

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-7
(July 2009)

A large law firm represents a builder of a proposed office building (“Developer Client”). That representation has been ongoing for a long period of time and includes matters relating to the financing of the building and matters relating to the obtaining of building permits, zoning variances, and other needed approvals. As part of the effort to obtain the needed permits, the law firm is scheduled to make presentations on behalf of the Developer Client to the local Civic Association, the local Township’s Planning Commission, the Historical and Architectural Review Board and the Zoning Hearing Board.

Two weeks prior to the scheduled presentation to the Zoning Board, another client of the law firm in a matter unrelated to the development project, but who lives in the neighborhood of the proposed building site (“Neighbor Client”), learned of the zoning hearing and determined that he or she would oppose the granting of the necessary variance. Unaware that the firm represented the Developer Client, the Neighbor Client requested a firm lawyer to represent him or her in opposing the project.

The law firm discovered within hours of the contact by the Neighbor Client that the firm represented the Developer Client on the project and could not represent the Neighbor Client in the matter. No services were performed for the Neighbor client, and no advice was given to the Neighbor Client regarding the matter. The firm disclosed to the Neighbor Client that it represented the Developer Client on that same date.

The inquirer asks if the firm is disqualified in whole or in part from representing the Developer Client in connection with the development project.

Pennsylvania Rule of Professional Conduct 1.7 (“the Rules”) **Conflict of Interest: Current Clients**, provides that:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Rule 1.0, **Terminology**, provides in part that:

(e) “Informed consent” denotes the consent by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

This inquiry poses difficult questions regarding the law firm’s response to the situation.

First, it is apparent that at the moment when the Neighbor Client determined that he or she was opposed to the project, and so advised a lawyer at the firm, a conflict developed under Rule 1.7(a)(1) in that the representation of the Developer Client was at that point directly adverse to another client. As of that moment, then, the law firm and the clients faced a difficult situation. Plainly, the law firm did the right thing by telling both clients immediately of the conflict and declining to accept the representation of the Neighbor Client in opposing the application.

But that does not entirely resolve the problem in that the Neighbor Client remains a client of the firm, albeit in an unrelated matter having nothing to do with the development project, and Neighbor Client remains opposed to the project on which the law firm would be advancing the interests of the Developer Client. Even if the Neighbor Client is not represented by the law firm, he – either himself or with the assistance of another lawyer – will continue opposing the project, perhaps even appearing at the very tribunal before whom a lawyer from the inquirer’s firm plans to present the Developer Client’s proposal and advocate for its approval over the opposition of the Neighbor Client and others. It is even possible that the Neighbor Client would testify as to his or her views regarding the matter and could even be cross-examined by a lawyer from the law firm.

This problem is a difficult one in that through no fault on the part of either of the two clients or the firm, a conflict arose that challenges the law firm’s duty of loyalty to

both clients. Loyalty to the Developer Client would require that the law firm remain in the matter and continue its work. Loyalty to the Neighbor Client would require that the firm not represent the Developer Client in its effort to pursue a development that the Neighbor Client opposes.

There are three possible solutions.

1. Withdrawal by the law firm from any further representation of the Developer Client in connection with any aspect of the development project. This would clearly impose a severe hardship upon the Developer Client. The law firm could remain as counsel to both clients in other matters.

2. Withdrawal from representation of the Developer Client in litigation or administrative matters relating to the project. An alternative would be to have the law firm decline to represent the Developer Client in connection with any litigation matters or quasi litigation matters in which there would be adversity between the Neighbor Client and the Developer Client. Either of these alternatives is less prejudicial to the Developer Client, but would mean that new counsel would need to be retained by the Developer Client to appear at the hearings on behalf of the developer. The law firm could remain engaged by the developer in all other matters relating to the development project.

3. Waiver of conflict by Neighbor Client. The firm would remain fully engaged by the developer provided it received a waiver of the conflict, based on informed consent, from the Neighbor Client. This could not be required of the Neighbor Client, of course, and Neighbor Client has already declined a waiver.

