

# ADVISORY ETHICS OPINION 2000-10

## SYNOPSIS:

A lawyer who discloses a potential conflict to a caller who sought to retain the lawyer and divulge the general nature of an employer-employee disagreement and potential litigation and the name of the Employer, is not disqualified from representing the institutional client because the lawyer involved explained to the caller that a conflict existed and that the caller would have to seek legal representation elsewhere. Under these facts, the lawyer may not then inform the employer (the institutional client) of the telephone call and its content.

## FACTS:

There are two questions presented by the facts. The first is whether the telephone call to the lawyer disqualifies him from representing the institutional client if litigation should arise between the caller and the institutional client. The second question is whether the lawyer may disclose the identity of the caller and the nature of the call to the institutional client.

Whether the lawyer can represent the institutional client depends on two factors. Did the call result in the formation of a lawyer-client relationship, and did the lawyer obtain any confidences during the course of the telephone call? Rules 1.7 and 1.9 are involved in our analysis, and read as follows:

### Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and;
  - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

### Rule 1.9. 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 interest 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.

Rule 1.7 regulates as to when an Lawyer can undertake the representation of new client if the representation may conflict with the interests of an existing client. Clearly, the Lawyer could not represent the caller against the Lawyer's institutional Client.

Rule 1.9 regulates the situations where a conflict may arise with a former client.

The unasked question of whether a preliminary consultation with an Lawyer ripens into an Lawyer-Client relationship that would preclude the Lawyer from later undertaking a representation adverse to the caller has been resolved.

As stated in the Annotated Model Rules of Professional Conduct, the key element in making such a determination is to see whether confidential information has been disclosed. In the case of *Richardson v. Griffiths*<sup>1</sup> the court explained that a “lawyer/client relationship is created when a person seeks advice or assistance. Our own Supreme Court, in *Bresette v. Knapp*<sup>2</sup> also held that “It is true that there may be an employment in the absence of an expressed agreement. Formality is not an essential element of the employment of a lawyer. The contract may be implied as well as expressed.” The ABA Committee on Ethics and Professional Responsibility has discussed every facet of this question in its lengthy opinion entitled Formal Opinion 358. In the fact situation presented here, it is clear that the requesting lawyer did not expressly or by implication give the caller advice or assistance.

The secondary question as to the propriety of the lawyer advising his institutional client of the details of the call is not so easily resolved, despite the conclusion that the telephone call did not result in the creation of a present or former lawyer/client relationship as described in Rule 1.7(c). It would seem that lawyer’s clarification that the caller would not have disclosed his name and the subject matter of the call had he known of the lawyer’s representation of the institution is the key to the committee’s response which is necessarily that the lawyer may not reveal the identity of the caller or the nature of its subject matter to the institutional client.

The information concerning the caller’s identity, and the subject matter of the call, were revealed in response to questioning by the lawyer. Common sense and ethical propriety mandate a determination that the revelation of this information to the institutional client would not be acceptable. ABA Formal Opinion 90-358 stated “Information imparted to a lawyer by a would- be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not work for the would-be client. If the lawyer takes adequate measures to limit the information initially imparted by the would-be client, in most situations the lawyer may continue to represent or to undertake representation of another client in the same or a related matter. When the information imparted by the would-be client is critical to the representation of the existing or new client in the same or related matter, however, the lawyer must withdraw or decline the representation unless a waiver of confidentiality has been obtained from the would-be client.” Since the telephone call did not impart information to the lawyer which would be critical to his representation of the institutional client, the Committee opines that the lawyer need not withdraw from its representation.

A different fact situation was discussed in the Committee’s Opinion 92-13, in which the requesting lawyer learned confidential information from the caller which could have a direct bearing on a claim being considered by the caller against the lawyer’s pre-existing institutional client. In that Opinion, we concluded that the lawyer was required to keep the information confidential and must decline to represent his existing client should the caller bring a claim involving the matter discussed in the phone call. We then noted, however that the requesting lawyer was not disqualified from continuing to represent his client in other matters.

## **CONCLUSION:**

The Committee opines that lawyer properly identified the existing conflict and correctly advised caller to seek representation elsewhere. The Committee also concludes that lawyer may not inform his institutional client of the call or its content.

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<sup>1</sup> 560 N.W. 2d 430 (N.E.B. 1997)

<sup>2</sup> 121 VT 376 (1960)