AO 1996-97/3

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1996-97/3
Conflict of Interest: Representation of Clients Against a Former Employer/Client
March 25, 1997
(Bar News, p.22, 5/7/97)

RULE REFERENCES:

Rule 1.6
Rule 1.6 (a)
Rule 1.9
Rule 1.9 (a)
Rule 1.9 (b)

SUBJECTS:

Client Communications
Confidentiality
Conflict of Interest
Disqualification

ANNOTATIONS:

Before representing a client against a former employer/client, the attorney must ensure that the current representation involves neither (1) a substantially related matter, nor (2) any confidential information received during the representation of the former client, whether or not such information was received in confidence. Rule 1.9; Rule 1.6.

The attorney is prohibited from representing a client against a former client under Rule 1.9 if (1) there was a valid attorney-client relationship with the former client; (2) the interests of the present & former client are materially adverse; (3) the former client has not consented to the new representation; and (4) the current & former matter is the same or substantially related. In such a situation, there is an irrefutable presumption that the attorney possesses confidential information gained from the former client, and no actual prejudice need be proved. Rule 1.9(a).

Even if the representation of the new client is not substantially related, before engaging in a matter involving a former client, the attorney must very carefully analyze and insure that no confidential information obtained during the former representation is any way being or may be used. Such confidential information is broadly defined under Rule 1.6 to include all information relating to the representation, and not only matters communicated in confidence by the client; this could include methodology of negotiations, internal policies and procedures, and preferences and positions taken in certain contractual or governmental actions. (Rule 1.6).

QUESTION:

Does an impermissible conflict arise when an attorney represents a client whose interest is adverse to a former client if the information the attorney seeks to use in the representation is now general or public knowledge?

FACTS:

The inquiring attorney was previously employed by a company as "Director of Government Relations" and later as "Director of Government and Community Relations." The attorney was not employed as counsel.

Although the company operates in more than 16 states, the attorney states that any confidential information he/she may have relates only to its operations in another state. The attorney also states that the information he/she would be using in representing clients against this company is generally known information and much of it is outdated and has become public knowledge.

The attorney inquires as to whether an impermissible conflict arises if he/she represents clients against this former employer.

RESPONSE:

The inquiring attorney has directed us to assume that a client/attorney relationship existed, even though the inquiring attorney was not employed as counsel.

Rule 1.9(a) states, "A lawyer who has formerly represented a person in a matter shall not thereafter:

> (a) represent another person in the same or a substantially related matter in which that client's interests are materially adverse to the interests of both unless the former client consents after consultation and with knowledge of the consequences…

A very recent New Hampshire case, Sullivan County Regional Refuse Disposal District v. Town of Acworth, 141 NH 479 (1996), sets forth four elements to determine when a Rule 1.9 violation is established: (1) there is a valid attorney-client relationship; (2) the interests of the present and former clients are materially adverse; (3) the former client has not consented in an informed manner to the new representation and (4) the current and former matter must be the same or substantially related. If these four elements are present, then it is irrefutably presumed that the attorney possesses confidential information about the situation, and must be disqualified. No prejudice need be proved which might result from the attorney's continued involvement.

The attorney states in his/her letter that "I would not be representing another client in the same or substantially related matter. The matters I worked on were in [another state]."

In NHOp 1992-93/13, this Committee opined, "The purpose of the substantial relationship rule is to protect the former client's confidential information, while allowing the attorney to use "generally known information about the client when later representing another client." Rule 1.9 ABA Model Code Comments. The comments suggest that the "underlying question is whether the lawyer was so involved in the matter that subsequent representation can be justly regarded as a changing of sides in the matter in question."

This Committee, in NHOp 1990-91/1, cited Kevlik v. Goldstein, 724 F.2d 844 (1st Cir. 1984), in which the "substantially related" test was determined. In that opinion, the Committee stated:

> ...the Court of Appeals adopted the "substantially related" test for the disqualification of an attorney based on the potential revelation of confidential attorney-client communications. This test provides that the former client need only show that matters embraced in the pending suit in which his former attorney is representing his adversary are substantially related to the previous cause of action. The Court will then assume that confidences pertaining to the

> matter were revealed during the course of former representation without inquiring into the nature and extent of such revelations.

Therefore, the inquiring attorney must consider this "substantially related" test in determining whether or not he/she should be disqualified from representation of the current client.