The Committee believes that any of the first three possibilities is ethically permissible. The first would completely remove the conflict and leave each client to its own devices regarding the development. The law firm would be equally loyal to each client in that it would decline to advance or oppose the other's views. It is troubling in that it leaves the Developer Client at a severe disadvantage in that the work that he will have paid for will at least in part have to be replicated by a new law firm. One remedy to that, of course, is some form of disgorgement of fees already paid by the Developer Client to the law firm, but that is not ethically mandated. Moreover, the Committee is well aware that the Developer Client will not see the parity in the law firm's effort to be equally loyal to each client. He, after all, has paid substantial fees, we assume, for the work done to date. While some work is done and finished, to now have to hire another law firm and bring that firm up to speed on the Developer Client's matter, will not only impose duplicate expense, it could prove to be very prejudicial in other ways as well. The Developer Client, we expect, would see a disproportionate adverse impact on him or her.

The second alternative is perhaps the most desirable, namely the withdrawal by the law firm from any of the directly adverse work in connection with governmental approvals while remaining involved in other aspects of the representation. That still

is somewhat prejudicial to the developer client, but will not be as problematical as the complete withdrawal proposed by the first option.

The third alternative, waiver by the Neighbor Client, is permissible, but the Committee cautions that care should be given to the provisions of Rule 1.7(b), since the Neighbor Client would be asserting a position (which is somewhat removed from a “claim” as used in that Rule), adverse to the Developer Client when the Developer Client is represented in the litigation or other proceeding before one of the land use tribunals. As noted above, it could even reach the point where the Neighbor Client would have to be cross examined by a member of the law firm. That could perhaps be remedied by having any cross examination handled by another law firm brought in for that purpose. The Committee believes that if due consideration is given to all these issues and the Neighbor Client wishes to do so, the Neighbor Client could waive the conflict with informed consent. In this case, that option is academic, however, since the Neighbor Client has declined to waive.

The Committee notes that this inquiry calls into question the issue of the “hot potato” rule and the “thrust upon” exception to that rule. The hot potato rule in general disallows a law firm from discharging a client for the purpose of eliminating a conflict where it desires to accept the representation of another client. This rule is a salutary one in that it prevents law firms from violating a duty of loyalty to a client that already exists in favor of a perhaps more lucrative client relationship.

There are exceptions to the hot potato rule. The potentially operative one in this case is referred to as the “thrust upon exception.” It is embodied in comment 5 to Rule 1.7 as follows:

Unforeseeable developments, such as changes in corporate and other organization affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is brought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdrawal from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See, Rule 1.16 The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See, Rule 1.9(c)

The Committee does not believe that the thrust upon exception permits the law firm to withdraw from the representation of the Neighbor Client because the conflict that arose is not an “unforeseeable development,” as that term is used in the comment. When the law firm accepted the representation of the developer with the idea of undertaking the project at issue, it was foreseeable that at some point in the future persons could emerge to oppose the project. That is inherent in a real estate development project over the time it is designed and promoted. Further, it is

foreseeable that such persons might be clients of the firm. In that sense, the kind of thing that happened here was indeed entirely foreseeable. It is true, of course, that the specific identity of such a client or clients may not have been ascertainable at the time of the Developer Client's engagement of the firm, but the Committee believes that under all the circumstances – that is, where the law firm in question is large and has many clients, some of whom can reasonably be expected to live in proximity to the development project – the development of such conflicts is not unforeseeable, and is a risk that law firms take on in the course of doing business.

For that reason, the Committee believes that the firm is precluded from terminating its representation of the Neighbor Client as a means of resolving the conflict. Since the Neighbor Client does not wish to waive the conflict, the firm has no choice but to limit its representation of the developer or eliminate it entirely. In the Committee's view, either option is permissible but they are the only avenues for ethically resolving the conflict.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.