Privilege & Conflicts Issues for In House Counsel

Baker Donelson
Presentation

Thomas H. Barnard
Shareholder
410-862-1185
tbarnard@bakerdonelson.com

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Agenda

I. Overview

II. Joining the Law Department

   A. Duties of Attorney

   B. Duties of the Department

III. Preserving Confidential Information

IV. Examples

V. Conclusion

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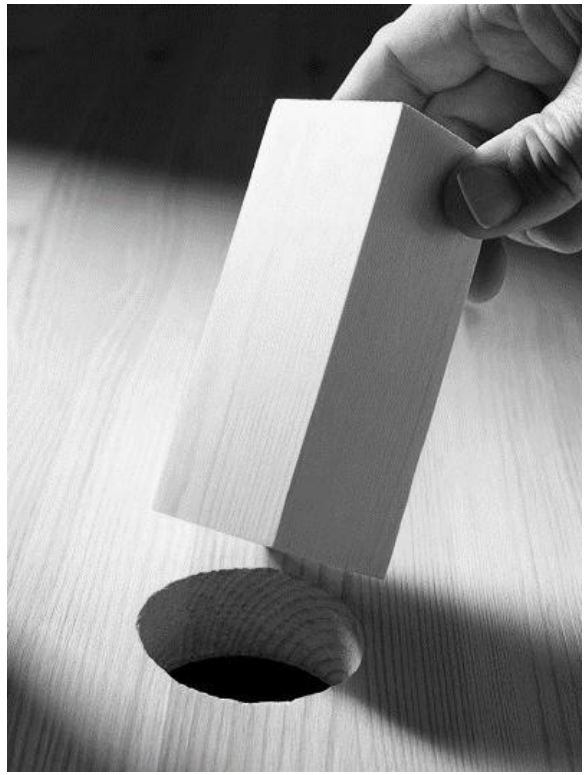
I. Overview

Square Pegs

"When it comes to ethical guidance, in-house lawyers get the short end of the stick. The Model Rules of Professional Conduct (the "Rules"), which most U.S. jurisdictions have adopted in some form, are more compatible with law firm practice than in-house work. Although a handful of Rules, such as Rules 1.11, 1.12, and 3.8, single out government lawyers for special attention, in-house lawyers are not so fortunate. Not only must they figure out how to adapt the Rules to a corporate environment for which many of those Rules were clearly not designed, but they must do so with little assistance from ethics opinions and CLE programs.[…] **In-house lawyers are like the proverbial 'square pegs' trying to navigate the "round hole" of legal ethics**."



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The Goal

Awareness and Issue Spotting

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II. Joining the Law Department

The Applicant

The Rules Still Apply

Notable Rules

MR 1.0 – Who is a "Firm"

MR 1.6 – Confidentiality

MR 1.7 – Conflicts for Current Clients

MR 1.9 – Duties to Former Clients

MR 1.10 – Imputation

MR 1.13 – The Organization as a Client

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What Are You Protecting?

And What Happens When it Goes Wrong?

The Penalty

Be mindful of the potential for state and federal courts to exercise their power to disqualify a lawyer (and potentially the entire law department itself) from continuing to represent a client by requiring the withdrawal when a disabling conflict exists.

An Example

Dynamic 3D Geosolutions LLC v. Schlumberger Ltd. (Schlumberger N.V.) - 837 F.3d 1280 (Fed. Cir. 2016).

Who is the "Client"?

Model Rule 1.13

The Text

An attorney employed or retained by an organization represents the organization acting through its "duly authorized constituents" (e.g., officers, directors).

The Problem

Corporations can only act through their employees/officers/directors. Thus, you never deal directly with the client per se, but only with agents of the client.

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What About Representing Both?

Model Rule 1.13

The Text

Allowed, but is a pitfall for conflicts:

"(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

The Problem

The model rules preclude an attorney from representing two or more clients if the representation of one client is directly adverse to another client, or if there is a substantial risk that the representation of a client will be materially limited by the attorney's responsibilities to another client (unless the attorney secures the informed consent, confirmed in writing, from each affected client). See, e.g., r. 1.7.

What about Affiliates and Subsidiaries?

