

Mid-engagement conflicts: practice points for the wise

Ethical Questions & Dilemmas is a regularly appearing column devoted to the subject of lawyer ethics and the Rules of Professional Conduct.

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Every lawyer's nightmare is the emergence of an actual or potential conflict of interest in the middle of an engagement. Developments like that happen notwithstanding careful conflict-checking at the outset of the engagement, and they present ethical and practical problems requiring careful attention.

This column considers some scenarios and makes suggestions about how to handle those situations with the commands of the Massachusetts Rules of Professional Conduct in mind. A future column will deal with the issue in the context of the lateral hire of another

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er lawyer in the middle of an engagement.

Consider the following not-uncommon fact patterns:

Scenario 1: In the course of work on a complicated business or real estate transaction for Client A, Client B unexpectedly surfaces with an interest in it.

Scenario 2: During a commercial litigation matter for Client A, Client B accepts an executive position with Client A's adversary.

Scenario 3: In the course of defending a personal injury action for Client A, it becomes evident that Client A has a viable contribution or indemnification action against Client B.

While the conflict of interest provisions in rules 1.7-1.10 are familiar to most lawyers, applying them in these situations can be tricky and difficult, and it is often wise for the lawyer to get some independent legal advice from a disinterested third party.

Here are some practice points:

- Resist the temptation simply to ignore the situation. Every conflict or potential conflict has the potential for causing the attorney involved needless stress and anxiety, not to mention the possibility of

disciplinary action. See Admonition No. 08-11, 24 Mass. Atty Disc. Rep. 860 (2008) (disciplining lawyers, in part, for continuing with representation even after learning of adversity to current client); Admonition No. 10-19, 2010 WL-6773209 (Mass. St. Bar. Disp. Bd. 2010) (disciplining lawyers for failing to conduct conflict analysis after client complaint and for attempting to remain "willfully blind" of the conflict.).

- Conduct a careful analysis of the situation to determine whether or not, in fact, a conflict is presented. For example, in scenarios 1 and 3, a key question is whether Client B is a current or former client. If Client B is a current client, the lawyer has a conflict of interest. If Client B is a former client, then a conflict of interest typically exists only if the pending transaction and the prior matter for Client B are "substantially related" and the interests of both clients are "materially adverse" to one another. See M.R.P.C. 1.9(a). A conflict also may exist, however, if the attorney obtained confidential information from her prior representation of Client B that the lawyer may not disclose to Client A, even if such a disclosure otherwise would be required as part of the lawyer's duty to represent Client A zealously and to carry out Client A's lawful objectives. Compare M.R.P.C. 1.6(a) with M.R.P.C. 1.2, 1.3 and 1.4. At the same time, not every

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“adversity” of interest constitutes a conflict. As comment [3] to Rule 1.7 points out, the fact that two clients may have only generally adverse economic interests is insufficient to create a conflict.

- If the attorney determines that a conflict of interest exists, consider whether the conflict is waivable. Once again, a careful consideration of a range of issues is obligatory. If Client B is a current client, the lawyer must “reasonably” believe that her continuing representation of Client A will not adversely affect the lawyer’s relationship with Client B. M.R.P.C. 1.7(a). If Client B is a former client, the attorney must “reasonably” believe that her representation of Client A will not be adversely affected by her prior representation of Client B. M.R.P.C. 1.7(b). Comment [5] appears to set forth a “disinterested lawyer” standard that may require the lawyer to obtain advice from independent counsel. M.R.P.C. 1.7, cmt. 5.
- If the lawyer determines that the conflict is waivable, the lawyer then must determine whether sufficient disclosure can be made in order to obtain the client’s consent, or, in some circum-

stances, the consent of both clients. That may not always be as straightforward as it seems. In Scenario 2, the lawyer may be limited by the type and extent of his relationship with Client B in what he is permitted to disclose to Client A. The fact of a lawyer’s representation of a client (as opposed to the substance of their communications) is not usually privileged. *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 449 Mass. 609, 619 (2007). However, that information still may be confidential within the meaning of Rule 1.6, and may be information that Client B does not want disclosed. Obviously, that wish must be respected, and it may therefore be impossible to make the type of disclosure necessary to obtain Client A’s consent.

- In obtaining a current or former client’s waiver of a conflict of interest, it appears to be the better course to counsel that the client may wish to seek independent legal advice as to the advisability of the waiver, even if it is not specifically required by the rules. The cautious lawyer also will want to confirm all communications concerning the waiver in writing, to avoid future dis-

putes as to the extent of the disclosure made by the attorney in order to obtain consent.

- In some situations, of course, the lawyer will determine that the conflict is not waivable, or that a sufficient disclosure cannot be made. Alternatively, one or more of the involved clients may refuse to consent. The lawyer then must withdraw (or seek leave to withdraw) from the engagement, a determination that likely will cause client unhappiness. In our experience, that is a discussion that is best handled in a straightforward manner, with specific reference to the pertinent rules of professional responsibility and with an acknowledgment that the result will work some hardship upon the client. The lawyer should assure the client that she will take whatever steps are necessary to protect the client’s interests and to ensure a smooth transition of the file.

While mid-engagement conflicts present challenges for the attorney and client alike, if these practice points are observed, the lawyer is in the best position to navigate his way through a difficult situation. MLW

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