

LEGAL ETHICS OPINION 1806

CONFLICT OF INTEREST IN LITIGATION
INVOLVING REAL ESTATE THAT IS OWNED
BY TRUSTEES.

You have presented a hypothetical involving a potential conflict of interest arising out of a real estate sale in the past and a current dispute regarding a possible right of way crossing that same property. Nineteen years ago, Attorney A represented X, Y, and Z in purchasing the real estate. Since that time, Attorney B has joined A's firm. Attorney B now represents client C in establishing the right of way crossing the real estate. C is in litigation against X, Y and Z regarding the right of way. The land is now held not by X, Y and Z individually, but is held in trust, with the three of them serving as trustees. Attorney B wrote to the trustees' attorney to determine whether there is any objection to a possible conflict of interest on the part of B. Several months have passed, but the trustees' counsel has not responded.

Under the facts you have presented, you have asked the Committee to opine as to whether Attorney B has a conflict of interest here, even though:

- 1) The real estate sale was nineteen years ago;
- 2) Attorney A did not search or certify the title to the property as those tasks were performed by a title company;
- 3) The current adverse parties are the trustees of a trust whereas the prior representation was of the three purchasers as individuals;
- 4) Attorney B has not reviewed the file and was not at the firm at the time of A's representation of the purchasers; and
- 5) The trustees' attorney has failed to respond to Attorney B's inquiry about the matter.

Your request is concerned with whether Rule 1.9 triggers a conflict of interest for Attorney B. Rule 1.9 (a) states that:

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 both the present and former client consent after consultation.

That provision applies not only to Attorney A but also to Attorney B because Rule 1.10(a) states that:

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 1.6, 1.7, 1.9, or 2.10(e).

Attorney A and Attorney B together would seem to be in a classic "former client" conflict situation in that Attorney A represented parties who are now adverse parties in B's case, which

may be substantially related to that of Attorney A. However, the request, in effect, raises five potential reasons why no such conflict is in fact triggered here. The Committee will review each of these five factors individually.

1) The real estate sale was nineteen years ago.

This posited reason would suggest some sort of “statute of limitations” on the application of Rule 1.9. While of course, the long passage of time affects just how much a lawyer remembers about a former client, Rule 1.9 nonetheless does not have a statute of limitations period, nor is the presence of a conflict dependent upon a lawyer’s memory of his former client’s matter. The Committee does not find that this particular factor prevents the application of Rule 1.9 to this representation.

2) Attorney A did not search or certify the title as those tasks were performed by a title agency.

This factor goes to whether or not the two representations (the original purchase and the new right-of-way dispute) are “substantially related” under Rule 1.9. This Committee has on several occasions discussed what is meant by the term “substantially related.” A summary of those opinions was outlined in LEO 1652 as follows:

Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination. LEO #1613 addressed "substantial relatedness," as follows:

[T]he committee has not established a precise test for substantial relatedness under DR 5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts (LEO #1473), the same parties (LEOs #1279, #1516), or the same subject matter (LEOs #1399, #1456).

Courts addressing the issue have stated that substantial relatedness exists where the matters or issues raised in the current and the former representation are essentially the same, arise from substantially the same facts, or are byproducts of the same transaction, Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724 (E.D. Va. 1990), or entail virtually a congruence of issues or a patently clear relationship in subject matter. In re Stokes, 156 B.R. 181 (Bkr. E.D.Va. 1993). See also Pasquale v. Colasanto, 14 Va. Cir. 54 (1988).

Those prior Committee opinions all analyzed the question under the former DR 5-105(D). The Committee notes that the analysis remains appropriate as the newer Rule 1.9 (a) retains the pertinent language from former DR 5-105(D).

While it may be possible that the two matters are substantially related, the Committee does not have before it sufficient facts to make that determination. For example, while the facts state that Attorney A did not search for or certify the title, the facts do not indicate whether the clients

independently made arrangements themselves with the title agency, whether Attorney A recommended and vouched for the title agency, whether he handled the arrangements, or whether he simply referred the clients to the agency. The Committee can only note that Attorney B should consider all pertinent facts as indicated by the opinions outlined above in determining whether the matters are “substantially related” so as to trigger a conflict of interest.

3) The current adverse parties are the trustees of a trust whereas the prior representation was of the three purchasers as individuals.