Model Rule 1.7

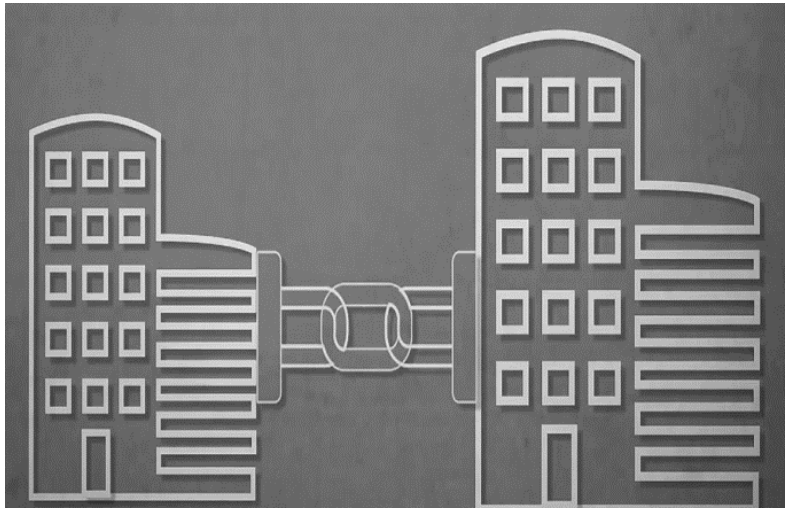
The Text

Comment [34] to Model Rule 1.7 provides a general rule that representation of a corporation does not result in representation of affiliates and subsidiaries. It states in pertinent part:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter . . . .

The Application

Courts consistently have reinforced the proposition that the existence of an attorney-client relationship with one corporate affiliate does not create, by default, an attorney-client relationship with all corporate affiliates.



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Additional Considerations

Affiliates and Subsidiaries

The Text

See Rule 1.13, Cmt. [10] (noting that "[t]here are times when the organization's interest may be or become adverse to those of one or more of its constituents").

The Application

- Consider: Multinational conglomerate with litigation burden subsidiary
- How can the General Counsel fulfill loyalty to both?

A Potential Solution

Retain independent outside counsel for the subsidiary to protect its interests in the spin-off. *See* NYCBA Formal Ethics Op. 2008-2 (noting that, in a spin-off transaction, "it is wise for the parent to secure for the subsidiary outside representation").

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Be Mindful of "Former Client" Issues

Model Rule 1.7

The Text

Remember: Comment [3] to Rule 1.7: It requires that lawyers (and law firms (remember MR 1.10) to "adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest."

The Application

An in-house attorney may be asked or expected to work on a matter on behalf of the employer organization that is adverse to, or otherwise relates to, a former client of the in-house attorney—from when the attorney was either in private practice or at a prior in-house counsel position.

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Additional Considerations for Applicant Attorney

Model Rule 1.7

ABA Formal Opinion 96-400 | DC Ethics Opinion 367 (July 2014)

Rule 1.7(a)(2): A lawyer's pursuit of employment with a firm that the lawyer currently opposes in a matter may materially limit the lawyer's ability to represent the lawyer's current client, thereby posing a conflict of interest under Rule 1.7(a)(2).

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II. Joining the Law Department

The Law Department

Brief Refresher

Model Rule 1.7

The Text

Comment [3] to Rule 1.7: It requires that lawyers (and law firms (remember 1.10)) to “adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.”

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Beware Rule 1.10

The Imputation of Conflicts to the "Firm" – the Legal Department

The Text

The conflict of interest rules provide that an individual lawyer's conflict is imputed to all other lawyers "associated in a firm." Rule 1.10(a) (emphasis added). (Remember Rule 1.0(c))

Rule 1.0(c) defines a "firm" or "law firm" as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." (emphasis added).

Individual Rules May Vary based on the Jurisdiction

Consider: Lawyers in the legal department to work on the same or substantially related matter adverse to a former client as long as the personally disqualified lawyer is screened, and notice is given to the former client.

Vs.

Screening as long as the lateral doesn't have material confidential information. Requires screening and notice to the former client.

