**VERMONT BAR ASSOCIATION PROFESSIONAL RESPONSIBILITY SECTION**
**ADVISORY ETHICS OPINION 2017-2**

## SYNOPSIS

A deceased partner's limited and terminated representations, separately or when viewed collectively, of a predecessor corporation merged into another corporation, do not require a law firm to seek the former client's consent or to withdraw from representing plaintiffs in an environmental class action suit involving the conduct of the predecessor client corporation, when no other lawyer currently at the firm had a role with the deceased partner's representation or has access to the files, and the current class action is not substantially related to the deceased partner's former representation pursuant to the V.R.P.C. 1.9 or 1.10 former client and imputation of conflicts rules.

## FACTS

Law Firm "A" is a member of a consortium providing representation to plaintiffs in a class action case filed against "Z" Corporation. The suit pleads several causes of action against Z Corporation and its predecessor "X" Corporation arising from alleged discharge of a particular chemical into the environment over a more than twenty-year period. Z Corporation merged with X Corporation and assumed all of its liabilities during this period. Almost a year after the suit commenced, Law Firm A discovered that a deceased partner "D" represented X Corporation on five matters during the period covered by the class action suit. Those representations occurred more than ten years after the commencement of activities giving rise to the class action lawsuit. There is no indication that Attorney D or Law Firm A ever acted as general counsel to either X or Z Corporation.

Attorney D passed away four years prior to commencement of the class action. According to firm records, all the matters on which Attorney D represented or advised X Corporation were closed, no one else currently at Law Firm A has had access to Attorney D's X Corporation files, and no other attorney at Law Firm A has access to the files. A non-lawyer at the firm has the password to X Corporation's electronic files, and the hard copies of the files are in a locked storage unit. Law Firm A is representing that it has no access to any secrets or confidences of X or Z Corporation. The last matter on which Attorney D represented X Corporation ended approximately one year before the merger. Attorney D was not involved in the merger of X and Z Corporations, and did not represent Z Corporation subsequent to the merger.

The specific matters on which Attorney D was involved during the time period relevant to the class action included, first, a zoning matter which involved an environmental law claim. This zoning/environmental matter did not involve the particular alleged chemical discharge at issue in the class action, involved documents which were and are part of the public record, and the zoning matter was settled. It also appears from the public record that Attorney D had a limited, perhaps perfunctory role in that matter. The second matter where Attorney D represented X Corporation involved a business dispute with a company, unrelated to the class action, about a defective carpet claim. A third matter involved a zoning violation allegation with

the municipality that lasted over a two year period, which appears unrelated to the class action allegations. A fourth matter involved a notice of trespass between X Corporation and an individual. The fifth and final matter was Attorney D's review of X Corporation's worker's compensation policy, which based on a review of billing records was three to four hours of Attorney D's time.

## QUESTION PRESENTED

Whether a deceased partner's limited and terminated representations, separately or when viewed collectively, of a predecessor corporation merged into another corporation, requires the firm to seek the former client's consent or to withdraw from representing plaintiffs in an environmental class action suit involving the conduct of the predecessor client corporation when no other lawyer currently at the firm had a role with the deceased partner's representation or has access to the files, and the current class action is not substantially related to the deceased partner's former representation.[1]

## ANALYSIS

Former client potential conflict of interest cases are frequent and growing in the legal profession, as both lawyers and clients become more mobile. From the days of the Model Code to today's Rules, the professional responsibility standard has focused on whether matters are "substantially related" as the threshold test in determining whether a former client must provide informed consent to the representation. Considerations of confidentiality, loyalty, conflicts of interest, and the appearance of impropriety have factored into the governing standards and their applications in specific cases. A current client's right to choose counsel, and the reality that ethical considerations designed to shield clients may be used as swords to increase costs and disadvantage adverse parties unjustly, also are at play. In 2009, this Section observed that "[c]laims 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." Advisory Ethics Opinion 2009-05.

In a 1988 Advisory Opinion, the Section stated the standard under the Code as follows: "The generally accepted rule with respect to successive representation is that, 'A lawyer may not oppose a former client in a matter which is substantially related to the subject of the earlier representation.' This proscription helps to safeguard confidential information gained in the prior representation (DR 4-101); eliminate any possible conflict of interest (DR 5-105); and avoid the appearance of impropriety (Canon 9)." Advisory Ethics Opinion 88-12.

Today, in Vermont, Rules of Professional Conduct 1.9 and 1.10, which deal with successive representation, incorporate the same "substantially related matter" threshold test.

[1] Law Firm A has asked the Professional Responsibility Section to address a number of hypothetical scenarios as part of this Advisory Ethics Opinion. In accordance with the Section's Rules, the Section does not consider hypotheticals, but relies instead on the facts presented by the requesting attorney. The Section further notes that any issues relating to discovery or custody of the files associated with Attorney D's work are beyond the scope of this Advisory Ethics Opinion.

Rule 1.9. DUTIES TO FORMER CLIENTS

(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 gives informed consent, confirmed in writing.

(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 gives informed consent, confirmed in writing.

(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 these rules 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 these rules would permit or require with respect to a client.

