

OPINION 2009-05

Synopses: (1) Where, six years earlier, a law firm prepared proposed estate documents for a husband and wife at the husband's request; where the husband and his various legal entities have been clients of the firm for thirteen years; where all information utilized for the preparation of the estate documents was provided by the husband/client; and where the firm's only contact with the wife was to mail copies of the proposed documents to her; and where the husband and wife are now involved in a divorce proceeding, the firm may continue to represent the husband/client and his various legal entities in matters unrelated to the divorce proceeding.

(2) Additionally, the firm is entitled to secure the payment of its fees through a mortgage from the husband's business entities as long as it satisfies the requirements of Rule 1.8 for a written agreement, after the client has been given an opportunity to seek advice of independent counsel.

Facts: Requesting law firm ("Firm") has represented a husband ("H") and his business entities since approximately 1996 and has an ongoing lawyer-client relationship with H and his businesses. In 2003, Firm prepared estate and trust documents for H and H's wife ("W"), at H's request, based solely on information provided by H. No Firm attorney had any direct contact with W, and W provided no information to Firm. Draft documents were sent to W for review, but W never responded, and the documents, to the best of Firm's knowledge, were never finalized. Firm has not had any further dealings with W since 2003, nor did Firm have any dealings with W before the preparation of the documents requested by H.

H and W are now involved in a contentious divorce in another state in which H's assets and his interests in various business entities are part of the marital estate.

In order to secure payment of its fees for work performed for H's limited liability companies in which H has an interest, Firm requested and the LLCs agreed to grant Firm mortgages to secure past obligations and to secure payment for on-going work performed by Firm for the LLCs. In connection with the granting of two mortgages on properties owned by the LLCs, Firm and the LLCs entered into a written engagement agreement authorizing the execution of the mortgages to secure past and ongoing fees. The LLCs consulted with independent counsel with respect to the engagement agreement and regarding the decision to grant mortgages to the Firm before executing the documents.

W has demanded that Firm withdraw from any further representation of H and H's LLCs and that Firm discharge the mortgages on grounds that they constitute a fraudulent transfer of H's marital assets in violation of an order of the out-of-state divorce court. That court issued an order governing the parties during the divorce proceedings. The Order prohibits either party from transferring assets without the approval of the other or the approval of the court.

W asserts that the Firm represented her in connection with the preparation of draft wills and trusts six years earlier and that it is disqualified from representing H and his business entities on an ongoing basis on grounds that such representation is substantially related to the work the Firm earlier did for W and is adverse to her interests. Beyond W's characterization of the two matters as being substantially related and adverse, W has provided no additional facts or information to support the characterization. W also asserts that she remains a client of Firm by virtue of Firm's work for her (at H's request) six years ago. W asserts she has always regarded Firm as her Vermont counsel. Firm confirms without contradiction that the only work it ever did involving W was to prepare the will and trust documents six years earlier based solely on information provided by H.

Analysis: Firm's involvement at H's request six years ago in preparing draft wills and trust documents for W that were never acted upon did not create an ongoing lawyer client relationship between Firm and W. The passage of time, the inaction in any follow-up to complete the wills and trusts and the failure of W to respond to Firm after Firm sent her drafts of the wills and trusts, has effectively extinguished whatever attorney client relationship might have existed. Rule 1.7 which governs conflicts between concurrent clients is, thus, inapplicable to the claim of conflict.¹

Rule 1.9 governs potential conflicts between a Firm and its former clients. Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which the second person's interests are "materially adverse" to the interests of the former client unless the former client consents after consultation. If it is assumed that a lawyer-client relationship arose between Firm and W in connection with Firm's preparation of the estate documents a consideration of Rule 1.9 must follow. Rule 1.9(a) provides as follows:

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 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.

On the basis of the information provided by requesting Firm, there is no conflict under Rule 1.9. Firm's continued representation of H and H's businesses in matters unrelated to W is not substantially related to the work Firm did in preparing draft wills and trusts at H's request six years earlier.

¹ **Error! Main Document Only.** Even if W was deemed to be a current client of Firm, the fact pattern here indicates that the Firm's ongoing work for H and H's business entities is unrelated to W and that the

Comment 3 to Rule 1.9 of the ABA Annotated Model Rules discusses the scope of the "substantially related" test. The Comment states as follows:

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 a subsequent matter.

Applying that definition of substantial relationship to the facts here makes plain that there is no substantial relationship between Firm's current representation of H and his LLCs and Firm's limited prior representation of W. There is no risk, let alone a substantial risk, that confidential factual information obtained from W in the prior representation will be used in Firm's ongoing representation of H and his LLCs in a way that will be materially adverse to W's interests. Firm did not receive any confidential information from W.

Claims of conflict must be taken seriously and examined closely, but claims of conflict should not be used as a tool to obstruct a person's right to counsel of the person's choice, particularly where a person has a longstanding ongoing relationship with a particular attorney or firm. Here, there is no basis for the assertion of a conflict under Rule 1.9.

W has also objected to Firm taking mortgages on properties owned by H's LLCs claiming that such a practice is prohibited by Rule 1.8. Rule 1.8 provides in pertinent part as follows:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

representation of H and his business entities is not directly adverse to W. Thus the provisions of Rule 1.7 would be inapplicable.

(3) the client consents in writing thereto.

Each of these requirements of Rule 1.8 has been satisfied in connection with the mortgages granted by H's LLCs. The mortgages were granted by the LLCs in connection with current and past obligations of the LLCs to the Firm. The mortgages were obtained by Firm pursuant to a written engagement agreement, and Firm's client, the LLC, was advised by independent counsel concerning the agreement and the provision of the agreement that mortgages would be provided to Firm. Contrary to wife's assertions, Rule 1.8 does not preclude such security arrangements between a client and its attorney as long as the protections set out in Rule 1.8 are complied with. They have been here.

After the initial letter request for an opinion was received, wife submitted to Firm a further letter claiming that Firm's action in obtaining mortgages from the LLCs was in violation of the out-of-state court divorce order which prohibited H or entities he controlled from transferring or encumbering assets during the pendency of the divorce. If there is such an order, it raises questions of substantive law which we do not address. We only confirm that Rule 1.8 has not been violated on the facts presented in the request for an opinion.