NEW YORK STATE BAR ASSOCIATION
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# New York State Bar Association
# Committee on Professional Ethics

**Opinion 1008 (4/24/2014)**

**Topic**: Representing new clients adverse to a current or former client

**Digest**: Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

**Rules**: 1.6(a); 1.7(a) & (b); 1.9(a) & (c)

## FACTS

1. Inquirer is a law firm ("Law Firm") that desires to represent some new clients ("New Clients") against an entity that the Law Firm considers to be a former client (the "Entity"). The Entity objects to the representation. The Entity and the Law Firm have jointly prepared and submitted a detailed set of facts that we accept for purposes of this opinion. According to the jointly submitted statement of facts, the Entity at one time leased a gas station. The gas station's owner later sued the Entity and a co-defendant ("Co-Defendant") for breaching the lease agreement (the "Lease Action"). The owner sought to recover the costs of removing gasoline storage tanks and remediating the premises. The Law Firm defended the Entity in the Lease Action.

2. The defense in the Lease Action was controlled by the Entity's Co-Defendant, which had purchased the Entity's interest in the property before the Lease Action began. The purchase was made pursuant to a Purchase and Sale Agreement ("PSA") covering scores of gas stations. The Law Firm worked closely with the Co-Defendant's counsel on the Lease Action. The Lease Action eventually settled.

3. Recently, the Law Firm agreed to represent the New Clients against the Entity and/or its Co-Defendant. Specifically, the New Clients claim that the Entity and/or its Co-Defendant operated various gas stations (though not the one involved in the concluded Lease Action) in a manner that damaged the New Clients' property. The Entity at one time owned these other gas stations, but sold them to Co-Defendant pursuant to the PSA before the Lease Action was filed.

4. The Entity has asked the Law Firm to withdraw from representing the New Clients, on

two grounds: (a) the Law Firm never sent a termination letter to the Entity, which therefore contends that it remains a current client; and (b) even if the Entity is a former client, it contends that the new matter is substantially related to the Lease Action in which the Law Firm defended the Entity. Specifically, the Entity says that the matters are substantially related because the Law Firm acquired confidential information during the Lease Action regarding: (i) the Entity's negotiating strategy in the Lease Action, (ii) the Entity's interpretation of the PSA, (iii) the relationship between the Entity and its Co-Defendant in the Lease Action, and (iv) the future obligations of the environmental/remediation contractor assigned to the PSA properties by the Entity.

5. The Law Firm counters that (a) the Entity is a former client because the Law Firm has not performed any legal services for the Entity since October 2012, and (b) the New Clients' matter is not substantially related to the Lease Action. Specifically, the Law Firm contends that the New Clients' claims are not substantially related because the present claims involve a different lease agreement and different gas stations. The Law Firm recognizes that the New Clients' matters might involve theories of recovery under the PSA, but the Law Firm says the PSA would potentially be a discoverable document. In sum, the Law Firm argues that the present and former matters are not substantially related because the Law Firm did not acquire any confidential information from the Entity in the Lease Action that New Clients could use to the Entity's disadvantage in the present dispute.

**QUESTION**

6. If a law firm represented an entity in a matter and has not performed any legal services for the entity for more than a year, but the law firm has not sent a termination letter to the entity, may the law firm represent new clients against the entity, over the entity's objection, in a new matter that is related in some ways to the original matter?

**OPINION**

7. The inquiry raises three sets of issues: (i) conflicts with current clients; (ii) conflicts with former clients; and (iii) duties of confidentiality to former clients. We will address these issues in turn. We address only whether the representation is permitted under the New York Rules of Professional Conduct (the "Rules").[1] We are not taking into account additional factors that a

