

**DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS**

OPINION 2000-1

June 29, 2000

**This opinion is merely advisory and is not binding on
the inquiring attorney, the Courts, or any other tribunal.**

SUMMARY OF THE FACTS

A member of the Delaware Bar (the “Inquiring Attorney” or the “Inquiring Firm”) represents the plaintiff in litigation in Delaware. The defendant in the case is the Inquiring Attorney’s former client and is a corporation with employees in Delaware. The former client is the plaintiff’s former employer.¹ The Inquiring Firm advised defense counsel in the Litigation (“Opposing Counsel”) of the inquiry to the Committee and both firms have requested that the Committee issue an Advisory Opinion.

Plaintiff’s suit against his Former Employer is based on a written contract of employment. The Inquiring Firm no longer represents Former Employer. Its prior representation involved matters that were different from those raised in the Litigation. Inquiring Firm did not have access to confidential information that would assist it in the Litigation. However, Inquiring Firm represented Former Employer for 16 years on a variety of matters.

¹ For ease of reference, the plaintiff will be referred to as “Plaintiff,” the litigation will be referred to as the “Litigation,” and Inquiring Attorney’s former client and Plaintiff’s former employer will be referred to as “Former Employer.”

CONCLUSION

Inquiring Firm is not required to withdraw as counsel for Plaintiff under the Delaware Lawyers' Rules of Professional Responsibility. Rule 1.9 does not require counsel to withdraw because of the mere duration of the prior representation. Rather, the facts or issues in the prior representation must be substantially related to those in the current litigation or confidences must have been likely or actually disclosed that could be detrimental to the former client in the present litigation. Based upon the information submitted by Inquiring Firm and Opposing Counsel , the Committee concludes that Rule 1.9 does not require Inquiring Firm to withdraw.

ISSUES PRESENTED

The issue presented is whether Inquiring Firm is required to withdraw because it previously represented the defendant in the current litigation. Inquiring Firm's situation is governed by Rule 1.9 of the Delaware Lawyer's Rules of Professional Conduct, which provides in pertinent part:

Rule 1.9 Conflict Of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) 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 consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

DISCUSSION

The Inquiring Firm represented Former Employer in a variety of matters between 1980 and 1996 (the “Prior Representation”). Roughly two-thirds of the matters involved acquisitions of real estate by Former Employer. Two matters could be considered related to employment. One was an EEOC/ADA type claim brought in 1992 by a professional in the same department as Plaintiff (the “Matter of John Doe”). The other was an employment benefits claim. The Litigation involves the question of whether termination of Plaintiff’s employment contract was proper.

During the period beginning at least in 1994 through the termination of Inquiring Firm’s relationship with Former Employer in 1996, Former Employer had in-house counsel. In-house counsel played a role in managing services provided by the Inquiring Firm. In addition, in the Matter of John Doe, Inquiring Firm was not the only outside counsel, since Opposing Counsel also appeared in that action. In reported and unreported court decisions in which Former Employer was a party, Inquiring Attorney was counsel for Former Employer in less than 20% of the cases.

Plaintiff brought his suit in 1998, claiming that Former Employer improperly terminated a written contract of employment in 1997. That contract was entered into between Plaintiff and Former Employer in 1995 and contained specific provisions regarding termination of Plaintiff’s services.

Around the time that Inquiring Firm ended its representation of Former Employer, Former Employer’s parent corporation was acquired by another entity. This resulted in a complete change of senior management within Former Employer. Former Employer currently employs none of the senior managers from Former Employer who consulted with Inquiring Firm during the Prior Representation.

Inquiring Firm's representation relating to employment matters was very limited in scope. It consisted exclusively of the defense of two (2) claims that had distinctly different factual and legal issues. Inquiring Firm did not draft or negotiate the contract at issue in the Litigation. Inquiring Firm neither negotiated nor drafted other employment contracts, with the exception of providing a draft contract for a senior manager in 1984. Inquiring Firm did not prepare form contracts. It did not advise on employment compliance, policies or practices. However, following the events that led to the Litigation, Inquiring Firm attempted to initiate settlement discussions regarding Plaintiff's claim by contacting the then-Chief Operating Officer of the parent corporation of Former Employer. This individual had formerly been an executive of Former Employer.

The underlying purpose of Rule 1.9 is to ensure that a client's confidential communications to his lawyer are not used against that client when his lawyer later represents a party adverse to the former client. See, e.g., Satellite Financial Planning Corp. v. First Nat'l Bank of Wilmington, 652 F. Supp. 1281, 1283 (D.Del. 1987). Nevertheless, neither the Rules of Professional Conduct, nor the courts, employ a per se prohibition against representing a new client against a former client. Id. "The underlying question is whether the lawyer was so involved in the [previous] matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Rule 1.9, cmt.

