

NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 628 - 3/19/92 (9-91)

Topic: Conflict of Interest – Former Client Conflicts

Digest: A lawyer may represent a plaintiff in a civil action against a former client unless (1) confidences or secrets were imparted during the prior representation which are relevant to the current representation, or (2) unless the prior litigation is substantially related to the current litigation; consent of the former client may cure the conflict, but if the former client does not authorize release of confidences and secrets, the current client's consent may be necessary and in some cases cannot be practicably obtained.

Code: EC 4-5; EC 4-6; EC 5-1; DR 4-101; DR 5-108; Canon 9.

QUESTION

May a lawyer who recently defended a restaurant in Small Claims Court in connection with the theft of property from a patron's car parked in the restaurant's parking lot, undertake to represent a client who fell in the restaurant in an action against the restaurant?

OPINION

The inquirer proposes to represent an individual for the purpose of commencing a tort action against a restaurant in which the individual fell and broke her hip. The inquirer represented the restaurant in Small Claims Court approximately a year ago. That litigation involved a claim that personal items were stolen from an automobile in the restaurant parking lot. The inquirer made three or

four court appearances on behalf of the restaurant and tried the matter. The inquirer states that the trial resulted in a modest judgment in favor of the plaintiff in an amount less than that offered by the restaurant in earlier settlement negotiations.

The inquirer does not believe that he learned anything in his prior representation of the restaurant which would be of benefit in the proposed litigation against the restaurant. He represents that the two matters involve different issues. The inquirer presently does not represent the restaurant in any capacity, nor did he before the Small Claims Court litigation began, or when his proposed client's fall occurred, some months after the earlier litigation terminated.

The New York Code of Professional Responsibility was amended, effective September 1, 1990, adding DR 5-108 ("Conflict of Interest - Former Client"). That rule reads as follows:

- A. Except with the consent of a former client after full disclosure a lawyer who has represented the former client in a matter shall not:
 - (1) Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
 - (2) Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret has become generally known.

This new provision crystallizes much of the guidance provided in our prior opinions rendered under the 1970 Code, see N.Y. State 605 (1989); N.Y. State 492 (1978); N.Y. State 303 (1973); N.Y. State 139 (1970); see also, N.Y. State 25 (1966)(former Canon 6 prohibited the use of former client confidences and secrets in substantially related litigation against that former client). The provision also works important changes in the standard of disciplinary conduct relevant to conflicts with a former client. In particular, our prior opinions adopted the substantial relationship test (as it was developed by the courts) to determine whether a lawyer ethically may undertake representation against a former client where the lawyer maintains that no relevant confidences and secrets were procured in the prior representation. Where there is such a substantial relationship, the law presumes that the lawyer obtained confidences and secrets in the prior representation relevant to the current or proposed representation. See, e.g., United States v. Ditonmaso, 817 F.2d 201, 219 (2d Cir. 1987); Evans v. Artek Systems Corp., 715 F.2d 788, 791 (2d Cir. 1983). Whether that presumption is rebuttable by the lawyer seeking to undertake the new representation is open to serious debate. See United States Football League v. National Football League, 605 F. Supp. 1448, 1457, 1461-62 (S.D.N.Y. 1985)(collecting cases and holding that, in the Second Circuit, the presumption is rebuttable). This Committee embraced the substantial relationship test as an adequate statement of the 1970 Code standard in the context of successive criminal

representations. N.Y. State 605 (1989). The amended 1990 Code, however, now provides a textual standard by which to gauge impermissible representation against a former client. Because the judicially developed substantial relationship test is continually evolving, see cases collected in United States Football League v. National Football League, 605 F. Supp. at 1457 (defining it has been a "longstanding problem"), and was intended to define the test of attorney disqualification in a litigation context, it does not provide a suitable standard for discipline. Although most of the cases suggest that misconduct under the applicable disciplinary code is not sufficient to require disqualification without an additional finding that the current litigation is likely to be "tainted," see Evans v. Artek Systems Corp., 715 F.2d at 791-92 (2d Cir. 1983); Cheng v. GAF Corporation, 631 F.2d 1052, 1058 (2d Cir. 1980), vacated on other grounds, 450 U.S. 903 (1981); Armstrong v. McAlpin, 625 F.2d 433, 444-45 (2d Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981); United States Football League v. National Football League, 605 F.Supp. at 1464; S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp., 69 N.Y.2d 437, 443-44 and n.3 (1987), there are also some instances where a lawyer would be disqualified, but should not be disciplined. Armstrong v. McAlpin, 625 F.2d at 453 n.4 (Newman, J., dissenting)(urging a disqualification rule closer to the Code standard than the litigation "taint" criterion adopted by the majority would otherwise require, but conceding that the lawyer in question "acted fairly and uprightly").

