NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

Committee on Professional Ethics

Opinion 922 (4/26/12)

Topic: Conflicts arising from previous representation

Digest: Lawyer may represent prospective client in litigation that could involve impleading former clients if current litigation is not substantially related to the matters on which the lawyer represented those former clients. However, in the impleader action, lawyer may not be able to reveal or use certain information relating to the former clients.

Rules: Rule 1.6(a) & (b), 1.9(a) & (c)

FACTS

1. The inquirer has represented a condominium homeowners' association (the "HOA") from time to time in various matters. Recently, the inquirer was asked to undertake the defense of the HOA in an action, brought against it by the city in which the condominium is located, for alleged nonpayment of the condominium's water bill. The inquirer anticipates that in defending the HOA, it will be appropriate to implead "certain unit owners," some of whom the inquirer represented in the acquisition of their units. The inquirer no longer represents any of the unit owners in any capacity. The inquirer asks whether, in these circumstances, the inquirer may ethically undertake the defense of the HOA in the water bill action.

QUESTION

2. May a lawyer ethically defend a condominium homeowners' association in an action brought by the city for nonpayment of a bill even though the lawyer might have occasion to implead unit owners whom the lawyer represented when they acquired their units?

OPINION

3. Rule 1.9(a) of the Rules of Professional Conduct precludes a lawyer who has formerly represented a person (the former client) in a matter from representing another person (the prospective client) in the same or a "substantially related" matter in which the prospective client's interests are "materially adverse" to the former client's interests unless the former client "gives informed consent, confirmed in writing." In other words, the former client's informed consent is required only when (a) the prospective and former clients' interests in the new matter are materially adverse, and (b) the matters are the same or substantially related.

4. In this inquiry, the inquirer proposes to represent the HOA (the prospective client) in the water bill action (the new matter) that may be adverse to one or more unit owners (the former clients) whom the inquirer previously represented in their acquisition of their units (the former matters). Would Rule 1.9(a) preclude representation of the prospective client?

5. The "material adversity" element of Rule 1.9(a) is clearly met. Impleading the former clients would create material adversity in the new matter because if a money judgment were rendered against the HOA, the impleader, if successful, would make the unit owners liable to the HOA for at least portions of that judgment.

6. Since the interests of the inquirer's prospective client in the water bill action are materially adverse to those of the inquirer's former clients, the question turns on whether the water bill action is "substantially related" to the former matters in which the lawyer previously represented any of the unit owners who might be impleaded in the new matter.

7. 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." Rule 1.9, Cmt. [3]. *A fortiori,* matters are also substantially related if the lawyer in question actually and knowingly obtained (and now possesses) confidential factual information that would materially advance the prospective client's position in the subsequent matter.

8. Without trying to list all the circumstances that could bear on the question of substantial relation, we note some examples.

a. The lawyer should consider whether it is likely that the construction or validity of any of the terms of the unit purchase and sale agreements would be put in issue in the present matter. If so, the presence of a transaction common to both matters would make them substantially related, and each former client's informed consent to the lawyer's representation of the HOA (confirmed in writing) would be required. *Cf.* Rule 1.9, Cmt. [1] ("a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of a former client").

b. The lawyer should consider the effect of confidential information that does not bear directly upon the merits of the water bill action but nevertheless could affect its outcome. If one of the former clients were likely to be an important witness in a trial of the new matter, and the lawyer had damaging information bearing on the credibility of that witness, such information could materially advance the position of the HOA in the water bill action. Similarly, information concerning a former client's financial status, health or other possible vulnerabilities could be relevant to ability to withstand protracted litigation. These kinds of confidential information would often not be so significant as to materially advance the prospective client's position – indeed,

> on the facts presented, this inquiry does not present any Rule 1.9(a) problem based on confidential information – but it is another area of potential conflict for the lawyer to consider.

9. These examples illustrate the fact-specific nature of analyzing whether matters are substantially related. The inquirer has indicated that the prior representations of unit owners and the contemplated representation of the HOA are "completely separate and unrelated." We lack sufficient facts to confirm that determination, but if the inquirer has taken into account the kinds of considerations discussed above, and has correctly concluded that the present and former matters are not substantially related, then the inquirer may represent the HOA in the water bill action without obtaining consent of the former clients.

10. Even in that situation, however, there could be certain constraints on the inquirer's representation of the HOA.[1] The inquirer may possess confidential information of the previously represented unit owners that is not significant enough to make the current and former matters substantially related but nevertheless might be of some use in the impleader matter. In that event, absent consent or some other exception to Rule 1.6, the inquirer would not be able in the new litigation to disclose the confidential information of the former clients or use it to their disadvantage. *See* Rules 1.9(c), 1.6(a) and 1.6(b). Moreover, while the inability to use such information does not automatically preclude undertaking the new representation, it may do so in certain circumstances.[2]

CONCLUSION

11. A lawyer may represent a client in litigation that could involve impleading some of the lawyer's former clients if the current litigation is not substantially related to the matters on which the lawyer represented those former clients. Even if the lawyer may and does undertake the representation, however, the lawyer may not use confidential information of those former clients in the current litigation unless a specific exception to the confidentiality rules applies.

(32-11)

---

[1] These constraints could also apply when the former and new matters are substantially related and the Rule 1.9(a) conflict is cured by consent, because consent to represent an adverse party in related new litigation does not automatically include consent to use confidential information. N.Y. State 903 ¶ 16 (2012); N.Y. State 901 ¶ 9 & n.1 (2011).

[2] *See* N.Y. State 903 ¶ 16 (2012) (absent former client's consent to use confidential information, attorney must determine whether having that information creates Rule 1.7(a) conflict, either because the lawyer could not avoid using the confidential information or because of significant risk that having the information would adversely affect the lawyer's professional judgment); N.Y. State 901 ¶ 9 (2011) (same); N.Y. City 2005-02 (applying prior Code of Professional Responsibility) ("The fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose does not without more create a conflict of interest barring the dual representation").