



Alerts

Future Conflict Requires Knowledge of Specific Adversity or Particular Clients Who May Be Involved

December 15, 2010

Lawyers for the Profession® Alert

District of Columbia Legal Ethics Committee, Op. 356 (Nov. 2010)

Brief Summary

When an attorney suspects that adversity will develop during a matter, but cannot identify the specific nature of the adversity or the particular client(s) who will take an adverse position, no conflict of interest exists. And if a conflict subsequently arises between Clients A and B — the waiver of which would require the revelation of Client A's confidences — the lawyer need not obtain client B's informed consent to continue to represent Client A, so long as the conflict was not reasonably foreseeable.

Complete Summary

The Washington D.C. Bar Legal Ethics Committee addressed two issues arising out of the following factual scenario: Lawyer represents Client A in a proposed acquisition of Company X. Lawyer knows — based *only* on her industry experience — that one or more of her other clients also likely will attempt to either bid on Company X or oppose Client A's acquisition on some basis, but she does not know which specific clients might do so. Client A asks lawyer to keep the acquisition confidential until it is formally announced. But before a formal announcement is made, Client B announces that it will attempt to acquire Company X, albeit with different counsel.

The Legal Ethics Committee first addressed whether the lawyer could represent Client A despite the likelihood of a future conflict developing. The Committee opined that no conflict would exist in this scenario because the attorney could not identify the specific nature of the conflict or the potentially affected clients. Regarding the applicable rule, RPC 1.7, the Committee noted that its text suggests that conflicts must be clear, specific and not based on mere speculation. The Committee focused on the requirements for obtaining client consent to a conflict, which would be impossible to fulfill absent specific knowledge of the affected clients and the nature of the conflict.

The Legal Ethics Committee then addressed whether the attorney would be required to withdraw from representing Client A once Client B announced its plans. Given that Client A requested that its proposed acquisition remain confidential, it would be impossible for the lawyer to obtain Client B's informed consent to representation of Client A without revealing Client A's confidential

Service Areas

Counselors for the Profession

Lawyers for the Profession®



information. The Committee opined that, because the conflict created by Client B's actions was not reasonably foreseeable under the terms of the applicable rule, no waiver was required from Client B, and the attorney could continue to represent Client A. Finally, the Committee noted that continued representation nonetheless would be barred if the conflict were likely to adversely affect the lawyer's representation or judgement, under RPC 1.7(b)(2)-(4).

Significance of Opinion

This opinion is helpful for attorneys who work in highly specialized areas, or in industries with small client pools where it may be easy to forecast a conflict of some sort, but difficult to predict the precise nature of the adversity or the particular other clients who may be or become involved. The Committee also elaborates on the general understanding that withdrawal may not be necessary when a conflict is "thrust-upon" a lawyer, even absent a waiver.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.