This reason is put forth as removing the situation from the reach of Rule 1.9 under a theory that the two matters do not involve the same parties; that is, that Attorney A’s former purchasing clients are not the same as Attorney B’s land-owning adverse parties. In recent LEO 1788, the Committee addressed a situation in which an attorney currently represented a widow as administrator of the wife’s estate who now wanted the attorney to represent him in electing his statutory share as surviving spouse because the will left him nothing. The question presented was whether this new representation triggered a Rule 1.7 conflict between two current clients—the administrator and the surviving spouse. The Committee concluded that it did not. The basis for that conclusion was that the attorney did *not* have two clients; he had one client with two needs: legal advice regarding his role as administrator and legal advice regarding his rights as a surviving spouse. The opinion provides authorities for the proposition that representing a fiduciary, such as an administrator or a trustee, is representation of that individual regarding that particular role. *See* LEO 1788 (and authorities referenced therein).

This same analysis applies for determining whether the three trustees count as “former clients” for Rule 1.9 purposes. Accordingly, just because the landowners now hold the land as trustees rather than outright does not in some way render them something other than “former clients” of Attorney A, which are then via Rule 1.10 imputed to Attorney B. That the purchasers/trustees were formerly clients of Attorney A and are now adverse parties in Attorney B’s case means that Attorney B must determine whether the two matters are substantially related before proceeding. Thus, the element of the trust in this scenario does not remove Attorney B’s new case from the reach of Rule 1.9.

4) Attorney B has not reviewed the file and was not at the firm at the time of A’s representation of the purchasers.

The fact that Attorney B has not reviewed the file would be relevant if Rule 1.9 conflicts could be “cured” by development of a screen for Attorney B regarding this matter. However, Rule 1.9 does not permit a screen to “cure” a conflict triggered by the rule; only consent from the former client can provide that “cure” and allow the representation. Therefore, the Committee opines that Attorney B’s lack of familiarity with the file is insufficient to remove this situation from the reach of Rule 1.9.

In this fourth factor is also the suggestion that because Attorney B was not at the firm at the time of Attorney A’s representation of the purchasers, the potential conflict should not be imputed to Attorney B. That suggestion could only be based on a misreading of Rules 1.10(a), which, to review, operates in the present scenario as follows: Attorney A would have a potential

conflict of interest were he to represent the landowner suing his three former clients; accordingly, if Attorney A cannot represent the new clients, neither could any other attorney associated in a firm with Attorney A, including Attorney B. Thus, whether Attorney B was present at the firm at the time of the first representation at issue is not part of the analysis; what is important is that Attorney A and Attorney B are in the same firm at the time of the *new* representation.

The Committee opines that this fourth posited factor does not remove this scenario from the reach of Rule 1.9

5) The trustees' attorney has failed to respond to Attorney B's inquiry about the matter.

The suggestion made with this reason is that, while recognizing that consent from the former party is required to "cure" a Rule 1.9 conflict, perhaps after some amount of time or some number of requests, an attorney may treat silence as consent. Rule 1.9 contains no language providing that a default alternative to actual consent would be constructive consent where the attorney has made a reasonable effort to seek consent from the former client. The only "cure" for a Rule 1.9 conflict of interest is for the former client to provide actual "consent after consultation." That the counsel for the three purchasers/trustees has not responded to the Attorney B's requests provides no safe harbor for Attorney B if the facts of this case constitute a conflict of interest.

In sum, this Committee opines that the scenario as presented is just the sort of new representation that a lawyer should analyze under Rule 1.9(a). The Committee declines to definitively conclude whether there is a conflict of interest under that provision because, as indicated with regard to item 2, above, the determination of whether the matters are "substantially related" must depend on both the factors identified in that discussion and facts regarding the matters that are not before the Committee.

Finally, the Committee notes that even if the facts support that no conflict of interest is triggered by Rule 1.9(a), Lawyers A and B also need to consider the possible application of Rule 1.9(c), which states as follows:

(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 or gained in the course of 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.

Committee Opinion
September 20, 2004

Thus, regardless of the outcome of the Rule 1.9(a) determination outlined above, if Attorney A received any confidential information during the representation of the purchasers/trustees at the time of purchase that would be pertinent in Attorney B's representation against those parties in the new matter, then, as Rule 1.9 and Rule 1.10 together impute the effect of that information from Attorney A to Attorney B, Attorney B could not represent the neighboring landowner, absent consent from X, Y, and Z. Whether Attorney A received such information is a factual determination that the Committee cannot make based on the limited facts provided in the hypothetical.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.