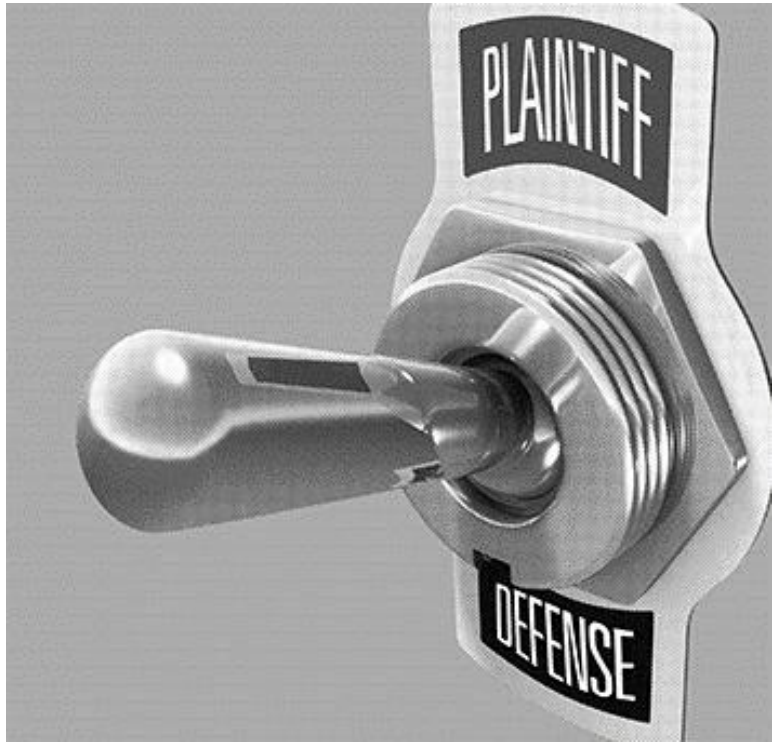
What If the New Attorney was Previously Adverse?

Model Rule 1.7(a)(2) and Rule 1.6

The Text

A concurrent conflict exists if … there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 1.6 requires that the attorney keep confidential the information acquired during the prior representation. The duty of confidentiality has no time limit.



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What If the New Attorney was Previously Adverse?

Duties to Former Clients – MR 1.9

The Text

Cannot be adverse to a former client in a matter where the lawyer represented that former client on the "**same or substantially related matter**".

Cannot represent a client in the same or substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client if the lawyer has material confidential information**.**

The Application

ABA Ethics Opinion 99-415

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What is "Substantially Related"?

Duties to Former Clients – MR 1.9

The scope of a "matter" is a question of fact—the test is whether the lawyer was so involved in the prior matter that the subsequent representation can be regarded as a changing of sides.

The Text

[Comment 3] Matters are "substantially related" 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.

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Lawyer Joining an Adverse Law Firm / Competitor?

Same Rules Apply and May Act as Sword

The Rules At Play

- Rule 1.6 – Confidential Information
- Rule 1.9 – Former Client (Now you)
- Rule 1.10 – Imputation

ABA Ethics Opinion 99-415

A former in-house lawyer may, without obtaining consent from the former client, represent a client in a matter that is materially adverse to the lawyer's former employer unless during the course of the lawyer's employment by the organization either the lawyer **personally had represented** the employer in **the same matter** or in a **substantially related matter** or another member of the organization's legal department had done so and the former in-house lawyer had acquired **protected information material to the new matter**. (Remember *Dynamic 3D Geosolutions LLC v. Schlumberger*)