In reviewing the information submitted by the parties, the Committee was mindful that requiring counsel to withdraw is a weighty step. When such issues are litigated, they are viewed with a certain degree of suspicion. In a decision on a motion to disqualify, Chancellor Allen observed that disqualification necessarily deprives

one of the litigation adversaries of the advice, counsel and assistance of the lawyer of his choice at the behest of his litigation adversary. When the relevant facts justify this result, . . . [the Rules] ought to require it.

But a decent respect for the reality of litigation requires one to acknowledge that this step may be sought for tactical reasons. See Delaware Lawyers' Rules of Professional Conduct Preamble: Scope 3 (effective October 1, 1985) (“[t]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons”).

Delaware Trust Co. v. Brady, Del.Ch., C.A. No. 8827, 1988 WL 94741, at *2, Allen, C. (Sept. 14, 1988) (citing authorities).

Rule 1.9 provides for disqualification when the following four requirements are met: (1) the lawyer had an attorney-client relationship with the former client; (2) the present client's matter is the same or substantially related to the first client's matter; (3) the interests of the second client are materially adverse to the former client; and (4) the former client has not consented to the representation after consultation. Bowden v. KMart, Del. Super., C.A. No. 97C-10-020, 1999 WL 74308 at *1, Witham, J. (July 1, 1999) (Mem.Op.).

Former Employer is a former client of Inquiring Firm. The interests of the Plaintiff are materially adverse to Former Employer in the Litigation. Former Employer has not consented to Inquiring Attorney's representation of Plaintiff in the Litigation.

Thus, the primary issue is whether, based on the information provided to the Committee, Plaintiff's matter “is the same or substantially related” to the Prior Representation of Former Employer. To determine whether prior litigation is “substantially related” to the current matter, the Committee must answer the following questions: (1) what is the nature and scope of the prior representation; (2) what is the nature and scope of the present lawsuit; and (3) whether the client might have disclosed confidences to counsel in the course of the prior representation that were (a) relevant to the action, and if so, (b) could those confidences be detrimental to the former client in the current litigation. Id. (citing J.E. Rhoads &

Sons, Inc. v. Wooters, Del.Ch., C.A. No. 14497, 1996 WL 41162, Chandler, V.C. (Jan. 26, 1996)).

In comparing the past and present matters “more facts of a relationship are needed than a simple statement of prior work done in a superficially similar area.” Bowden, at *2. “Merely pointing to a superficial resemblance between the past and present representation is insufficient.” Century Glove, Inc. v. Iselin, 62 B.R. 693, 695 (Bankr. D.Del. 1986) (citing Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020 (5th Cir. 1981), cert. denied, 454 U.S. 895 (1981)). It is not advisable to hypothesize “conceivable but unlikely situations in which confidential information ‘might’ have been disclosed which would be relevant to the present suit.” Satellite Financial Planning Corp. v. First Nat’l Bank of Wilmington, 652 F. Supp. 1281, 1284 (D.Del. 1987).

1. Nature And Scope Of The Prior Representation

The Prior Representation consisted of sixteen years of advice on a variety of issues, primarily in the acquisition of real estate. Inquiring Attorney’s counsel was sought on very few matters even tangentially related to employment contracts. In the Matter of John Doe, the case revolved around an ADA-like claim and did not involve an employment contract at all. Virtually none of Former Employer’s senior management present during the Prior Representation is currently employed by Former Employer. In the nine cases involving Former Employer available on the Westlaw database since 1986, Inquiring Firm represented Former Employer only twice in litigation during that time period. Former Employer had litigation counsel other than Inquiring Attorney and his firm on seven other occasions during the duration of the Prior Representation and Former Employer had in house counsel at least during the mid 1990’s.

2. Nature And Scope Of The Present Lawsuit

The Litigation involves claims of breach of contract, negligence in the termination of the contract, loss of consortium and punitive damages. The primary focus appears to be whether the Former Employer complied with the contract's termination provisions.

3. Disclosure of Confidences

Under the third element of the “substantially related” test, the Committee must determine whether confidences were disclosed or likely disclosed that were (1) relevant to the Litigation and if so, (2) could those confidences be detrimental to Former Employer in the Litigation. Certainly, confidential communications were exchanged during the sixteen years covered by the Prior Representation. However, the information provided to the Committee suggests that no confidences were disclosed that were relevant to the Litigation, or could be detrimental to the Former Employer. This is not to say that the Committee cannot imagine a situation where relevant confidences could be disclosed in an earlier representation that could be detrimental if used against the former client later on. But “a realistic appraisal” of the possibility that confidences were disclosed during the Prior Representation that will be harmful to Former Employer in the Litigation is not sufficient to require Inquiring Firm to withdraw at this time. Bowden v. Kmart Corp., 1999 WL 743308, at *1.