The attorney has represented that he/she will not be working on any matter which he/she had worked on while employed as the "Director of Government Relations" at the previous company. Thus, he/she concludes that the matters are not substantially related. Given the attorney's statement that he/she would not be representing another client in the same or substantially related matter, and given the ABA Model Comment referenced above, it would appear that, generally speaking, the attorney would not be in violation of Rule 1.9(a) by representing clients against this former client. However, the attorney, on a case-by-case basis, should continually evaluate whether instances arise in which "substantially related" matters may be relevant to any current representation. In such an event, unless proper consent is obtained from both the former client and the current client, the attorney is disqualified.

Even if an attorney determines that his or her involvement in a matter for a new client is not identical or substantially related to representation of a former client, the attorney must go on to determine whether, despite the lack of a substantial relationship, it is reasonably foreseeable that the attorney will use confidential information to the disadvantage of the former client. This would include not only information that may have been gleaned from a specific case, project or matter in which the attorney was involved, but also general information regarding company practices, policies and strategies that may be relevant."

Rule 1.9(b) states:

> (a) "A lawyer who has formerly represented a person in a matter shall not thereafter:…
>
> (b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Unlike the previous Code of Professional Responsibility, the Rules of Professional Conduct presume that all information which is imparted by a client to an

attorney or which an attorney learns in the course of representation is confidential. See Rule 1.6. Gone are the historical distinctions between confidences and secrets. The rules are broad enough to protect the voluntary disclosure of both privileged and unprivileged communications gained during the course of representation. Thus, every piece of information which the inquiring attorney hopes to use in his representation of the new client must be evaluated to determine whether he learned of it in the course of his previous employment. This would not only include information relevant to a specific case or project. It would also include general corporate strategy, knowledge of policies and procedures, preferences about positions that the company may take in contracts, litigation and representation before governmental agencies, and the like. If any of this useful information could reasonably be used by the inquiring attorney, then unless such information has become "generally known", the attorney cannot use it, and thus, is disqualified absent consent from the former client.

The inquiring attorney states "I would be using information about [the company] that is generally known. Some of the confidential information I had about [the company] is outdated and has become general knowledge. In any event, most, if not all, of the confidential information I know is related to only to [the other state's] operations."

The inquiring attorney also states that his/her duties included "...public relations activities,...drafting contracts, negotiating franchise renewals, assisting in responses to rate complaints filed before the FCC, and appearances before city councils." Most, if not all, of these activities could have resulted in gaining information that could be considered confidential according to the ABA Model Code Comment referenced above.

It is probable that the attorney would have information about the former client that could be used to the detriment of the New Hampshire subsidiary. The ABA Model Code Comments under Rule 1.6 state "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

Furthermore, this Committee, in NHOp 1990-91/1, opined "...a lawyer is prohibited from representing a client if the representation will be directly adverse to another client. The Committee determined that even after legal representation is terminated, a lawyer is under a continuing obligation not to reveal or use client confidences and, consequently, should avoid representing clients in any cases which might affect the on-going duty to preserve the original client's confidences. NHOp. 1988-89/11, and NHOp. 1983-84/9."

If in fact the information obtained by the attorney is now "generally known" and "public knowledge," the attorney would not be in violation of 1.9(b) by representing clients against this former client as long as this knowledge does not involve the same "substantially related" matter. However, it is probable that not all the information the attorney obtained while employed by the company is now "generally known" or "public knowledge," especially with respect to strategy, policies and procedures. The Committee cautions the inquiring attorney that a careful analysis of his knowledge is advised.

SUMMARY:

The Supreme Court's decision in Sullivan clarifies the analysis regarding the attorney's duties under Rule 1.9(a). However, given the scope of Rule 1.9(b) and the language of the Court in Sullivan concerning the protection of a former client's confidences, the attorney is well-advised to carefully analyze whether such confidences and information have become "generally known" in toto. Confidential information obtained by representation of clients is often times very subtle, such as methodology of negotiations and knowing what their "bottom line" is. This type of information can be used to the detriment of the former client in representing clients against them. The attorney should take a long, hard look at these possibilities before agreeing to this type of representation to avoid having to withdraw later on while in the midst of representing the new client.

To be noted, the purpose of the rule is to protect client confidentiality and to assure that the client has some control toward that end. A former client can always waive this confidentiality.

Certainly, if proper consents are obtained from both the former client and the present client prior to representing the client, this type of representation would be proper.