

ADVISORY ETHICS OPINION 1999-09

SYNOPSIS:

An Assistant Attorney General who formerly worked for an organization that represented class members in a class action against the State and who represented some class members personally on matters not directly affected by the class action should not represent the State or participate on behalf of the State in the pending class action or in future class actions involving the same class members or the same core legal issues.

FACTS:

A supervisory attorney in the Office of the Attorney General was formerly employed by an organization that represented a plaintiff class in ongoing matters stemming from a consent decree issued some time ago in a class action suit. The Attorney General's office represented the defendants in the suit. In addition, a state department represented by the requesting attorney initiated suits seeking to be relieved of the consent decree. An organization where the requesting attorney formerly worked defended those suits. The attorney did not directly represent the class in the suit, but represented individual clients, some of whom are members of the class. The attorney relates that the organization that formerly employed the attorney has waived any potential conflict on behalf of its clients, but another entity that represents a client in the class action has not waived potential conflicts on behalf of its client, whom the requesting attorney represented on another matter years ago. The attorney points out that the current case involves legal questions that arose due to litigation that was not in existence while the attorney was employed at the organization representing the class.

In addition, a second class action suit was filed against the state department that employs the requesting attorney after the attorney left the organization where the attorney was formerly employed. However, the attorney represented the named plaintiff in the class action suit on a matter in the attorney's former employment that is represented to be unrelated to the instant litigation. There has not been a waiver of conflict on behalf of the class. The requesting attorney indicates that the litigation is based on legislation that had not been enacted when the attorney represented any individuals who are or may be members of the class.

The attorney asks two questions concerning each case. First, is there a conflict between the former clients and the attorney's current employer, the State? The second question is if a conflict exists, can counsel waive it on behalf of a class?

DISCUSSION:

The applicable section of the Vermont Rules of Professional Conduct is §1.9, which reads as follows:

CONFLICT OF INTEREST: FORMER CLIENT

- (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 consents after consultation.**
- (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 consents after consultation.**
- (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 Rule 1.6 or Rule 3.3 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 Rule 1.6 or Rule 3.3 would permit or require with respect to a client.**

The Vermont Supreme Court recently observed, "Most states and federal courts today apply a standard derived from Rule 1.9 of the Model Rules of Professional Conduct." Under that provision, "[a] lawyer who has formerly represented a client 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 consents after consultation."¹

"Substantiality is present if the factual contexts of the two representations are similar or related."² Thus, "determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations."³ Once a substantial relationship between the matters is found, "the court need not inquire whether the attorney in fact received confidential information, because the receipt of such information is presumed."⁴ ("Once a substantial relationship has been found, a presumption arises that a client has indeed revealed facts to the attorney that require his disqualification.")⁵

The purpose of the presumption is to avoid "put[ting] the former client to the Hobson's choice of either having to disclose his privileged information in order to disqualify his former attorney or having to refrain from the disqualification motion altogether."⁶ In addition to safeguarding client confidentiality, the presumptive disqualification serves "to avoid any appearance of impropriety."⁷

The applicable portions of Vermont Rule §1.9 are (a) and (b). Subparagraph (a) applies when the lawyer seeks to represent another person in the same or a substantially related matter in which the new client's interests are materially adverse to the former client's interests. Subparagraph (b) applies in the situation when (1) the lawyer seeks to represent the new client in the same or a substantially related matter as the firm with which the lawyer was previously associated had previously represented a client (2) whose interests are materially adverse to the lawyer's new client and (3) about whom the lawyer had acquired information protected by rules 1.6 and 1.9(c) that is material to the matter. In either case, the former client must consent after consultation.

Given the situation, the Committee concludes that the interests of the former clients and the new client are materially adverse, since they are opposing parties in the class actions. In our view, one key issue is whether the matters are the same or substantially related. According to the requesting attorney, the matters on which the lawyer represented the former clients were not the same as the class actions about which this inquiry is made. It is more difficult for an outsider to determine whether or not the matters are substantially related, but the recitation in the request made by the lawyer does not convince the Committee that the matters are not substantially related.

In addition, the requesting lawyer represents that some of the lawyers representing the former clients' positions have waived a conflict. The lawyer does not represent that the former clients have been consulted or have waived the conflict. Both the relevant subsections of Rule 1.9 require the client's consent after consultation. We do not believe, in light of that language, that counsel for a class can waive this type of conflict on behalf of the class or individual class members. The waiver must come from the former client.

In light of our view that the requesting lawyer has not shown that the matters are not substantially related and the fact that the former clients of the lawyer have not personally waived any conflict, the Committee is of the opinion that the lawyer should not participate in either class action.

¹ Model Rules of Professional Conduct, Rule 1.9(a). *State v. Crepeault*, 167 Vt. 209, 704 A.2d 778 (1997).

² *Trust Corp. v. Piper Aircraft*, 701 F.2d 85, 87 (9th Cir. 1983) (quoting *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980)).

³ *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569, 572-73 (1993).

⁴ *State v. Jones*, 180 Conn. 443, 429 A.2d 936, 939-40 (1980), overruled on other grounds, *State v. Powell*, 186 Conn. 547, 442 A.2d 939 (1982); see also *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985).

⁵ *Id.*

⁶ *McClanahan*, 430 S.E.2d at 574 (quoting *Government of India v. Cook Indus.*, 569 F.2d 737, 740 (2d Cir. 1978)); see also *Smith*, 757 F.2d at 1100 (the presumption "is intended to prevent proof that would be improper to make") (quoting *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1347 (5th Cir.1981)); *Jones*, 429 A.2d at 940 ("The court cannot inquire into whether the lawyer did in fact receive confidential information during his previous employment . . . because . . . [that] . . . would destroy the very same confidences which [the rule] protects.")

⁷ *Smith*, 757 F.2d at 1100. *Id.*