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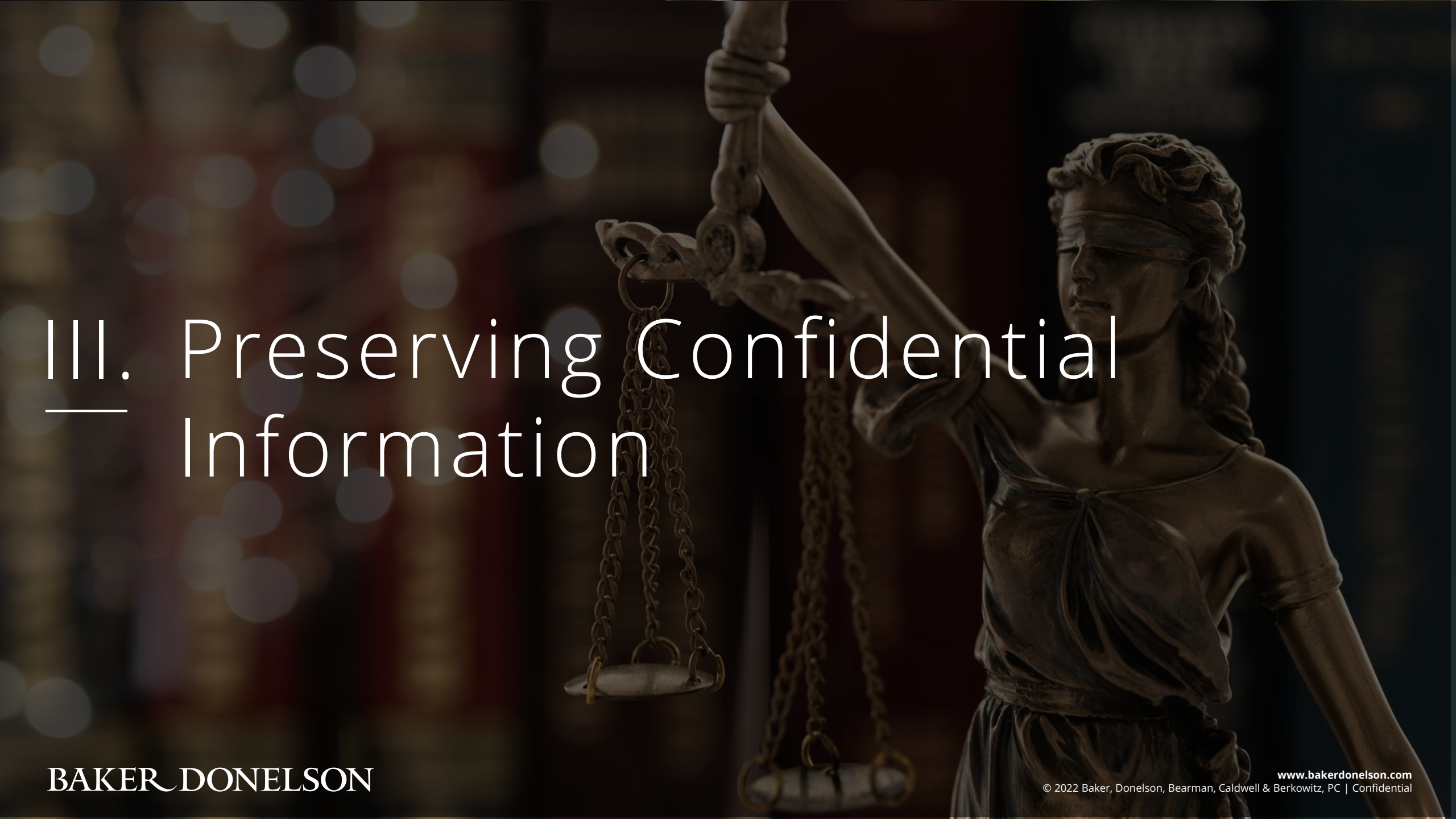

III. Preserving Confidential Information

What is Attorney Client Privilege?

Refresher

Elements

- A communication;
- Made between privileged persons;
- In confidence;
- For the purpose of seeking, obtaining, or providing legal advice to the client;
- Unless waived.

Purpose

"to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."

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What is “Confidential Information”?

From Applicable Ethical Rules

Confidential information under the ethics rules is more than merely information protected by the attorney-client privilege. Generally governed by Rule 1.6*

Definitions May Vary by Jurisdiction:

TN: Essentially says what it is “not”: [3b] Information made confidential by this Rule does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. For example, during legal research of an issue while representing a client, a lawyer may discover a particularly important precedent, devise a novel legal approach, or learn the preferable way to frame an argument before a particular judge that is useful both in the immediate matter and in other representation. Such information is part of the general fund of information available to the lawyer.

Vs.

MA: "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research or (B) information that is generally known in the legal community or in the trade, field, or profession to which the information relates.

