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

Opinion 1103 (7/15/2016)

Topic: Conflicting interests; representation of competing enterprises; substantial relationship

Digest: An attorney who previously represented Corporation A may undertake the representation of Corporation B in litigation with Corporation X that is unrelated to the attorney's prior representation of Corporation A, notwithstanding that Corporations A and B are competitors in the same industry and that it is in Corporation A's economic interest for Corporation B to lose the litigation with Corporation X. Corporation A's threat to sue Corporation B in a matter unrelated to the attorney's prior representation of Corporation A similarly does not bar the attorney from representing Corporation B in the threatened litigation.

Rules: 1.0(*l*), 1.7(a) and 1.9(a) & (c)

FACTS

1. Corporation A and Corporation B are competitors. They are engaged in the same industry, in the same geographic area, providing similar services to the same customer base. The inquirer previously represented Corporation A in a matter that has been concluded ("Matter 1"). The inquirer now proposes to represent Corporation B in litigation with Corporation X ("Matter 2"). The inquirer states, and we assume for purposes of this opinion, that Matter 1 and Matter 2 are not factually related. However, if Corporation B is unsuccessful in this suit, it might be forced to cease operations, which would benefit Corporation A.

2. Also, Corporation A has recently threatened to sue Corporation B on a matter ("Matter 3") that is not factually related to Matter 1.

QUESTIONS

3. May a lawyer undertake to represent a client, Corporation B, in litigation with Corporation X, where it is in the economic interest of a former client, Corporation A, for Corporation B to lose the litigation?

4. May a lawyer undertake to represent a client, Corporation B, in litigation threatened against it by the lawyer's former client, Corporation A, when the threatened litigation is not related to the lawyer's former representation of Corporation A?

OPINION

Applicable Rules

5. The inquirer states that Matter 1 has concluded. Consequently, we assume that Corporation A is a former client of the inquirer. *But see* N.Y. State 1008 (2014) for an example where the client argues it is a current client despite the fact that the matter has concluded. Whether the client is a current or former client is a mixed question of fact and law that is outside our jurisdiction to determine.

6. We have held that a lawyer's duty of loyalty to a client ends with the termination of the representation. *See* N.Y. State 638 (1992), N.Y. State 628 (1992) (although the duty to preserve confidences remains, the duty of loyalty ends with the termination of the lawyer-client relationship).

7. The limitations on a lawyer's right to oppose a former client are defined mainly by Rule 1.9(a), which provides:

> (a) A lawyer who has formerly represented a client in a *matter* shall not 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 unless the former client gives informed consent, confirmed in writing. [Emphasis added]

Thus, even assuming that the former client has not consented, Rule 1.9(a) does not prohibit a lawyer from representing a new client unless both prongs of Rule 1.9(a) are satisfied -- (i) the new matter must be the "same" matter or "substantially related" to the prior matter, *and* (ii) the new client's interests must be "materially adverse" to the interests of the former client.

8. The term "matter" is defined in Rule 1.0(*l*):

> "Matter" includes any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

9. Comment [2] to Rule 1.9 helps to understand the meaning of the terms "matter" and "materially adverse":

> [2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with *materially adverse interests in that transaction* clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another

> client in a factually distinct problem of that type, even though the subsequent representation involves a position *adverse* to the prior client. . . . [Emphasis added]

10. Comment [3] to Rule 1.9 explains what is meant by "substantially related":

> [3] 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]

11. Even if the legal issues involved in two matters are the same, it would not make the matters substantially related. As we noted in N.Y. State 1029 (2014):

> The mere circumstance that the current representation may involve legal issues that were also involved in the Litigation does not make the matters substantially related. Interpretations of the ethical rules have long distinguished between conflicts involving the same matter and conflicts involving the same legal issue. Such "issue" (or "positional") conflicts tend to be more problematic in the case of concurrent representation than in the case of former representation. Even as to concurrent representation, a lawyer may ordinarily "take inconsistent legal positions in different tribunals at different tribunals at different times on behalf of different client," although there can be circumstances in which an issue conflict arises because "there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's representation of another client in a different case."

See also Rule 1.9, Cmt. [2] (quoted in ¶ 8 above).

