



**New York State Bar Association
Committee on Professional Ethics**

Opinion 989 (10/25/13)

Topic: Conflicting interests; former client

Digest: A law school legal clinic which previously represented a not-for-profit organization may thereafter represent an organization with similar objectives in applying to the Internal Revenue Service for not-for-profit status, since the matters for the proposed and former clients are not substantially related within the meaning of the Rules, the new representation would not involve use of confidential information of the former client, and the relevant interests of the clients are not materially adverse.

Rules: 1.6(a), 1.9

FACTS

1. A law school legal clinic (the “Clinic”) previously represented a not-for-profit organization (the “Former Client”). As a result of a dispute within the organization, a group of dissident organization members has formed a new organization (the “Proposed Client”) that would perform the same kinds of functions as the Former Client, and has asked the Clinic to represent it in applying for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (the “New Representation”).

QUESTION

2. May the Clinic undertake the New Representation, or would such representation constitute a conflict of interest?

OPINION

3. Under the Rules of Professional Conduct (the “Rules”), a lawyer has ethical responsibilities to former clients as well as to current ones: “After termination of a client lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules.” Rule 1.9, Cmt. [1].

4. In particular, Rule 1.9 (Duties to Former Clients) 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.

....

(c) A lawyer who has formerly represented a client in a matter ... shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 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; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

5. The term "substantially related" is explained in 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.

6. If the Clinic were to undertake an extensive or continuing relationship with the Proposed Client, that representation could include matters substantially related to the representation of the Former Client in which the two clients' interests were materially adverse. In that case, Rule 1.9(a) would preclude representation of the Proposed Client unless the Former Client gave informed consent, confirmed in writing.

7. For two reasons, however, we believe that the limited New Representation proposed in the inquiry would be unlikely to give rise to such a conflict.

8. First, on the facts presented, the New Representation does not seem "substantially related" to the representation of the Former Client within the meaning of Rule 1.9. The filing of an application for tax exemption would generally not implicate confidential information of the Former Client.¹ The information needed for such an application is, rather, information about the Proposed Client and its conformity with legal requirements for tax-exempt status.

¹ See Rule 1.6(a) ("Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."); Rule 1.6, Cmt. [4A] ("The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research."); Rule 1.9, Cmt. [3] ("In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.").

9. Second, the facts presented do not suggest that the Proposed Client's interests in the IRS application would be materially adverse to the interests of the Former Client. While the Former Client may be concerned with competition from a new organization with similar goals, this kind of general enterprise competition is not enough to create a conflict of interest. *Cf.* Rule 1.7, Cmt. [6] ("simultaneous 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"). Just as representation of competing business enterprises is not automatically representation of "differing interests" under Rule 1.7(a), we believe that competition between not-for-profit organizations would not ordinarily make establishment of the newer organization materially adverse to the interests of the existing one under Rule 1.9(a).

CONCLUSION

10. Under Rule 1.9, the Clinic's representation of the Proposed Client would not be in a matter substantially related to its representation of the Former Client; it would not involve use of the Former Client's confidential information; and the relevant interests of the Former Client and Proposed Client are not materially adverse. The Clinic may thus undertake the New Representation, representing the Proposed Client in applying for not-for-profit status, without obtaining the Former Client's consent.

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