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Best Practice Tips

For the Corporate Law Department

Defending Against Potential Disqualification

- Lateral lawyer had no involvement in adverse matters;
- Lateral lawyer had involvement, but lateral lawyer did not have access to “material information” in adverse matters regarding adverse party
- Consents (Screening + Notice to former)

Methods and Advice

- Proper Information on Hiring/Intake
- The Corporate “Conflict Database”
- Be Aware of Local Rules*

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Proper Hiring and Intake

Be Aware of MR 1.6

Coming from Corporate Law Department

Request information from lateral lawyer sufficient to determine whether the former employer is adverse in any current matters, the nature of the lawyer's involvement in the matters, and whether the lateral lawyer has any "material information" about the matters (Both need to be careful here – no specifics (1.6)).

Coming from a Law Firm

Request information from lateral lawyer sufficient to determine the nature of the lateral lawyer's involvement in any currently adverse maters and whether the lateral lawyer has "material information" relating to any currently adverse matters by reason of the lateral lawyer's involvement or the firm's representation of the adverse party

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The Law Department "Conflict Database"

Remember Model Rule 1.10

What Should be Maintained?

- Corporate family information (For you as client)
- Names and prior employers of current and former employees
- Any matter previously handled by lawyers adverse to the company before they were onboarded to the inhouse staff

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What About Screening?

Remember Model Rule 1.10

The Model Rules, as well as the rules in some states, provide for an exception to the preclusion by imputation, where the conflicted attorney is "timely screened from any participation in the matter"—but strict compliance with the requirements for an ethical screen, including providing notice to the affected former client, would be required in order for such exception to apply. See 1.10(a)(2).

From the ABA

"While few legal departments utilize a system for checking conflicts and approving new engagements—let alone maintaining a list of former clients—of each in-house attorney, such a system might be advisable to avoid potential violations. Further, whenever a conflict becomes apparent, the in-house attorney may need to consider some form of prophylactic or remedial action, such as creating an ethical screen, securing the informed written consent of the affected former client, or perhaps even having a nonlawyer colleague interface with outside counsel on the matter (thereby avoiding the need for in-house attorneys on such matter

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III. Preserving Confidential Information

Differences From Private Practice

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Be Aware of What You Communicate and How

Wearing "Multiple Hats"

Theory

Whether privilege protects an in-house lawyer's communications depends on the predominant purpose of the communication. If the objective is legal advice, then the communication is privileged, so long as it is confidential and between lawyer and client. Alternatively, if the lawyer is acting as a business negotiator or advisor, then the communication probably is not privileged.

In Practice

U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr., No. 6:09-CV-1002-ORL-31, 2012 WL 5415108 (M.D. Fla. Nov. 6, 2012)

- Draft documents prepared with the assistance of counsel or for the purposes of obtaining legal advice are privileged, as are drafts that contain information not included in the final version.
- But, the privilege does not extend to a draft that is "purely a business document.
- Communications labeled "Attorney-Client Privileged" are not privileged unless they satisfy the substantive requirements of the privilege
- Each email within a string must be separately analyzed and independently come within the privilege to be protected.

What About Communicating with Employees?

Wearing "Multiple Hats"

Predominate Rule

Upjohn Co. v. United States, 449 U.S. 383 (1981). Under *Upjohn*, to determine whether a lawyer's communications with an employee of a company are privileged, a court will consider (1) whether the communication was made for the purpose of obtaining legal advice; (2) whether it contained information needed by counsel; (3) whether it concerned matters within the scope of the employee's duties; (4) whether it was made by an employee who was aware of the communication's legal purpose; and (5) whether it was kept confidential. Id. at 394-95.

But Note State Differences

Most notably Illinois: *Sullivan v. Alcatel-Lucent USA, Inc.*, No. 12 C 7528, 2013 WL 2637936, at *3 (N.D. Ill. June 12, 2013), the court held that one employee, who was the primary contact with counsel for a particular legal matter and whose analysis and recommendation were part of the company's decision to settle the matter, was a necessary advisor and therefore part of the control group. By contrast, employees who merely created correspondence and documents in order to seek legal advice from in-house counsel were not members of the control group. Id. at *4.

Others include: Maine, New Hampshire, South Dakota, Oklahoma, Alaska, Hawaii, Kansas.

