

THE PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2007-11
(July 2007)

A number of years ago, while at a different law firm, the inquirer represented a medical professional as plaintiff in a failure to diagnose medical malpractice case. During the course of the trial, it became apparent to the inquirer that his client was providing testimony on cross examination that was “less than candid.” Later that day the inquirer remonstrated with his client to correct his testimony the next day. Nevertheless, while testifying the next day, the client once again gave “incorrect testimony.” After consulting with his client and the client’s wife, the inquirer asked leave of court to terminate the trial and dismiss the lawsuit with prejudice in exchange for the defendants agreeing not to sue the client for malicious prosecution. This was done. The client was not charged with giving false testimony at the trial.

The inquirer is now at a different law firm. Another attorney at that firm, who was not at the inquirer’s old firm, is now representing a plaintiff who is suing the same medical professional (now a former client of the inquirer) for malpractice. Recently, the attorney representing the former client in the present action sent a letter to the inquirer demanding that the inquirer’s firm and the inquirer’s colleague withdraw immediately from the representation of the plaintiff because of the inquirer’s former representation of defendant medical professional. The inquirer indicates in his inquiry that he is “cognizant of Rule 1.9c and its prohibition against using information obtained during representation of a client to the ‘disadvantage of the former client...’ The information [regarding the prior representation] could not and will not be used in the upcoming trial, so that provision, in my [the inquirer’s] opinion would not be violated.”

The inquirer advises that the firm wishes to continue as counsel for the plaintiff in the present case and asks whether such representation constitutes a violation of the Pennsylvania Rules of Professional Conduct (“the Rules.”)

Rule 1.3 **Diligence** provides that:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment [1] to that Rule provides that:

(1) A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act

with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

Rule 1.4 **Communication** provides in part that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; ...

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.7 **Conflict of Interest: Current Clients** provides that:

(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 [emphasis added].

(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 1.9 **Duties to Former Clients** provides that:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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.

(b) 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.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment [3] to the Rule provides in part that:

Matters 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. For example, a lawyer who has represented a

businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce...

Comment [8] and part of Comment [9] provide that:

(8) Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client.

However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

(9) The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent. See Rule 1.0 (e)...

Rule 1.10 **Imputation of Conflicts of Interest: General Rule** provides that:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10(b) or (c). ...

Comment [3] provides in part that:

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty **nor protection of confidential information are presented** ...[emphasis added].

Rule 1.0 **Terminology** provides 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.

The Committee advises that while it might appear that this inquiry would be answered with a simple analysis under Rules 1.9a and c, that in fact it poses several significant concerns of which the inquirer needs to be aware prior to deciding what he will do.

The Committee believes that the two matters are not substantially related, as contemplated in Rule 1.9a, so that any prohibition on the present representation would not stem from there. The nexus of the two cases are different, they are separated by at least several years, and involve the current defendant in his role as a professional medical provider, not as an individual allegedly harmed by another professional's malpractice.

This conclusion however, is not, however, material to the Committee's opinion. The inquirer obviously possesses confidential - and potentially damaging - information about the former client. If having that knowledge poses a problem for the inquirer under Rule 1.9(c) and other Rules, any attorney in the inquirer's present firm necessarily inherits that problem since the exception set forth in Rule 1.10(a) - "a personal interest of the prohibited lawyer [the inquirer]... that does not pose a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm," as further explained in Comment [3] obviously does not apply.

Significant concerns are however raised by the provisions of Rule 1.9c. The inquirer has confidential information about the defendant. First, that the defendant has lied under oath, not once but at least twice, the second time after he had been specifically directed to tell the truth. This could lead a reasonable attorney to conclude that the defendant might have a propensity to lie when giving sworn testimony. Second, the inquirer possesses at least some economic information about the defendant's earnings at the time of the first litigation. It is quite possible, depending on the outcome of the present matter that there could be issues regarding the defendant's financial ability to pay an excess judgment. As such, the economic information gleaned from the first representation could in fact be material to the firm's representation of its present client.

In addition, the Committee believes that there are several concerns raised by the inquirer's conclusion that the confidential information "could and would not be used." It is a question of substantive law as to whether the information about the defendant's prior conduct would be admissible for impeachment purposes. This will not be addressed in this opinion. However, even assuming it can not be admitted at trial, there are a number of subtle, even unconscious ways in which awareness of this information could be used to the detriment of the inquirer's former client. The attorney handling the case, aware that the defendant has lied under oath in the past, might use a different form of cross examination knowing that the defendant is not truthful all the time. On the other hand, the lawyer might avoid certain issues in discovery that he normally might pursue because of the firm's obligation to protect the former client's confidentiality. If learned by a different attorney without the confidentiality constraint, it could be used in settlement negotiations on behalf of the current client, i.e. an attempt could be made to admit it, resulting in a greater willingness on the part of the defendant to settle the matter. Should the inquirer believe that absent its confidential nature, is constrained from even considering its use, and this impacts the representation

of the firm's current client, posing a conflict under Rule 1.7a2. Because of confidentiality, the firm's present client can not be told of the conflict, and thus the present client can not waive it based on informed consent.

The Committee points out another concern under Rule 1.6. Should the inquirer's firm continue in the present representation, that then places the former client in the position of having to file a motion for disqualification if he intends to follow through on his counsel's demand that the inquirer's firm withdraw. Those proceedings could force the former client to reveal the specific information that he presumably does not wish revealed to anybody. In fact, since it is not even clear if the former client has told his present counsel about the specifics of what transpired in the prior case, by forcing the issue the inquirer may be jeopardizing the former client's current relationship with his present counsel or that counsel's perceptions of the merits of the case.

Adequate communication with the firm's present client again becomes an issue should a disqualification motion be filed. Under those circumstances, the inquirer will find himself in a situation where he must be open with the court, yet at the same time the inquirer is foreclosed from being open with the present client. The client might not wish to deal with the motion to disqualify and feel that it is better to get a new lawyer. However, in order to explain what the motion is about to his present client in deciding how to address the motion (acquiesce and withdraw or fight it) the inquirer's firm can not provide enough information to communicate the issue to the client as required by Rule 1.4, without violating the confidentiality provisions of Rule 1.6.

In conclusion, while the Committee is not prepared to conclude based on the limited facts as they are presently understood that the inquirer's firm must withdraw from the present matter, it is advising that the inquirer must go beyond simply positing that the firm could not and would not use the information. The inquirer must address whether the constraints imposed on him by his Rule 1.6 obligations to his former client potentially place his present firm at odds with its ethical obligations to its present client. The firm must also meet its heavy burden to examine the entire situation and make an honest evaluation as to whether it can meet its obligations under the cited Rules, not only where it comes to the degree to which the requirement of avoiding using the knowledge of the defendant's prior untruthfulness has any adverse impact on its present client's interests, but also on its obligation to effectively communicate on a variety of issues with the present client (Rule 1.4) and provide that client with the appropriate zeal in the firm's advocacy on behalf of him. (Rule 1.3). The Committee notes that there is a valid question as to whether compliance with the Rules under these circumstances is, as a practical matter, possible.

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.