With respect to cases in the latter category, we distinguish the disqualification standard from the disciplinary standard because courts may be unwilling to order disqualification in appropriate cases, fearing later unjustified discipline of an ethical, but disqualified, attorney. With respect to cases in the former category, we distinguish the two standards because a rule which places primary reliance on a criterion keyed to probable impairment of the adjudicatory process does not adequately identify those cases where the ethical precepts of the profession demand that a lawyer decline the proffered employment. Accordingly, the standard provided in DR 5-108(A) justifies a departure from our prior opinions embracing the evolving and sometimes uncertain common law substantial relationship test.¹

¹ We recognize that DR 5-108(A) was patterned after ABA Model Rules of Professional Conduct MR 1.9, which itself codified the common law substantial relationship test. MR 1.9 (Comment). See Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 174-78 (1991). Indeed, the "Source of Change" comment to the October 5, 1987 draft of the amended New York Code states that "[t]he concept of subdivision (A) [of DR 5-108] is derived from Model Rule 1.9 ... to incorporate the standards which courts have been applying to lawyers in conflict of interest situations involving former clients." See also Emons Industries, Inc. v. Liberty Mutual Insurance Co., 747 F. Supp. 1079, 1082 (S.D.N.Y. 1990) (DR 5-108 "embodies the venerable 'substantial relationship' test"). The ABA and NYSBA looked to the judicially developed substantial relationship test because the prior Code did not treat the problem of former client conflicts except in Canon 4, which prohibited revelation of client confidences even after the representation concluded. We do not ascribe to either bar organization, or to the Appellate Divisions which enacted the amended New York Code, an intent to discipline every lawyer removed from a case on a disqualification motion. Nor do we find an intent to adopt the litigation "taint" standard as the minimum level of conduct warranting discipline. Nevertheless, just as the Code provides valuable

We confirm the inquirer's opinion that the Small Claims Court litigation is not substantially related to the proposed slip and fall litigation. The issue turns on the scope of the prior representation and the likelihood that the lawyer would obtain confidences and secrets of the former client which may be relevant in the current litigation adverse to that client. Whether viewed as a matter of litigated issues, litigated facts or the probable scope of the confidential communications imparted in the prior representation, and the likely use of such information in the current matter to the detriment or embarrassment of the former client (DR 4-101[A]), we see no substantial relationship between the parking lot theft litigation and a subsequent slip and fall case.

Our opinion is not altered by the fact that the lawyer may have learned some of the former client's financial and corporate structure while preparing for the Small Claims Court litigation which may be useful to the lawyer in the proposed tort litigation, especially in settlement negotiations. Although there is some precedent in the cases for viewing access to financial data as a disqualifying circumstance, Analytica Inc. v. NPD Research, 708 F.2d 1263, 1267 (7th Cir. 1983), the better cases hold that "knowledge of a former client's financial and business background is not in itself a basis for disqualification if the client's background is not in issue in the later litigation." See, e.g., United States Football League v. National Football League, 605 F. Supp. at 1460. Similarly, we believe that DR 5-108(A)(1) does not require a finding that a lawyer's general knowledge of his former client's financial exposure or corporate structure is "substantially related" to the current representation unless there are peculiar aspects of the current representation making such information particularly relevant. We do not read the Analytica, Inc. opinion as requiring a different rule; to the extent it does, we do not embrace it.

The lawyer also must determine whether, during the prior representation, he or she actually learned any confidences and secrets (defined in DR 4-101[A] and explicated in N.Y. State 592 [1988]) which may be used in the current matter. DR 5-108(A)(2) provides a reminder of the lawyer's general duty to maintain confidences and secrets by prohibiting disclosure except where authorized by the five circumstances described in DR 4-101(C), or when the secrets have become "generally known." A lawyer possessing such confidences and secrets of the former client must evaluate whether such possession impairs his or her professional obligation to represent the current client competently and zealously within the meaning of Canon 6 and Canon 7. EC 5-1 (professional judgment must be exercised free of "compromising influences and loyalties" and the "interests of other

"guidance" to the courts in determining disqualification motions, Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975)(Gurfein, J., concurring); S&S Hotel Ventures Limited Partnership v. 777 S.H. Corp., 69 N.Y.2d at 443, we may often look to judicial interpretations of the New York Code, including the judicial development of the "substantial relationship" test, to provide guidance as to the ethical conduct permitted by DR 5-108(A).

clients . . . should not be permitted to dilute the lawyer's loyalty to the client").

