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Newsletters

Ghosts of Clients Past: 3 Ethical Duties to Former Clients and Things to Consider When Moving Between Firms

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Congratulations, you won (or more likely settled) the case! Your last invoice has been paid, you have closed out the file, and after a handshake from your thankful client, you are ready to move on to your next matter. There is no way this former client can return to haunt you, right?

Wrong. There are numerous ways that the ghosts of former clients can come back and torment attorneys. The American Bar Association ("ABA") Model Rules and state-specific rules prescribe the ethical obligations lawyers owe their previous clients. Additionally, duties owed to former clients can complicate the lateral hiring process.

While you might be ready to banish the specter of former clients, here are three tips to keep you in line with your ethical obligations.

1. A Lawyer Cannot Represent Another Client in the Same or Related Matter

ABA Rule 1.9 governs an attorney's obligations to their former clients. Under this Rule, a "lawyer who has formerly represented a client in a matter shall not after that 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, confirmed in writing."

The basis for such a rule is that the attorney-client privilege continues ***after*** the client-lawyer relationship has terminated, and lawyers cannot use confidential information obtained in the representation of a former client in a subsequent representation of a different client.

Rule 1.9 begs the question: what qualifies as "the same or a substantially related matter"? The ABA states that "[m]atters 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."

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For example, a lawyer who represented a shopping center with securing environmental permits would be precluded from representing a neighbor seeking to oppose shopping center building based on environmental concerns.

However, the lawyer would ***not*** be precluded from representing a shopping center tenant in resisting eviction based on nonpayment of rent. This is because the two matters are not "substantially related"; they do not involve the same transaction or legal dispute, and confidential factual information that would usually have been obtained in the prior representation of the shopping center would not materially advance the tenant's position in the eviction matter.

A. Client Information Must Go Beyond General Knowledge

Further, information available to the public or rendered moot by time does not disqualify a lawyer. Neither does general knowledge of an organizational client's policies. However, knowledge of specific facts gained in a prior representation that are relevant to the matter in question might. The ABA distills this rule to essentially one question: was the lawyer so involved in the matter that the subsequent representation can be justly regarded as changing sides in the matter in question? If so, the lawyer is precluded from representing the subsequent client under Rule 1.9.

Knowledge of an organizational client that goes beyond general knowledge is often called "playbook knowledge." This can include information on how an organizational client approaches settlement, their preferred litigation strategy, and other "insider knowledge." Knowledge of such essential strategy decisions, while not particular to a specific case or a client's confidence per se, can still materially advantage the subsequent client's position against the former client. Whether this "playbook knowledge" is disqualifying or a breach of fiduciary duty is a question of fact.

B. Rule 1.9 Also Applies to Lateral Partners and their New Firms

Rule 1.9 does not just apply to an individual lawyer, however. It also extends to the obligations lawyers within a firm have to their former clients. This causes problems for lateral hires, as phantoms of former clients could follow a lawyer throughout their career.

The ABA acknowledges this, stating that this Rule "should not unreasonably hamper lawyers from forming new associations and taking on new clients after leaving a previous association.… If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel."

Thus, the ABA has drafted Rule 1.9(b) to exorcise some of the ghosts of clients past for lawyers switching firms. Rule 1.9 (b) states that "[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, confirmed in writing." (emphasis added).

Therefore, neither the individual lawyer nor the second firm is disqualified if the lawyer acquires no knowledge or information relating to that particular client at the prior firm. This Rule applies even if the former and subsequent clients' interests are materially adverse to one another.

The ABA makes it clear that whether a lawyer acquired information protected by Rules 1.6 and 1.9(c) is a question of fact, supported by "inferences, deductions or working presumptions that reasonably may be made about how lawyers work together". In a smaller firm, one lawyer may have access to all the files of the firm's clients and regularly participate in discussions about their cases, even if the lawyer is not directly involved in representing that client.

In this situation, it could be inferred that this lawyer has acquired information protected by Rules 1.6 and 1.9(c) even for clients they do not formally represent. Alternatively, at a larger firm, a lawyer may only have access to the files of clients they are directly representing and do not participate in discussions about other clients. In this context, it can be inferred that the lawyer has only acquired information protected by Rules 1.6 and 1.9(c) for their clients. In either scenario, the

burden of proof rests upon the firm whose disqualification is sought.

2. A Workaround for Disqualification

Rule 1.10 provides a potential workaround for disqualification based on Rule 1.9(a) and (b). Rule 1.10 states that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless …

> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule… and
>
> (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and a firm partner, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.".

A. Check Your Specific Local State Rules

Lawyers are encouraged to check with their local state rules to ensure compliance with this rule; New Hampshire, for example, absolutely prohibits a personally disqualified lawyer "if that lawyer had substantial involvement in or received substantial material information about, a matter that is ongoing at the time of the firm transfer and that would be the focus of the screening procedures".

3. How Should Law Firms Handle Former Clients?

Finally, how does the law firm as an entity handle former clients? Do law firms end up like haunted houses, possessed by the spirits of their former lawyers' clients? Again, Rule 1.10 provides guidance.

Rule 1.10 states, "[w]hen a lawyer has terminated an association with a firm, and the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and
>
> (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter."

Thus, under certain circumstances, the law firm can represent clients with interests materially adverse to those of a former lawyer of the firm's clients. The Rule applies regardless of when the formerly associated lawyer represented the client.

Should We Be Scared of Former Clients?

Former clients can come back to haunt attorneys and law firms alike. But, by complying with the ethical obligations owed to their former clients, lawyers can prevent some ghastly consequences—including the specters of disqualification and bar grievances—and preserve client confidentiality.

American Bar Association, *Rule 1.9: Duties to Former Clients*.

Id.; American Bar Association, *Comment to Rule 1.6: Confidentiality of Information.*

American Bar Association, *Comment to Rule 1.9: Duties to Former Clients.*

Id.

Id.

American Bar Association, *Comment to Rule 1.9: Duties to Former Clients.*

American Bar Association, *Rule 1.9: Duties to Former Clients*.

American Bar Association, *Comment to Rule 1.9: Duties to Former Clients.*

Id.

Id.

Id.

American Bar Association, *Rule 1.10: Imputation of Conflicts of Interest: General Rule.*

New Hampshire Rules of Professional Conduct, Rule 1.10.

American Bar Association, *Rule 1.10: Imputation of Conflicts of Interest: General Rule.*

American Bar Association, *Comment to Rule 1.10: Imputation of Conflicts of Interest: General Rule.*