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Best Practice Tips

Wearing "Multiple Hats"

Preserve Privilege

1. **Means** – Emails vs. Phone
2. **Recipients** – Limit to "control Group" or "need to know" (Outside Counsel?")
3. **Substance** – Content percentages vs. a separate email with legal advice
4. **Clarity** – Make it clear it contains legal advice (don't overuse).
5. **Contents** – Subject lines, attachments. All may be important.

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IV. Case Studies

Case One: Former Client

During the ten years that you practiced in a private law firm, you handled numerous real estate purchase and sale transactions, including at least three transactions in which your clients purchased former commercial sites from Pharmaco, a large drugstore retail chain. Last year, you withdrew from your law firm and joined the in-house legal staff at Pharmaco. You just learned that your former law firm is representing one of your former clients in a breach of warranty claim against Pharmaco over asbestos contamination at the property that Pharmaco sold to your former client in the transaction that you handled.

Do you have a conflict of interest if the General Counsel tasks you with working on Pharmaco's defense in this matter?

Case One: Former Client

Correct Answer: Yes

Rule 1.9(a), concerning conflicts of interest with former clients, applies:

> 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.

The initial question to be resolved is whether the prior real estate purchase and sale transaction in which Pharmaco sold the subject property to the plaintiff is “substantially related” to the breach of warranty claim against Pharmaco.

Case One: Former Client

Comment [3] to rule 1.9 fleshes out the meaning of “substantially related”:

> 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 information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

Instead of requiring the former client to disclose confidential information to show that the lawyer has a conflict of interest, the substantial relationship test serves as a proxy.

As the R&W that Pharmaco made in the real estate purchase and sale agreement you negotiated will likely be a central issue in this breach of warranty litigation, there seems little doubt that the two matters are “substantially related.”

Therefore, you have a conflict of interest, and any request for a waiver from the plaintiff is likely to be unavailing.

Case Two: Prior Matter

You are associate general counsel at Devco, a real estate development company.

Ten years ago, before joining the company, you were a partner in a local law firm, and, together with your firm colleagues, represented Sherman Paint Co. with respect to its facility in an industrial section of the city. Testing revealed the existence of an underground pool of toxic substances deep beneath the facility, the contamination likely resulting from the use of neighboring property over 70 years before. Ultimately, your environmental colleague concluded that Sherman Paint had no remediation or reporting obligations with respect to the contamination, and that representation was concluded. Subsequently, Sherman sold the facility to Jackson Supply Co. Now, Jackson Supply wishes to sell the facility to your employer, Devco, and the President of the company has asked that you handle the transaction from the negotiation of the purchase and sale agreement through closing. Is there at least a potential conflict of interest because of your prior representation of Sherman Paint?

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Case Two: Prior Matter

Correct Answer: Yes

Under Rule 1.7(a)(2):

> A concurrent conflict of interest exists if . . . . there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Your obligations under Rule 1.6 require that you keep confidential the information acquired during the prior representation of Sherman Paint with respect to this industrial facility, which would include any information concerning the toxic contamination underneath the property. The duty of confidentiality has no time limit.

At the same time, if you undertake the representation of Devco in this acquisition, you have a duty to do so zealously within the bounds of the law, which would include using any available information in your possession to advance the client's interest.

Case Two: Prior Matter

A New York City Bar ethics opinion, N.Y.C. Formal Opinion 2005-02, analyzes the relevant issues:

> Although a lawyer has a duty to use any available information to advance her client's interest, that is qualified by the lawyer's duty of confidentiality to her other clients.
>
> ". . . a client has no legitimate expectation that a lawyer will use confidential information of another client for the first client's benefit."
>
> A lawyer has neither the duty nor the right to disclose to one client the confidential information of another client.

Case Two: Prior Matter

The New York City Bar Opinion notes that there are two tests of whether the lawyer in such a situation has a conflict under Rule 1.7. The first is the "materiality" test.

There are situations . . . . where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information. In that situation, the lawyer can be said to represent "differing interests" in the sense that the representation of one client cannot be accomplished without violating the rights of another. Alternatively, the lawyer can be said to be unable to proceed . . . . because continued employment will mean violating a disciplinary rule, namely the requirement of [Rule 1.6] that a lawyer may not use a confidence or secret for the advantage of another client.