Finally we address whether the short span of time between the prior representation and the proposed one is relevant. Our prior opinions under the 1970 Code suggest that an appearance of impropriety would exist because the prior representation terminated a short time ago even if the current litigation is not substantially related and no actual relevant confidential information was obtained in the prior representation. In N.Y. State 329 (1974), we interpreted the 1970 Code to preclude a lawyer from undertaking representation against a former client which is "so recent that a proceeding against . . . [that client] would create the appearance of impropriety" prohibited by Canon 9. We noted that a determination of an appropriate interval between the two representations "would depend upon all of the surrounding facts and circumstances." *Id.* Later, in N.Y. State 605, and N.Y. State 303 we referred to the possibility that the new representation might, even in the absence of a substantial relationship and of impeding client confidences, "create an appearance of actually conflicting interests with, or professional disloyalty to the former client." N.Y. State 605. See also, N.Y. State 492 ("temporal proximity, ... of prior representation"). The issue is whether the time element is cognizable under the amended Code.

We believe that the drafters of the amended Code did not intend to incorporate a temporal standard into DR 5-108(A). Nor do we believe that the Code insists on maintenance of a loyalty obligation in connection with former clients divorced from considerations relating to client confidences, either actual (DR 5-108[A][2]) or presumed (DR 5-108[A][1]). Since T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265 (S.D.N.Y. 1953), it has been common to refer to a lawyer's continuing "duty of absolute loyalty to ... [the] client's interests [which] does not end with . . . [the] retainer." *Id.*, 113 F. Supp. at 268. See, e.g., Hazard & Hodes, The Law of Lawyering at 175 ("it is so well accepted that the duty of loyalty to the client survives termination of the relationship"). But the opinion in T.C. Theatre expresses a concern with the maintenance of confidences only; the reference to "loyalty" to the former client was restricted "to ... [the] client's interests" which, in that context, involved confidential communications only.² The problem of former client conflicts addressed in DR 5-108(A) is only one of client confidences: It does not involve the duty of undivided loyalty which is, by contrast, clearly relevant in the simultaneous multiple representation context. DR 5-105(A)-(C); EC 5-1, EC 5-14; EC 5 15; N.Y. State 580 (1987). See also, Cinema 5. Ltd. v. Cinerama, 528 F.2d 1384, 1386 (2d Cir. 1976). When the retainer contract has been executed, the duty to maintain confidences remains, EC 4-6, whether these are actual confidences (DR

² The opinion drew from Canon 6 of the former ABA Canons of Professional Ethics which also spoke of "undivided fidelity" in the former client conflict situation. Such a duty was articulated solely in reference to the "forbid[ding] ... [of] subsequent acceptance of retainers ... in matters adversely affecting any interest of the client *with respect to which confidence has been reposed.*" T.C. Theatres Corp. v. Warner Bros. Pictures, 113 F. Supp. at 268 (emphasis supplied).

5-108[A][2]) or presumed confidences (DR 5-108[A][1]), but the Code identifies no other implicated duty owed to the former client. Accordingly, our Committee rejects a temporal element because it is not intended or suggested in DR 5-108(A) and it would find its justification solely in the concept of client loyalty which ends with the termination of the lawyer-client relationship except as to client confidentiality expressly addressed in the Code.³

Where the lawyer owes a continuing duty to the former client to preserve confidences or secrets relevant to the proposed representation in accordance with the test set forth above (i.e., either actual or presumed confidences), the lawyer must consider whether, under DR 5-108(A), the matter may be cured by client consent. It is clear from the amended Code and our prior opinions under the 1970 Code that client consent may purge the conflict. DR 5-108(A)(preamble); DR 4-101(C)(l); N.Y. State 605; N.Y. State 555 (1984); N.Y. State 490 (1978). Although N.Y. State 605 required "the informed consent of each client to 'effectively absolve' the lawyer in the successive representation context" (quoting N.Y. State 492 [1978]), that opinion addressed successive representation in a criminal case in which the former representation in a substantially related matter would almost always compromise the current client's criminal defense. The courts in such cases require the current client's consent also, United States v. Cunningham, 672 F.2d 1064, 1070-73 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984), but even this requirement has been held insufficient to purge the conflict. United States ex rel. Tineo v. Kelly, 870 F.2d 854, 857-58 (2d Cir. 1989). Whether these judicial pronouncements should be adopted as a gloss on DR 5-108(A) in civil cases is the question before us. We conclude that there may be instances in which the current client's informed consent also must be obtained, and that these instances are identified by other provisions of Canon 5.

