THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2016-3
(June 2016)

The Inquirer seeks an opinion from the Committee concerning a potential conflict of interest with a former client. Inquirer states that Inquirer performed legal work for a client and that client’s various business entities from 2006 through approximately 2009 and again from May through October 2013. During the course of these various transactions, there were some conflicts of interest which the inquirer advises were waived by the client, and said waivers were confirmed in writing. The last representation terminated in October 2013.

The Inquirer is affiliated with a family investment company that loaned money to the client at times between 2006 and 2011. Inquirer notes that the client acknowledged that Inquirer was not acting as its counsel in connection with the loans.

In 2015, Inquirer was retained by another client (“new client”) to pursue the former client on account of an unpaid $140,000 loan. Inquirer contacted the former client, who admitted that the loaned monies were not used as promised, and, after some discussion, promised to repay the loan. Inquirer prepared a settlement agreement to memorialize the former client’s promise, incorporating the terms which the former client requested but also a clause acknowledging that former client well knew she and her company were not represented by Inquirer. Former client made a partial payment but did not sign the agreement or pay the remaining funds due. Inquirer filed a summons and lis pendens against the former client and its property. The former client through counsel has raised concerns regarding a conflict of interest and demanded that the Inquirer withdraw from this latest matter. Inquirer asks whether Inquirer is required to withdraw as counsel for new client.

Several Pennsylvania Rules of Professional Conduct (the “Rules”) are relevant to this inquiry.

**Rule 1.16. Declining or Terminating Representation** provides in part that,

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

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Rule 1.6. Confidentiality of Information provides in part that,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

... 

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

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

(3) to prevent, mitigate or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services are being or had been used; or

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(5) to secure legal advice about the lawyer’s compliance with these Rules; or

(6) to effectuate the sale of a law practice consistent with Rule 1.17; or

(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.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.
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; or

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

Rule 1.16 requires that a lawyer withdraw from representation if the representation will result in violation of the Rules of Professional Conduct. Thus the question is whether the representation of new client violates or will violate Rule 1.9(a), which prohibits an attorney who has previously represented a client in a matter from representing a client in the same or a substantially related matter in which new client’s interests are adverse to those of former clients, where the lawyer acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, absent informed consent of former client. Thus the rule integrates the duty of loyalty affected by the relationship of the prior and current representation with the duty to preserve confidentiality affected by the fact of receipt of information material to the current representation in the course of the prior representation.

Comment 3 to Rule 1.9 states:

Matters are "substantially related" for purposes of this Rule if they 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. [emphasis added].

There is no question that the interests of the clients are adverse in the current litigation, and obviously there is no informed consent by the former client to the alleged conflict of interest created by the current representation. The transaction took place subsequent to the transactions in which Inquirer represented former client and does not involve any of the properties with respect to which Inquirer provided services to former client. There is no indication that Inquirer represented the former client with respect to the loan which is the subject of the representation of new client or that the loan transaction itself is the same or substantially related to any prior transaction. As it does not appear that the matter for which Inquirer has now been retained is in any way related to the prior matter(s), Rule 1.9 (a) does not preclude the representation, except to the extent that confidential factual information as would normally have been obtained in the prior representation would materially advance the new client’s position in the subsequent matter.

This duty to preserve confidentiality of information received in representation of a former client is further elaborated in Rule 1.9(c), which precludes Inquirer from using 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 from revealing information relating to the representation except as these Rules would permit or require with respect to a client.

The question, then, is whether Inquirer received information protected by Rules 1.6 and 1.9(c) in the course of the prior representation that would materially advance the position of new client to the disadvantage former client; if so, the representation is prohibited under Rule 1.9(a) (2). Inquirer may not use or reveal such information under Rule 1.9(b). While there is a carve-out when the information has become generally known, on the information provided, that exception does not appear to apply. While “Information 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” [Cmt. 3], the most recent representation took place only two years prior to the current representation, and Inquirer became deeply familiar with many of former client’s financial interests, activities, and practices during the seven years in which representation occurred. Even though the matters are factually distinct, Inquirer’s work for the former client would have exposed Inquirer to information concerning the former client’s assets and asset protection strategies. That information is of a type that would materially advance the new client’s collection efforts and, thus, in the Committee’s view could give rise to a substantial relationship and thus a conflict under Rule 1.9. The comments make clear that prior experience with recurring
types of problems for the former client is a consideration in assessing the duty of confidentiality.

Furthermore, none of the exceptions to Rule 1.6 permit disclosure of any information received by Inquirer in the course of that representation, and there is no indication that such information is generally known.

For these reasons, unless Inquirer legitimately believes that in the course of the prior representation of former client s/he did not receive any information that would materially advance the position of new client, and that representation of new client will not entail the disclosure or use of such information, inquirer is required to withdraw from representation of new client.

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.