



Two Recent Court Decisions Address Important Conflict of Interest Issues

Two recent court decisions remind us of the serious problems that can be caused by not carefully examining the issues raised by a potential conflict of interest. In *Board of Managers of Eleventh Street Loftominium Association v. Wabash Loftominium LLC*, 2007 WL 2416817 (Ill. App. 1 Dist.) ("Wabash"), the Illinois Court of Appeals disqualified a law firm for not complying with Rule of Professional Conduct 1.7 relating to conflicts with current clients. In *Attorney Grievance Commission of Maryland v. Siskind*, 2007 WL 2404800 (Md.), the Court of Appeals of Maryland applied Rule 1.9 to address conflicts with a former client.

In *Wabash*, the Illinois Appellate Court determined that the law firm involved did not disclose the conflict and did not obtain the necessary consent in connection with claims against an affiliate of a company that the firm had represented for several years. The court reasoned that the management group of the firm's existing client, as well as the individual defendants and the corporate defendants in the litigation at issue, were substantially similar. The court was not persuaded by the argument for purposes of this disqualification analysis that the separate corporations should be treated as distinct entities for conflict purposes. The court distinguished Illinois Ethics Opinion 95-15 (1996) which generally permits a lawyer to represent one corporate defendant who is adverse to a corporate affiliate of that client. The court noted that Op. 95-15 provides for several exceptions to that general rule, including "where the client corporation and the subsidiary in question have the same management group." That exception to the general rule applied here because the court found that the management group for all the entities involved consisted of substantially the same individuals.

The court also addressed ABA Formal Ethics Op. 95-390 (1995) which addressed conflicts in the corporate family context. Op. 95-390 stated that an analysis under Rule 1.7 acknowledged the importance of factual circumstances and emphasized that "the fact that a lawyer for a subsidiary was engaged by and reports to an officer or general counsel for its parent may support the inference that the corporate parent reasonably expects to be treated as a client." In this case, the attorney involved was engaged by and reported to the management group that ran the parent corporation, as well as the subsidiary and affiliated corporations, which would lead that

management group to believe that they were included within the family of existing clients of the law firm. The court was critical of the fact that the attorney took no affirmative action to inform the management group that it was ending their long-term attorney-client relationship. The law firm attempted to argue that its representation and relationship had ended but the court relied on the fact that there were 60 matters opened over the last 7 years for which 15 members of the firm billed over \$175,000 in fees. Thus, the court rejected the applicability of any analysis under Rule 1.9, which applies to former clients. Nor was the court impressed with the screening of any attorneys who had done work for the affiliated entities. The court reasoned that "there is no provision in Rule 1.7 for an internal screening memorandum... to take the place of affirmative disclosure and informed consent."

Of particular educational value was the discussion by Justice McBride about why the attorney-client relationship was not considered by the court to have been ended properly for purposes of a conflict analysis. The court, in rejecting the law firm's argument that its relationship with its client was over, stated that "the subject law firm's relationship with its client was sufficiently continuous, and the mere fortuity that the client did not require more extensive or frequent services than he did cannot be the escape hatch the law firm would have it be." See *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F.Supp. 188, 194 (D.N.J. 1989). The court distinguished other cases that dealt with clearly circumscribed and specific tasks as opposed to a broader and more general type of representation of an entity.

In support of its finding of a Rule 1.7 conflict, the court cited to *International Business Machines v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978), for the position that merely because no specific assignment from the client was pending; a continuous client relationship can be found based on a past pattern of repeated engagements, even if on a fee for service basis, as opposed to a standing retainer agreement. Compare generally, *Elonix I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F.Supp.2d 579 (D.Del. 2001) (separate offices of same large law firm representing and suing international corporation in unrelated matters, would not be disqualified on conflict of interest basis).

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In the *Siskind* case, the court addressed a messy set of facts involving the minefield that is known as the representation of joint clients who subsequently have a disagreement. The troubles of this attorney began when he agreed to represent only one of the two clients that he formally represented jointly, in a suit where that one client sued the lawyer's former client. The court found that the rule on former client conflicts—Rule 1.9—was violated after the attorney filed suit on behalf of one of the joint clients against the other in connection with matters related to the lawyer's former representation of both of them.

The attorney began the joint representation when he formed an entity that his two clients obtained a 50% interest in. After one of the partners bought out the interest of the other partner in the entity, the attorney filed suit for breach of contract against both the entity that he formed and the one partner who had purchased the entire entity. Maryland's high court found that the attorney did not obtain the consent of the former client to represent an existing client in a substantially related matter in which the current client's interests were materially adverse to those of the former client, in violation of Rule 1.9. By operation of law, the court explained that the attorney was presumed to possess confidential information relating to the entity that he formed and the former client.

The court rejected the argument that the "joint representation doctrine" or "common interest doctrine" required a different result. An important distinction was made between the attorney-client privilege and the ethical duty to preserve a client's confidences. The court underscored that the ethical duty to preserve a client's confidences is broader than the evidentiary privilege, encompassing not only confidential information, but all knowledge acquired by the client.

The court also referred to the Comment to MRPC 1.9 which provides: "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in that matter in question." See *St. Albans Fin. Co. v. Blair*, 559 F.Supp. 523, 526, *aff'd*, 725 F.2d 670 (3d. Cir. 1983). The court explained its result as follows: "This type of fair-weather loyalty and former client poaching is forbidden; an attorney may not abandon the duty not to harm a former client when circumstances make it expedient and/or self-serving to do so."★

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