

Law firm may not “choose” between conflicting present clients and withdraw from representation so as to relegate one present client to “former client” status in order to take advantage of less stringent conflict rules

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QUESTION:

“I have found myself in a situation where my opponent in litigation contends that my law firm must withdraw from representation of a long time client, A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the new Rules of Professional Conduct which became effective January 1, 1991. I would appreciate receiving a confidential opinion from you as to whether we can take advantage of the comments to Rule 1.7 and withdraw from representing client C and continue to represent client A under Rule 1.9.

The situation arose when I filed suit on behalf of our long time client A against B, an Alabama general partnership, and its general partners C and D, for breach of a construction contract and a fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

Shortly after filing suit, I learned that another lawyer in our firm, Jane Doe, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved preparing the necessary legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose. Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

Legal work on the condominium project for C commenced in April 1989. For several years prior to this date, my law firm had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which was not in any way related to the condominium project. In November 1989, client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B and in November 1990, A asked us to file suit against B.

C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990.

In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

In January 1991, we were advised by counsel for C (Law Firm X) that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a copy of the Complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the Rules of Professional Conduct and cites a portion of the comments thereto (under subtitle "Conflicts in Litigation") which state:

"Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated."

Since the matter involving C is wholly unrelated to the construction litigation, it seems to me that other comments to Rule 1.7 control how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comments under "Loyalty to a Client" states:

"Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9."

Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

This resolution of the asserted conflict was mentioned to C's counsel who responded by citing Wolfram's Hornbook on Modern Legal Ethics and the California bankruptcy case In re California Cannery and Growers, 74 B.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to who he would represent. However, the bankruptcy case seems to be distinguishable from our situation since the two matters involved here are totally unrelated and since the case deals with the old code. Additionally, the portions of Wolfram cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent our long time client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and to

continue to represent C in the condominium project, or whether we should do something else. We would appreciate your confidential opinion as to what we should do in this situation and whether we can withdraw from representation of C and continue to represent A in the construction litigation.

ANSWER:

Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation. Additionally you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

DISCUSSION:

Rule 1.7 of the Rules of Professional Conduct provides the following:

“Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.”

As pointed out in the Comment to Rule 1.7 “loyalty is an essential element in the lawyer’s relationship to a client.” In the situation where a lawyer takes part in litigation against an existing client “the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.” Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the Rules of Professional Conduct provides the following:

“Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantaged of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.”

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client.

In the instant situation there is no question that you could not continue to represent both client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9). Indeed the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that, “Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.” We do not believe that this Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise, would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in United Sewerage Agency v. Jelco Inc., 646 F.2d 1339, (9th Cir. 1981) where the Court held that:

“The present-client standard applies if the attorney simultaneously represent clients with different interest. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a ‘former client’ by choosing when to cease to represent the disfavored client.” (Supra at 1345, N.4, citing, Fund of Funds Ltd. v. Arthur Anderson & Co., 567 F.2d 225(2d Cir. 1977).

For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to your client C.

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