THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2013-1
(January 2013)

The inquirer has, over several years, represented numerous plaintiffs who have contracted Disease B, a communicable infectious disease, and who are seeking recovery from various facilities for not having prevented Disease B’s occurrence. Recently, there was an outbreak of Disease B at Hospital A. Prior to this outbreak the inquirer had been discussing with the President of a national company (President C), (which Company has a device which when installed prevents the outbreak of Disease B), the possibility of writing a joint article on Disease B. When the outbreak of Disease B occurred at Hospital A, President C sent an e-mail to the inquirer giving him a “heads up” about the outbreak.

The next day, President C called the inquirer and advised that the National Center for Disease Control was seeking information from him (President C). His company’s product had been installed at Hospital A to prevent Disease B. The inquirer states that “I told him to be careful about responding to the CDC.” President C then proceeded to advise the inquirer as to the history of his (President C’s) interaction with Hospital A and why he believed that Hospital A was completely at fault and responsible for the outbreak of Disease B in this instance. However, in that conversation, President C advised that there had been a problem detected by an outside consultant with the device and its settings and that as a result President’s C’s company had upgraded the device and that this had resulted in “an almost complete eradication of the bacteria causing [Disease B].” The inquirer advises that, “none of the information he [President C] gave me seemed inculpatory as to the President’s company.”

Three days later President C sent the inquirer a draft of a letter he wanted to send to the Administrator at Hospital A in which President C went into great detail as to why his product could not be at fault for the outbreak as claimed by the Hospital A administrator, reiterating much of what the President had told the inquirer on the telephone three days earlier.

Several days later the inquirer was advised by an expert (one that he used in the past for a Disease B case), that the expert had referred to the inquirer the daughter of one of the patients in Hospital A who had contracted Disease B.

That same afternoon the inquirer had yet another conversation with President C, in which the inquirer suggested some changes to the draft letter which the President had previously forwarded to the inquirer. In addition, the inquirer suggested to the inquirer that he needed an attorney more conversant with corporate matters and defamation, and possibly a public relations professional.
The inquirer suggested the name of a local attorney who then sent an email to the President indicating his availability to communicate. The suggestion of retaining another attorney was memorialized in an email from the inquirer to President C on that same day.

Two days later the daughter of the patient with Disease B at Hospital A called the inquirer and advised that her father had died. She requested that the inquirer call her back.

The following day, President C sent another email to the inquirer and the local attorney to whom the inquirer had referred the President, with another draft letter to the Hospital A administrator, again exonerating President C’s company.

The next day the inquirer called President C and advised that he, the inquirer, might be representing the daughter of a decedent (“decedent”) who died from Disease B contracted while a patient at Hospital A. President C stated that the day before he had discussed this (the potential representation of persons suing Hospital A), with his son, who is apparently in some way affiliated with President C’s company. President C stated that he was not concerned about the inquirer’s representation of the decedent or any other plaintiffs because the real culprit was Hospital A. President C further stated that his son thought that the inquirer might be able to represent both President C’s company and plaintiffs. The inquirer stated that this could not be done.

The above phone conversation was memorialized in a letter of the same date addressed to President C and his company, with one paragraph stating, “It is my understanding based on today’s conversation that you have no objection to my representation of any claim that may be presented in the Hospital A outbreak. This consent has been granted by you even though you may be a defendant in any lawsuit or claim that my office represents.”

In that letter the inquirer requested that President C sign and return a copy, indicating his agreement with the waiver. No signed agreement has ever been received back from President C, and according to local counsel, President C’s corporate counsel advised President C not to sign the letter.

After the confirming letter was sent to the President, the inquirer contacted the daughter of the decedent and took information about her father’s case. During the intake the inquirer spoke about his prior dealings with President C. The daughter indicated to the inquirer that she had no problem with his prior dealings with President C and these dealings were memorialized in a letter sent to the daughter, and subsequently to other siblings.

The inquirer asks if he can represent the estate of the decedent under these circumstances.
Pennsylvania Rule of Professional Conduct (the “Rules”) 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.

Rule 1.9 **Duties to Former Clients** provides in part that, 

(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.

…

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.18 **Duties to Prospective Clients**, provides in part that,

…

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information which may be significantly harmful to that person learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that
lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When a lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, ...

The inquirer has correctly concluded that representation of the daughter would require representation in a matter substantially related to the matter about which he received confidential information from President C.\(^1\) Whether the inquirer had formed an attorney client relationship with President C's company, or whether it was only a relationship with a prospective client, the result in this case is the same. The information that President C shared, specifically the hiring of an outside consultant by Hospital A to adjust President C's company's machinery, as well as President C's position as to why his company was not negligent and the hospital was, (which was in a letter which the inquirer helped to revise), clearly was information that fits within the rubric of information that is substantially related to the decedent's case, and is thus covered by Rules 1.9 and 1.18b. The inquirer himself recognized this when he advised that he could not represent President C's company in the matter, and when he correctly understood that to proceed with the representation of the decedent he needed a waiver from President C. Even given the facts as provided, it is clear that absent absolute evidence and proof that in no way was President C's company liable for the specific outbreak at Hospital A that obviously, the inquirer would have to include President C's company in his lawsuit on behalf of the decedent. This is evidenced by the fact that in the confirming letter to President C the inquirer wrote, "This consent has been granted by you even though you may be a defendant in any lawsuit or claim that my office represents."

The remaining issue to be examined is whether or not the verbal waiver of the conflict by President C would have been sufficient for the inquirer to proceed with the representation of the decedent.

There is nothing in the Rules that would have required the inquirer to confirm the original waiver of the conflict by President C in writing. However, by confirming

\(^1\) It is possible that, if inquirer concluded that President C's company could not conceivably be liable to decedent for damages arising out of the infectious disease outbreak, or liable as a third part defendant to Hospital A, then he could assume representation of the decedent, because decedent's interests would not, pursuant to Rule 1.9(a) be materially adverse to the interests of President C's company. However, the Committee finds that the facts of this inquiry do not bear this out, and agrees with the inquirer's understanding, as evidenced by his request for a waiver that in fact President C's company's interests are, indeed, materially adverse to the interests of the decedent.
that waiver in writing and asking for the President to sign off on said writing, the inquirer provided President C with the opportunity to withdraw whatever waiver he had provided. Even if this had not been done, there remains an issue as to whether the information provided by the inquirer to President C adequately disclosed the foreseeable ways that the conflict could adversely affect the interests of President C's company. If the information provided was insufficient for President C to make a waiver of the conflict based on informed consent, which is required not only by Rule 1.18d1 but also by Rule 1.9a, then that verbal waiver would not have been sufficient ab initio.

Whatever the answer to that question, in this particular situation, even assuming that the verbal waiver by President C was sufficient, this waiver was then revoked when upon advice of counsel, President C refused to sign the written waiver. It clearly can be inferred from the inquirer's desire to have a written waiver, although not necessary, that the inquirer had concerns about the sufficiency of the verbal waiver he had received. However, the waiver having been revoked by the refusal of President C on advice of counsel to not sign said waiver, the inquirer must now decline the representation of the decedent.²

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.

² For the same reasons that inquirer cannot accept the decedent as a client, the inquirer cannot accept as clients any other victims of the specific outbreak of Disease B at Hospital A.