

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2009-4
(March 2009)

The inquirer previously represented Company A in connection with patent and trademark procurement. Company A then sold its business, along with all patents and trademarks, to Company B. The inquirer was not involved in any way with the asset purchase and did not represent Company A after the sale. The inquirer currently represents Company B in connection with maintaining IP rights related to the assets it purchased from Company A. Company A now wants to consult with the inquirer about a dispute with Company B concerning the terms of the asset purchase. The inquirer asks whether the so-called “hot potato” rule prohibits him from terminating his representation of Company B so that he can represent Company A in the asset purchase dispute.

The “hot-potato” rule to which the inquirer refers evolved as a method for attorneys to avoid impermissible conflicts between two clients by converting one into a former client by terminating representation. The reason behind the practice is that under the Pennsylvania Rules of Professional Conduct (the “Rules”) dealing with conflicts, attorneys have more stringent obligations to current clients than to former clients. For example, Rule 1.7, which deals with *current* clients, strictly prohibits an attorney from representing two clients whose interests are directly adverse absent informed consent (as defined by Rule 1.0e). However, Rule 1.9, which deals with *former* clients, merely prohibits attorneys from working on “the same or a substantially related matter” as they did for the former client.

Based on the facts as the inquirer has presented them, this situation is clearly covered by Rule 1.7, which provides as follows:

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 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.

Absent compliance with Rule 1.7(b), which includes informed consent from both clients, the inquirer can not represent Company A because the matter is directly adverse to the interests of the inquirer’s current client, Company B. Moreover, the ethical violation cannot be avoided by the inquirer terminating his representation of Company B. As noted in International Longshoremen’s Association, 909 F.Supp. 287, 293 (E.D. Pa. 1995), “[A]n attorney may not drop one client like a ‘hot potato’ in order to avoid a conflict with another, more remunerative 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 it.