[1] The inquiry was submitted by a law firm rather than by an individual lawyer. For simplicity of expression, this opinion speaks in terms of duties of that firm rather than duties of its individual lawyers. At the expense of that simplicity, we could set forth our analysis in greater detail to account for the following. We rely on certain provisions of the Rules in which the direct imposition of duties is upon an individual lawyer rather than upon a law firm. *See* Rules 1.6(a), 1.7 and 1.9. It is through *other* provisions of the Rules that such duties are imposed derivatively (or related duties are imposed) on others in the lawyer's firm and on the firm as a whole. *See, e.g.*, Rule 1.6(c) (requiring lawyer to exercise reasonable care to prevent breaches of confidentiality by others), Rule 1.10 (a)-(c) (imputing specified conflicts to law firm and its associated lawyers), Rule 1.10(e) (requiring law firm to maintain conflict-checking system), Rule 5.1 (requiring law firm and supervisory lawyers to make reasonable efforts to ensure that lawyers in the firm conform to the Rules), and Rule 8.4(a) (providing that a lawyer "or law firm" shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do

court might consider if deciding a motion to disqualify, and we are not predicting how a court would rule if such a motion were eventually filed. Our jurisdiction extends only to interpreting the Rules; we do not opine on legal questions such as whether there is warrant for disqualification.

## A. Conflicts with Current Clients: Rule 1.7.

8. The threshold question is whether the Entity is a current client or a former client. Rule 1.7(a)(1) generally prohibits a law firm from opposing a current client in any matter, related or unrelated, absent compliance with Rule 1.7(b), which among other things would require the client's informed consent confirmed in writing.[2] If the Entity remains a current client of the Law Firm, therefore, the Law Firm may not oppose the Entity on behalf of New Clients because the Entity is objecting rather than consenting to the representation. But if the attorney-client relationship between the Law Firm and the Entity has ended, then we would instead apply Rule 1.9, which governs conflicts with former clients.

9. The Rules of Professional Conduct do not define when an attorney-client relationship ends. On the contrary, Scope ¶ 9 says that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Thus, whether the attorney-client relationship between the Law Firm and the Entity has ended depends in part on questions of law beyond our jurisdiction. Scope ¶ 9 also says: "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." We also lack sufficient facts to determine whether the Entity remains a current client of the Law Firm.

10. We note, however, that the Law Firm's failure to send a termination letter to the Entity does not by itself prove that the attorney-client relationship continues. A termination letter (or email) from a lawyer to a client clearly notifying the client that the attorney-client relationship has ended will often be a good practice, and in some circumstances may be dispositive. But an attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.,* 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship … is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'" and a rule "that requires a law firm announce the conclusion of its engagement …. would conflict with the principle … that the relationship is terminated upon the accomplishment of the purpose for which it was created"); *Miller v. Miller*, 203 A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual

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so, or do so through the acts of another"). However, we do not think it necessary to set forth all our analysis at that greater level of detail.

[2] "The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." Rule 1.7, Cmt. [6]. Conflicts arising under Rule 1.7 (and also those arising under Rule 1.9, which we discuss below) are among those imputed by Rule 1.10(a) to other lawyers associated in the same firm.

authority to represent a client ends when … the lawyer has completed the contemplated services").

11. The passage of time is another indicator of whether a person remains a current client, but it is not dispositive. Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment for the Entity at a given moment.

12. Here, despite the lack of a termination letter, several circumstances – including the fact that the Law Firm has concluded its work on the Lease Action and has not handled (or been asked to handle) any new matters for more than a year – suggest that the Entity is a former client. The parties have not identified any countervailing factors, such as a longstanding pattern of representation over the years, or the Entity's reasonable belief that the Law Firm needs to perform additional legal work to fulfill the purpose of the earlier representation. If such factors exist, they could count in favor of the Entity being a current client.

13. Although we have set forth some relevant factors, we do not have all the facts relevant to whether the Entity remains a current client of the Law Firm, and in any event we lack authority to reach what is ultimately a legal determination on that issue. If the Entity remains a current client of the Law Firm, then the Entity is entitled to the protections of Rule 1.7(a)(1). In that case the Law Firm may not oppose the Entity in any matter, related or unrelated, unless the conflict is consentable under Rule 1.7(b)(1) and the Law Firm obtains the Entity's informed consent, confirmed in writing, under Rule 1.7(b)(4).