12. The fact that the current client and the former client have competing economic interests does not create a conflict of interest under Rule 1.9(a). Even if Corporations A and B were both current clients of the inquirer, their economic competition would not prohibit the inquirer from representing both of them. As Comment [6] to Rule 1.7 explains, with respect to simultaneous representation of two clients:

> [S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse, *such as representation of competing economic enterprises in unrelated litigation,* does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients. [Emphasis added.]

See also, Charles W. Wolfram, *Competitor and Other "Finite Pie" Conflicts*, 36 Hofstra L. Rev. 539, 550-55 (2007) (discussing cases in which lawyers represent economic competitors). Since a lawyer may simultaneously represent *current* clients who are economic competitors, then *a fortiori* a lawyer may represent a client whose interests are contrary to the interests of a *former* client who competes economically with the current client.

May the inquirer represent Corporation B in Matter 2?

13. The inquirer has told us, and we are assuming, that Matter 1 (the completed matter in which the inquirer previously represented Corporation A) is not "substantially related" to Matter 2 (Corporation B's contemplated suit against Corporation X). We thus assume that Matter 1 and Matter 2 do not involve the same transaction or legal dispute. Because the contemplated and former matters are not the same or substantially related, Rule 1.9 would not bar the inquirer from undertaking the proposed representation. We therefore do not need to determine whether Corporation B's interests in Matter 2 are materially adverse to the interests of Corporation A. Rule 1.9(a) requires that both prongs of the test be met – same or substantially related, and materially adverse – and here the first prong is not met.

14. Nevertheless, it is worth noting that Corporation B's interests in Matter 2 would not be materially adverse to the interests of Corporation A under Rule 1.9. Just as competing economic interests do not create "differing interests" within the meaning of Rule 1.7(a)(1), so they do not create a "materially adverse" interest within the meaning of Rule 1.9(a). Here, the fact that Corporation A will benefit if Corporation B is unsuccessful in Matter 2 (because Corporation B is likely to be forced to go out of business if it loses, thus eliminating a competitor), does not create a materially adverse interest under Rule 1.9(a). That would stretch the meaning of "materially adverse" too far.

15. However, the inquirer remains bound by Rule 1.9(c) even if Rule 1.9(a) does not apply. Rule 1.9(c) prohibits a lawyer from using or revealing a former client's confidential information that is protected by Rule 1.6 except as the Rules would permit or require with respect to a current client.

May the inquirer represent Corporation B in Matter 3?

16. Corporation A's threat to sue Corporation B, even if the threat matures into a lawsuit, does not disqualify the inquirer from representing Corporation B in Matter 3, as long as Corporation A remains a former client and Matter 1 and Matter 3 are not the same or substantially related. *See, e.g.*, N.Y. State 1008 (2014) (discussing whether a client is a current or former client as well as the conflicts rules applicable in each situation). Since the inquirer has stated and we are assuming that Corporation A is a former client and that Matter 3 is not substantially related to Matter 1, Rule 1.9(a) does not bar the inquirer's representation of Corporation B in Matter 3 because the first prong of the test in Rule 1.9(a) is not met. In addition the second prong of the Rule 1.9(a) test is not met. The fact that Corporations A and B have generally competing economic interests does not create a "materially adverse" interest within the meaning of Rule 1.9(a).

17. If the inquirer's representation of Corporation B in Matter 3 were substantially related to

the former representation of Corporation A in Matter 1, then Rule 1.9(a) would prohibit the inquirer from defending Corporation B in the litigation brought by Corporation A unless the inquirer obtained Corporation A's informed consent, because the "materially adverse" prong of Rule 1.9(a) is always met when a former client is on the opposite side of a lawsuit involving the same or a substantially related matter, whether as plaintiff or defendant.

CONCLUSION

18. Where an attorney had previously represented Corporation A, the attorney may undertake the representation of Corporation B in litigation unrelated to the attorney's representation of Corporation A, notwithstanding that the two corporations are competitors in the same industry and that Corporation B's failure in the litigation would indirectly benefit Corporation A by eliminating a competitor. Corporation A's bringing suit against Corporation B in a matter unrelated to the attorney's prior representation of Corporation A is similarly not barred by Rule 1.9(a).

(20-16)