

Opinion No. 2006 -2

Synopsis

A law firm may hire an associate who previously represented a party the law firm is currently suing on an unrelated matter provided no information from the prior representation is revealed or used to the client's disadvantage.

Facts

A law firm is contemplating hiring a new associate. The prospective associate previously worked for another firm where he or she represented a client in certain regulatory matters. The law firm is involved in pending litigation adverse to this same client. The subject matter of the regulatory representation and the subject matter of the litigation are unrelated.

Questions Presented

1. May the law firm hire the prospective associate without creating a conflict of interest?
2. If the prospective associate is hired, must he or she be screened from involvement in the litigation against the former client?

Analysis

This matter involves a question of successive representation, and accordingly is governed by Rule 1.9. Rule 1.9 states:

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 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.

In addition, Rule 1.10, which governs imputed disqualification is implicated. This rule provides, in part:

RULE 1.10. IMPUTED DISQUALIFICATION: GENERAL RULE

(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, 1.8(c), 1.9 or 2.2.

Read together, Rules 1.9 and 1.10 would prevent the employment of the prospective associate if that associate had represented a client in the same litigation in which the firm represents the client's opponent. However, the critical distinction here is the fact that the prospective associate was involved in representing the adverse party in regulatory matters unrelated to the subject matter of the litigation. The requesting law firm has also represented that there is little likelihood that any issues involved in the litigation would relate to these past regulatory matters. Assuming this to be accurate, under these circumstances, no conflict of interest is presented under Rule 1.9(a) or 1.9(b).

Rule 1.9(c), however, creates a further proscription that applies even if different matters were involved. This rule prevents an attorney who has formerly represented a client in "a matter" from using information acquired in that representation to the disadvantage of the client or revealing information relating to the representation, unless required or permitted by Rule 1.6 or Rule 3.3. This rule would prevent the new associate from sharing any information learned from a former client with the new firm, if that information would be used to the disadvantage of the former client. Under the circumstances, although not required by the rules, one way to avoid any risk of violating Rule 1.9(c) would be to screen off the associate from any involvement in, or discussions concerning, the litigation against the former client. See Opinion No. 2005-2

(advocating screening protocol to avoid attorney's involvement in cases where his spouse represents adverse party).