former client refuses. The request for a waiver could be construed as an admission that one was required. Or, suppose that the former client asks whom the lawyer plans to represent and all the details of the new matter, which an astute former client would do. Can the lawyer provide that information, or would doing so violate the lawyer’s duty of confidentiality to her new client? We have just scratched the surface of the issues raised by conflict waivers in former client situations.

As we said in the prior installment: “Don’t try this at home.” When confronted with a conflict issue, consult an expert in your firm or corporate legal department.