For example, in many cases, a lawyer may readily obtain the former client's consent to the proposed representation, including permission to reveal confidences and secrets. A lawyer would be required, at least, to inform the former client in terms which make clear that the client may refuse to consent without any sense of guilt or embarrassment, and that a refusal to consent will not result in any other untoward consequences. The lawyer also must inform the former client of the right to insist

³ We have considered authority which infers a continuing duty of loyalty to the former client, Charles Wolfram, Modern Legal Ethics, § 7.4.2 at 361-62 (1986), and the principal case in which the loyalty concept was said to have been articulated, E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 394-95 (S.D. Tex. 1969), but do not find the inference supported in the Code. This inquiry does not require us to address the duties which attend termination of a longstanding and intimate representation of a person or corporation. Accordingly, we express no opinion concerning such a case except to note that the duties, if any, which might survive such a relationship with a client would find their only source in Canon 4's duty to maintain confidences and secrets, and the extent to which Canon 9's reference to the appearance of impropriety requires that lawyers ensure that former clients not suffer "reasonable apprehension" that confidences and secrets will be revealed without their consent.

that confidences and secrets imparted to the lawyer during the prior representation be held inviolate. See generally, C. Wolfram, Modern Legal Ethics, §7.2.4 at 343-47 (listing important points to cover in the consent conference). If the lawyer obtains both a consent to the proposed representation and permission to reveal the former client's confidences, DR 5-108(A) permits the proposed representation and the lawyer may ethically undertake it without further inquiry.

If, however, the former client consents to the proposed representation, but insists that some or all of the previously reposed confidences and secrets be maintained, the lawyer may be hampered in the current representation because DR 5-108(A)(2) and DR 4-101 prohibit the use of such confidences and secrets except in the circumstances identified therein and the lawyer may need to make use of these confidences and secrets in order to discharge his or her duty under Canon 7 to represent the client "zealously within the bounds of the law." The current client, of course, is entitled to know if he or she will be hiring a lawyer who is compromised by professional obligations owed to third parties. DR 5-101(A) prohibits a lawyer, therefore, from accepting employment, without the informed consent of the current client, if the lawyer's "professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." See also, EC 5-1 (professional judgment must be exercised "solely for the benefit of . . . [the] client and free of compromising influences"). If the lawyer's judgment may be adversely affected by the duty to preserve a former client's confidences notwithstanding the former client's consent to the proposed representation, the duty to obtain the current client's consent "after full disclosure" arises and is a necessary precondition to acceptance of the retainer. The difficulty is, however, that the lawyer will not be able to make the disclosure to the current client necessary to obtain an informed consent without divulging the confidences required to be preserved. In the "typical case" in this category, i.e., where the lawyer must maintain confidences and secrets which affect the exercise of the lawyer's professional representation of the current client, the lawyer "cannot practicably obtain the requisite consents to continue representing the . . . [current] client." ABA Formal Opn. 90-358 (September 13, 1990).⁴ The lawyer may not in such a case

⁴ The ABA opinion concerned the analogous situation of a prospective client who divulged confidences to a lawyer in their initial retainer conference, after which the prospective client decided against retaining the lawyer and the opposing side, the so-called existing client, in the legal matter attempts to retain the lawyer in the action against the prospective client. The ABA Committee interpreted Model Rule 1.7(b) in the same fashion as we interpret the New York Code today, finding that "DR 5-101(A), DR 5-105(A) and DR 5-105(D) [sic] of the predecessor Code, . . . lead[s] to the same result although the language differs." ABA Formal Opn. 90-358. See also G. Hazard & W. Hodes, supra note 1, at 140.1 (Rule 1.7(b) "is a direct descendant of Canon 5 of the Code"). Because the prospective client who has imparted confidences and secrets to the lawyer is in substantially the same position as the former client considered here, the analysis in ABA Formal Opn. 90-358 is equally pertinent here. The language is interpolated to fit the circumstances here:

The principal inquiry under Rule 1.7(b) is whether, as a result of the lawyer's duty to protect the information relating to the representation of the . . . [former] client,

undertake the current representation even with the consent of the former client unless the lawyer reasonably believes that his or her professional judgment will not be impaired by the duty to preserve the former client's secrets.

CONCLUSION

For the reasons stated above and subject to the qualifications described, the question is answered in the affirmative.

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the lawyer's representation of the current] client may be materially limited. Even if the lawyer reasonably believes that the representation of the ... [current] client would not be adversely affected by a material limitation (such that the [current] client's consent to the representation after consultation would permit the lawyer to represent the client), revelation of sufficient information for the ... [current] client to appreciate the significance of the limitation on the representation ordinarily would require the lawyer to divulge information relating to the ... [former] client's representation. Since such a revelation can be made under Rule 1.6 [DR 4-101] only after consulting with the ... [former] client (which ordinarily also would be foreclosed [if the former client is represented by a lawyer or refuses a consultation or consent to disclosure]), the lawyer in the typical case cannot practicably obtain the requisite consents to continue representing the ... [current] client.

ABA Formal Opn. 90-358 (text at n.10).
