



Committee on Professional Ethics

Opinion 871 (5/31/11)

Topic: Conflicts of interest with former clients

Digest: An attorney may not oppose a former client in a different matter without the former client's informed consent, confirmed in writing, if a reasonable lawyer would perceive a substantial risk that the attorney would normally have learned confidential information during the prior representation that could be used against the former client in the present matter.

Rules: 1.9(a) & (c)

QUESTION

1. May an attorney represent a new client who is adverse to a former client in a different matter?

OPINION

2. The inquiring attorney wishes to represent a husband (the "Husband") in a divorce proceeding against his wife (the "Wife"). However, the attorney is concerned because he represented the Wife three years ago in a Family Court matter. In that Family Court matter, the Wife sought to modify a child visitation order regarding her child from a previous relationship. That child is not the Husband's child, and the Husband was not involved in the previous matter. However, the Husband and the Wife have three children in common through the present marriage. An existing Family Court order has already determined custody issues regarding the three children in common, and the inquiring attorney considers it "likely" that the existing custody order regarding these three children will be incorporated into the ultimate divorce decree. The inquirer does not say, however, whether the Wife agreed to the existing custody order or whether she will agree to its incorporation into the divorce decree. May the inquirer represent the Husband in the divorce proceedings?

3. Under Rule 1.9(a) of the New York Rules of Professional Conduct (the "Rules"), an attorney may not represent a client whose interests are materially adverse to a

former client, unless the former client gives informed consent, confirmed in writing, if the matter on behalf of the present client is "substantially related" to the matter in which the attorney represented the former client. According to Comment [3] to Rule 1.9:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that ***there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.*** [Emphasis added.]

4. Here, the matters plainly do not involve "the same transaction or legal dispute." The matter the inquirer handled for the Wife was a visitation dispute in which the Husband was not involved, whereas the new matter is a divorce action in which the Husband is involved. But as explained by Comment [3] to Rule 1.9, the matters are nevertheless "substantially related" for purposes of Rule 1.9(a) if "a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the [present] client's position in the subsequent matter." Comment [3] also provides an illustration that may apply here: "For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce."

5. We emphasize that the "reasonable lawyer" test articulated in Comment [3] is not whether the lawyer *actually* obtained confidential information about the former client in the prior matter that would be useful against her in the present matter. Rather, the test is whether a reasonable lawyer would perceive a sizeable *risk* that a competent lawyer handling the prior matter would *normally* have gained confidential information about the former client that could be turned to the present client's advantage in the matter against the former client. In other words, the "reasonable lawyer" test *presumes* that an attorney has confidential information about a former client if a reasonable lawyer would see a substantial risk that a typical attorney would have acquired such information in the prior matter. As Comment [3] explains:

... A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and ***information that would in ordinary practice be learned by a lawyer providing such services.*** [Emphasis added.]

6. Here, the former representation of the Wife concerned visitation rights of third parties regarding a child unrelated to the marriage in which a divorce is now sought. A reasonable lawyer may conclude that the inquirer, in that former representation, would normally have obtained information concerning such things as the Wife's financial

resources, the home life of the child, and the Wife's parenting skills. If that information is also relevant in the impending divorce action, a reasonable lawyer might also perceive a significant risk that the inquirer will use that information to the Husband's material advantage (and to the Wife's material disadvantage) in the divorce proceeding. However, applying the reasonable lawyer test to determine whether two matters are "substantially related" within the meaning of Rule 1.9 requires a factually intensive analysis, and we have only a skeletal version of the facts. What a "reasonable lawyer" would conclude in the situation at hand depends on a more nuanced description of the nature of the two matters than we have been given here.

7. For example, if the parenting ability or financial condition of the Wife were issues in the prior representation, or if other issues would normally have given a competent attorney reason to seek out confidential information during the prior representation that would materially advance the interests of the Husband (and be materially damaging to the Wife) in the divorce case, then the "reasonable lawyer" test of Comment [3] would be satisfied and the two matters will be deemed "substantially related" under Rule 1.9(a).

8. If the former matter and the present matter are deemed "substantially related," then Rule 1.9(a) prohibits the inquirer from representing the Husband in the divorce matter absent the Wife's informed consent, confirmed in writing. The terms "confirmed in writing" and "informed consent" are defined in Rule 1.0(e) and (j) respectively as follows:

(e) "Confirmed in writing" denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

9. Whether or not the prior and present matters are substantially related, the inquirer must abide by the restrictions of Rule 1.9(c) in the divorce proceeding and elsewhere. Specifically, Rule 1.9(c)(1) prohibits the inquirer from *using* confidential information of the former client to the disadvantage of the former client "except as these Rules would permit or require with respect to a current client or when the information has become generally known," and Rule 1.9(c)(2) prohibits the inquirer from *revealing* confidential information of the former client that is protected by Rule 1.6 – whether to

her advantage, disadvantage, or otherwise – “except as these Rules would permit or require with respect to a current client.”

CONCLUSION

10. Whether an attorney may oppose a former client in a new and different matter without the former client's informed consent (confirmed in writing) depends on whether a reasonable lawyer would perceive a substantial risk that a competent attorney would normally have learned confidential factual information during the prior representation that could be used against the former client in the new matter.

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