Rule 1.10. IMPUTATION OF CONFLICTS OF INTEREST: 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 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm in a matter in which the disqualified lawyer did not participate personally or substantially, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client

represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Our prior opinions, like the comments to the ABA Model Rules, note that "the scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction." See Advisory Ethics Opinions 1988-12, 2000-05, 2000-07, 2000-12, and 2001-03. The lawyer's involvement in a matter can also be a question of degree." ABA Comment on Rule 1.9[2]. "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 the subsequent matter." ABA Comment on Rule 1.9[3]. Each analysis has been and is driven by the particular and sometimes explicitly narrow facts presented. The ABA Model Rule 1.9 and 1.10 comments are available, respectively at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/comment_on_rule_1_9.html and https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_10_imputation_of_conflicts_of_interest_general_rule/comment_on_rule_1_10.html.

The present situation presents facts more unusual than most. This Section has not previously addressed a case where a lawyer's relationship with a firm was "terminated" by death, no other lawyer at the firm represented the former client, and no lawyer at the firm has access to the files from the deceased lawyer's representation. There is an initial question whether the Rules as written specifically address this situation, and the Section has not located explicit guidance in the Official Comments or our precedents to aid in this situation. The Rules clearly contemplate situations where a lawyer and client actively end their relationship and one or more lawyers who worked for the client remain with a firm or the firm retains client files. Rule 1.10(b), which most closely appears to apply, seems to contemplate a voluntary termination of a lawyer's role in a firm, beginning with the prefatory language: "when a lawyer has terminated an association with a firm . . ."

Rule 1.9(a) speaks in terms of a lawyer's own conduct in a successive representation situation and requires an imputation rule to extend its terms to anything like the present case. Rule 1.9(b) deals with successive representation by a lawyer or their former firm, and does not apply here. Rule 1.9(c) can be construed in a manner that could arguably be applicable, as it covers "[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,…."** (emphasis added). However, the Section concludes Rule 1.9(c) would not preclude Firm A's continued representation of the

class action plaintiffs, as there is a question whether the imputation rules would apply in this deceased partner situation, and even if they did, the conduct proscribed under Rule 1.9(c) is not at issue. Firm A has not looked at and will not use information in the files related to the prior representation to the disadvantage of Z Corporation. Any relevant information in those files also appears to be in the public record, which would preclude a violation of Rule 1.9(c). Considering the obligations of lawyers and law firms to preserve client files and the understandable situation when a partner passes away leaving files with which only they were familiar, and the client never requesting return of those files,[2] the Section would not construe Rule 1.9(c) to preclude Firm A's continued representation even if it found Rule 1.9 to be applicable.

Rule 1.10(a) is also inapplicable, as it addresses situations "[w]hile lawyers are associated in a firm" to impute obligations from one lawyer to the entire firm. Rule 1.10(b) is the closest provision that would potentially be applicable, but the Section questions whether it is controlling. The policy reasons for Rule 1.10(b) do not appear to apply squarely, and the language implies that the lawyer who represented the client terminated the association with the firm in a manner other than passing away. As with the Rule 1.9(c) analysis above, however, even if the language of Rule 1.10(b) applied, the Section concludes that the other conditions and policies behind the rule would not require discontinuance of the representation or consent of Z Corporation, because the matters, whether individually or collectively, are not substantially related.

Neither Attorney D nor Firm A represented Z Corporation pre-or post-merger. From the facts provided, Attorney D also did not serve as general counsel to X or Z Corporation. Neither Attorney D nor Firm A represented X Corporation with respect to the particular chemical or alleged cause of the claim at issue in the class action. Neither Attorney D nor Firm A has represented X Corporation for approximately fifteen years. Four of the matters on which Attorney D was retained are plainly unrelated, involving a carpet dispute, a trespass case, an unrelated zoning matter, and a business dispute. The only matter which gives cause to any concern was a zoning/environmental issue that is represented as unrelated, and involved only the filing of a form notice of appeal from a local decision, and the transmission of an X Corporation request for emissions testing to the State of Vermont over the course of less than a week, both of which are publicly available. Firm A has been scrupulous about walling off access to Attorney D's files, and there is no question of Firm A using X Corporation's confidential information from those files. The Section accepts Firm A's representations that while Attorney D's X Corporation files are technically in its possession, it has not looked at or had access to them. Rule 1.10(b) is lawyer- specific, stating that "any lawyer remaining in the firm has information protected by," and the procedures Firm A has undertaken are appropriate in the circumstances.

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[2] See American Bar Association Center for Professional Responsibility publication on "Materials on Client File Retention" including ABA Comm. on Ethics and Professional Responsibility Informal Op. 1384, "Disposition Of A Lawyer's Closed Or Dormant Files Relating To Representation Of Or Services To Clients" and ABA Comm. on Ethics and Professional Responsibility Formal Op. 92-369 "Disposition Of Deceased Sole Practitioners' Client Files And Property," available at https://www.americanbar.org/groups/professional_responsibility/services/ethicssearch/materials_on_client_file_retention.html

All Firm A's representations of X Corporation had been terminated. (Note: If other lawyers at Firm A had previously been involved in the matters underlying the class action on behalf of X Corporation, or if Firm A provided advice on the facts underlying the class action to X Corporation, the Section's conclusions likely would be different.) In addition, considering how much time has passed since the commencement of the class action and the discovery of Attorney D's prior involvement, we are mindful of the rights of the class action plaintiffs to counsel of their choice. If Z Corporation had raised an objection at the onset of the class action, the facts could have been different, but not necessarily the Section's conclusion.

## CONCLUSION

Even if the substantive terms of V.R.P.C. 1.9 or 1.10 were applicable, Firm A may continue to represent the class action plaintiffs in these circumstances without Z Corporation's informed consent because the matters are not substantially related and Firm A will not be using protected information it acquired in Attorney D's limited representations to disadvantage Z Corporation.