**B. <u>Conflicts with Former Clients: Rule 1.9</u>.**

14. If the Entity is not a current client, then it is a former client. Under Rule 1.9(a), a lawyer may not represent a client with interests "materially adverse" to those of a former client in a matter "substantially related" to the matter the lawyer handled for the former client, unless the former client gives informed consent, confirmed in writing. Here, the interests of New Clients in the current matter are "materially adverse" to the interests of the Entity, and the Entity has not consented (and in fact has objected) to the Law Firm's representation of New Clients. Given the former client's objection, the only open question is whether the current matter is "substantially related" to the former matter (the Lease Action).

15. Guidance on this question is found in Comment [3] to Rule 1.9. The first sentence says that matters are "substantially related" if (i) they involve the "same transaction or legal dispute" or (ii) a reasonable lawyer would perceive "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." Here, the new matter is plainly not the "same transaction or legal dispute" as the old one, but the new and old matters could still be substantially related based on the risk that confidential information acquired by the Law Firm in the old matter would materially advance the position of New Clients in the new matter. We therefore turn to the balance of Comment [3], which discusses how even distinct matters may be substantially related through confidential information.

16. Some parts of Comment [3] address what "normally" or "ordinar[il]y" happens, rather than whether the lawyer *actually* obtained confidential information in the particular case. It makes sense that what normally happens should trigger the protections of Rule 1.9(a). As Comment [3] notes, the purpose of those protections would be defeated if a party seeking disqualification had to reveal its confidential information in order to protect it:

> 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.

17. The relevance of what normally or ordinarily happens is reflected in the Comment's example of a matter deemed to be substantially related even though the example identifies no particular actually acquired confidential information: "[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations…." Rule 1.9, Cmt. [3].

18. On the other hand, the *actual* receipt of confidential information in the prior matter would seem even more compelling than a mere likelihood of its receipt. "*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." N.Y. State 992 ¶7 (2012). This view is supported by the following language from Comment [3]:

> [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…. [K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

19. Comment [3] also suggests various reasons that current and former matters might *not* be substantially related:

- The environmental lawyer mentioned above "would not be precluded … from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

- "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."

- "Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."

- "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation."

20. The inquiring Law Firm should apply the precepts of Rule 1.9(a) and Comment [3] to the various kinds of information that the Entity contends demonstrate a substantial relationship between the Lease Action and the current matter, and to other kinds of potentially relevant information as well, such as the practices of the Entity in maintaining gas stations.

21. If any of these kinds of information would "materially advance" New Clients' position against the Entity, that would make the matters substantially related and preclude the new representation. However, the "materially advances" inquiry is fact-intensive, so we cannot reach a definitive conclusion as to whether the matters are substantially related.

## C. Confidentiality Duties to Former Clients: Rule 1.9(c).

22. Whether or not the present and former matters are substantially related, the Law Firm has a continuing duty of confidentiality to the Entity pursuant to Rule 1.9(c), which "generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients." Rule 1.9, Cmt. [8]. Specifically, Rule 1.9(c) provides that a lawyer (1) shall not "*use*" confidential information "to the disadvantage of the former client" unless the Rules "would permit or require [such use] with respect to a current client" or the information has become "generally known" and (2) shall not "*reveal*" a former client's confidential information "except as these Rules would permit or require with respect to a current client."[3]

23. Particular pieces of confidential information may lose their protected status as time goes by, such as when the information becomes generally known or when disclosure would no longer be embarrassing or detrimental to the client. But otherwise, a lawyer's duty to protect such information remains in force even after a current client becomes a former client. We lack sufficient facts to determine what information is protected by Rule 1.9(c), but we note that the duty of confidentiality under Rule 1.9(c) applies whether or not matters are substantially related under Rule 1.9(a).

## CONCLUSION

24. Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the law firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

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[3] The term "confidential information" is broadly defined in Rule 1.6(a) to include (subject to certain exceptions not applicable here) "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."