

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE

Opinion 2014-1
(April 2014)

The Inquirer wrote seeking an opinion from the Committee concerning a potential conflict of interest issue that arose. Over one year ago, Inquirer was appointed by the United States District Court to represent a criminal defendant in a securities fraud case (the “Client”). Shortly before seeking guidance from the Committee, Inquirer learned that a new member of his law firm (“Attorney A”) had previously acted as counsel for the primary government witness against Inquirer’s Client. The witness was a cooperating defendant in the criminal matter, and Attorney A had negotiated the witness’ cooperation with the United States Attorney and his subsequent plea deal. Attorney A no longer represents the witness (“Attorney A’s Former Client”). Inquirer anticipated that, in order to effectively and appropriately represent his Client, he would need to vigorously cross-examine Attorney A’s Former Client. Both Inquirer, Attorney A and their law firm, as well as Attorney A’s former law firm, are concerned about whether there is a non-waivable conflict of interest and whether Inquirer’s continued representation of his Client could result in potential civil liability for both sets of counsel and their law firms. Inquirer also states that neither Inquirer nor Attorney A would advise their respective clients to waive any potential conflicts of interest.

The applicable Pennsylvania Rules of Professional Conduct (the “Rules”) follow.

Rule 1.6 Confidentiality of Information, provides in part that,

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

...

(7) to detect and resolve conflicts of interest from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

...

Rule 1.7 Conflict of Interest: Current Clients

(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 client gives informed consent.

(emphasis added).

Rule 1.9 Duties to Former Clients

(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.

(b) *A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client*

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

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; and

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

(emphasis added).

Rule 1.10 Imputation of Conflicts of Interest: General Rule provides in part that,

(a) *While lawyers are associated in a firm, none of them shall knowingly represent a client when one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10 (b) or (c).*

(b) *When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:*

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

...

(emphasis added)

As an initial response to the inquiry, the Committee provides no response to the question of whether Inquirer's continued representation of his Client could result in potential civil liability for both sets of counsel and their current and/or former law firms. That issue is beyond the scope of the Committee's analysis and ultimate recommendations.

As for the question concerning the conflict of interest, the Committee believes that there is a non-waivable conflict of interest that precludes Inquirer from continuing to represent his Client in the criminal matter. Attorney A gained material, confidential information in connection with

his former representation, and the interests of Attorney A's Former Client and those of Inquirer's current Client are materially adverse in the same matter. See, e.g., United States v. Moses, 58 Fed. App. 549, 552, 2003 WL 220463 at *2 (3d Cir., Feb. 3, 2003) (where former client was expected to be called as a government witness in a subsequent criminal prosecution against the current client created a non-waivable conflict of interest for attorney); United States v. Stout, 723 F. Supp. 297 (E.D. Pa. 1989) (conflict of interest is non-waivable where the conflict itself interferes with the effective representation of a current client particularly where the attorney's ability to cross-examine could be affected by his prior representation of a former client). There is no question that the criminal matter involving these representations is the same and that the interests of the Client and Attorney A's Former Client are adverse in the criminal matter. See Rule 1.7(a). More importantly, once Attorney A joined Inquirer's law firm, any information that Attorney A learned from Attorney A's Client was imputed to Inquirer in the absence of an effective screen and without appropriate notice being provided to the affected clients. See Rule 1.10(b). From the inquiry itself, it is clear that no screen was established prior to Attorney A joining Inquirer's law firm and, based upon what information was already shared as part of the inquiry, it would be impossible to create an effective screen after the fact. Therefore, any confidential information obtained from Attorney A's Client would be imputed to Inquirer and would prohibit Inquirer from continuing to represent his Client. As such, Inquirer should no longer represent his Client, and Attorney A should not represent Attorney A's Former Client if Attorney A's Former Client sought further representation from Attorney A in this particular criminal matter. See Rule 1.9(b).

Further, based upon the inquiry, neither Inquirer nor Attorney A would have recommended that Client or Attorney A's Former Client waive any potential conflict even assuming that the conflict was waivable. Accordingly, there is no question that Inquirer cannot continue to represent his Client going forward, and Inquirer must withdraw from that representation so that new counsel may be appointed by the United States District Court.

As a cautionary note for other matters similar to this one, and to avoid concerns of this type in the future, the Committee notes the recent adoption by the Pennsylvania Supreme Court of Rule 1.6c(7) and recommends that conflict checks be run as soon as practically possible and prior to new attorneys joining law firms so that effective ethical screens might be erected when those attorneys join their new firms. This will permit the use of effective ethical screens and will hopefully eliminate the inadvertent exchange of any confidential information as between counsel for potentially adverse clients or former clients.

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 to it.