The Committee must also consider whether the nature of the Prior Representation itself requires Inquiring Firm to withdraw, despite the fact that confidential information has not been disclosed and/or used. Where the matters embraced within the current representation are substantially related to matters handled in the prior representation, a court will presume that during the course of the prior representation confidences were disclosed bearing upon the subject matter of the current representation. Webb v. E.I. DuPont de Nemours & Co., Inc., 811 F.

Supp. 158, 161 (D.Del. 1992) (citing Ulrich v. Hearst Corp., 809 F. Supp. 229, 233 (S.D.N.Y. 1992)). In Webb, the plaintiff's attorney had previously been employed as an attorney for the defendant DuPont for 27 years. Id. at 159. The deciding factor in that case was that plaintiff's counsel attached as an exhibit to plaintiff's motion for summary judgment a DuPont document which counsel drafted while employed at DuPont. DuPont's motion to disqualify plaintiff's counsel was granted. The rationale in Webb was not focused upon the disclosure of confidential information, but rather "the lawyer's use of confidential information in a manner adverse to the interests of the former client." Id. at 162 (quoting Ulrich, at 235-236).

Adverse use of confidential information is not limited to disclosure. It includes knowing what to ask for in discovery, which witnesses to seek to depose, what questions to ask them, what lines of attack to abandon and what lines to pursue, what settlements to accept and what offers to reject, and innumerable other uses.

Id.

However, the "appearance of impropriety" test proscribed in Canon 9 of the ABA Model Code on Professional Responsibility does not appear in Rule 1.9. Nemours Foundation v. Gilbane, 632 F.Supp. 418, 423 (D.Del. 1986); see also Hazard & Hodes, The Law of Lawyering §1.9:107 (1997 Supp.) (noting that the ABA Rules of Professional Conduct avoid the Canon 9 term "appearance of impropriety" because it is too vague a standard for discipline). The substantial relationship test governs inquiries under Rule 1.9 and it is highly fact-driven. The Committee cannot rely upon feelings and conclusory allegations unfounded in fact, despite the general canon that Delaware attorneys should avoid even the appearance of impropriety. Cf. J.E. Rhoads & Sons, Inc. v. Wooters, Del.Ch., C.A. No. 14497, 1996 WL 41162, at *5, Chandler, V.C. (Jan. 26, 1996) (finding that where a substantial relationship exists, the legal system is best served by heeding Canon 9 and avoiding "even the appearance of impropriety"); Cardoni v. Power Int'l, Del. Super., 1990 WL

35307, at *2, Bifferato, J. (Mar. 27, 1990) (noting that the appearance of impropriety allegedly created when a member of defense counsel's firm testifies is simply not enough to warrant disqualification). Accordingly, while the Committee does not condone any conduct to which the appearance of impropriety attaches, it must also be cautious when interpreting Rule 1.9.

Given the nature and scope of the Prior Representation of Former Employer, it is difficult to imagine, based on the information available to the Committee at this time, that Inquiring Attorney would be able to take any unfair advantage over Former Employer. The Committee does not believe that the mere fact that Plaintiff and John Doe were employees of the same department of Former Employer is enough to justify the disqualification of Inquiring Attorney and his Firm. But cf. Bowden v. Kmart, supra (attorney disqualified from representing plaintiff in slip and fall case adverse to Kmart when attorney had previously represented Kmart in earlier slip and fall case). Nor is it sufficient that the current Litigation and the John Doe matter both fall within the sphere of "employment" cases. But cf. Kanaga v. Gannett Co., Inc., Del. Super., 1993 WL 485926, Bifferato, J. (Oct. 21, 1993) (disqualifying defense counsel from defending libel suit on behalf of newspaper relating to alleged medical malpractice when the firm formerly represented plaintiff in a medical malpractice action). The American Bar Association most recently found that mere generalized knowledge of the former client's policies or strategies is not, without more, such material information as to a specific matter as to warrant disqualification. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 415 (1999).

Both parties were given an opportunity to inform the Committee of facts and circumstances relevant to the question of whether Inquiring Firm must withdraw because of the Prior Representation. Based on this information, the Committee

concludes that the nature and scope of the Prior Representation is not substantially related to the issues in the Litigation and that Inquiring Firm did not have access to confidential information that could be detrimental to Former Employer in the Litigation. Accordingly, the Committee opines that, under these facts, Inquiring Firm is not required to withdraw.