

THE PHILADELPHIA BAR ASSOCIATION
Professional Guidance Committee
Opinion 2014-4
(June 2014)

The inquirer has a new client (“New Client”) who has approached his firm to represent her in a personal injury case against one of the inquirer’s firm’s former corporate clients. The inquirer seeks guidance concerning perceived conflicts of interest arising from potential adversity between the New Client and the inquirer’s firm’s former client, including a recommendation as to the ethically permissible actions the inquirer should take. For the reasons set forth herein, the Committee finds that Pennsylvania Rule of Professional Conduct (the “Rules”) 1.9 does not require that inquirer’s firm obtain informed consent from its former client before representing the new client in a personal injury matter against the former client, where the new matter is not “the same or substantially related” to the subject matter of the prior representation.

In 2014, New Client suffered personal injuries when she slipped and fell on a parking lot of a commercial property. While investigating New Client’s case, the inquirer discovered that ABC Enterprises owns the subject property. Between January 1990 and October 1991, the inquirer’s firm represented ABC Enterprises, providing legal services described as “general corporate representation, zoning issues, real estate purchases, a breach of lease, and an unemployment compensation claim.” Following a review of his firm’s records, the inquirer concluded that the firm’s prior representation of ABC Enterprises “in no way dealt with, concerned, or was related to, the specific commercial property on which the New Client was injured.” The firm has not represented ABC Enterprises since 1991-1992.

During the investigation of the potential conflicts issues, the inquirer also learned that ABC Enterprises is a fictitious name owned by ABC Limited Partnership. In 1995, the firm represented one of ABC Limited Partnership’s general partners (“General Partner”) in his personal capacity. The inquirer’s firm’s work for General Partner was limited to “a variance application matter involving a local municipality [that] did not have anything to do with the real estate currently at issue.”

Rule 1.9 governs a lawyer’s duties to former clients, and provides in pertinent part:

- (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.

Comment 3 to Rule 1.9 defines “substantially related” matters as those that “involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior

representation would materially advance the client's position in the subsequent matter." The Comment further explains that "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."

When the former client at issue is an organizational client, "general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation." Conversely, "knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."

Given the facts presented, it is clear that the current premises liability action is not substantially related to any prior work performed for ABC Enterprises. The inquirer's firm's prior representation of ABC Enterprises occurred between January 1990 and October 1991, and was limited to general corporate issues, zoning issues, real estate purchases, a breach of lease matter and an unemployment compensation claim. There is no evidence that inquirer's firm defended ABC Enterprises in any premises liability actions or counseled ABC Enterprises on any such issues. Additionally, inquirer's firm's representation of General Partner in his personal capacity in a 1995 zoning variance application did not concern the specific commercial property on which New Client slipped and fell.

The subject matter of the 2014 premises liability matter is separate and distinct from the prior representations. Germane issues in a premises liability claim are, *inter alia*, whether the defendant had actual or constructive notice of the dangerous condition, the legal status of the claimant, and whether the plaintiff exercised due care for her own safety.¹ The prior representation of ABC Enterprises is unlikely to have touched on the condition of the property in 2014, the legal status of New Client (business invitee, etc.), or any issues of contributory negligence. Any zoning work and real estate transactional work that inquirer's firm performed in the past is not related to the 2014 premises liability matter, as the inquirer represents that his firm's work "in no way dealt with, concerned, or was related to the specific commercial property on which New Client was injured."

Moreover, had the inquirer's firm received confidential information during the prior engagements, the passage of more than twenty years renders any information gained in the course of the prior representation obsolete. The issues in contention in a premises liability matter are factual in nature and deal only with the specific set of circumstances present at the time of the incident; especially given the almost twenty year gap, it is unlikely that any of those issues were implicated in any of the former representations.

¹ See, Updyke v. BP Oil Company, 717 A.2d 546 (Pa. Super. 1998); Swift v. Northeastern Hospital, 690 A.2d 719 (Pa. Super. 1997); Carrender v. Fitterer, 503 Pa. 178 (1983).

Thus, it is the Committee's opinion that the inquirer need not obtain informed consent from ABC Enterprises before representing New Client in her claims against ABC Enterprises. The firm's prior representation of ABC Enterprises is not the same or substantially related to this premises liability matter. The Committee suggests that the inquirer disclose the prior representation of ABC Enterprises to New Client and address any ramifications that might, notwithstanding the absence of a Rule 1.9 conflict of interest, arise from the former representation, including the possibility that that ABC Enterprises might seek to disqualify inquirer's firm from representing New Client in the matter.

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.