The second is the "independent professional judgment" test. The question
. . . is whether the lawyer's exercise of independent professional judgment, which must be exercised zealously in the interests of the lawyer's client, will be or is likely to be adversely affected by the lawyer's possession of the information and the restriction on its disclosure or use. The issue is that a lawyer may steer so far clear of disclosing the embargoed information that the lawyer will not pursue other avenues that another lawyer might pursue to obtain the information. The lawyer, for example, may not recommend a course of conduct that he or she otherwise might, or not investigate a situation, for fear that the impetus was tainted by the confidential information.

Case Two: Prior Matter

The confidential information acquired in your prior representation of Sherman Paint would not be material if it would be uncovered in the ordinary course of Devco's acquisition matter, unless it would be important for Devco to acquire that information earlier than it would be obtained in the ordinary course.

As you would typically urge any purchaser of industrial property to conduct Phase II environmental testing as part of its diligence efforts, and as such testing would disclose the underground contamination that you already know is there, your possession of that information a *priori* isn't likely to affect your representation of Devco unless it is important that Devco obtain that information sooner than you are likely to get the Phase II testing results.

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Case Three: Imputation

Assume the same facts as in Case One or Case Two.

Would the general counsel at Pharmaco or Devco, as the case may be, or any of your other colleagues, be able to represent the company in the breach of warranty litigation, or in the real estate acquisition, without the conflict arising from your prior representation of the plaintiff, or from the knowledge that you obtained during your prior representation of Sherman Paint?

What is your answer?

Case Three: Imputation

Correct Answer: No

Unfortunately, your conflict of interest will likely be imputed to all of the other lawyers in your office. Rule 1.10 provides as follows:

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).

You might argue that the imputation rule, by its terms, applies to law firms and not to the in-house legal staff of a corporation that is not a law firm. But, that argument would fail. Under the Rules, the terms "firm" and "law firm" are defined as follows:

> [A] professional entity, public or private, organized to deliver legal services, **or a legal department of a corporation or other organization**.(Emphasis added.)

Case Three: Imputation

Comment [1a] to Rule 1.10 adds gloss.

> With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.

Comment [3] to Rule 1.7 should also be noted.

> It requires that lawyers (and law firms) "adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest."

As a result, in-house legal organizations are required to adopt appropriate procedures to identify conflicts and potential conflicts.

Case Four: New Hire

You are general counsel at Bosco, a food processing company, and you have an opening for a lateral hire after the recent departure of a seasoned litigator in your office.

A young litigation partner at a law firm in the region has contacted you about the position. After a round of interviews, you and your assistant GC agree that she is just the person you're looking for. You ask her for the information that you'll need to run a conflicts check and discover that she previously performed a limited amount of research in connection with protracted commercial litigation between Ajax Company, her firm's client, and your company, and that her work on such matter has concluded.

You and several other in-house lawyers at Bosco have been involved with outside counsel in handling that same litigation.

Would hiring the lateral candidate pose a conflict for you and your staff? Would the conflict be cured if you screened her from the representation of Bosco in the litigation with Ajax? If not, what do you need to do?

Case Four: New Hire

Correct Answers: Yes and No.

Hiring her would pose a conflict of interest that might disqualify you and your entire in-house staff from representing Bosco in the litigation. An ethics screen alone is insufficient to cure the conflict. You'll need waivers from Ajax and from Bosco if you hire the lateral candidate.

The conflict issue arises under Rules 1.9 and 1.10. Rule 1.9(a) and (c).

Case Four: New Hire

Comment [4] describes the competing considerations that inform the Rule:

First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised.

Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel.

Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.

In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Case Four: New Hire

The lateral candidate would have a conflict if she were to join the Bosco in-house legal staff and work on the Ajax litigation for Bosco.

That would constitute “switching sides” in the same matter. Even if she were screened from the representation of Bosco in such litigation, and neither participated in such representation nor shared information with anyone else on the in-house legal staff about her former representation of Ajax in the litigation, the conflict would remain.

The only way to hire this litigator and avoid disqualification is to seek and obtain waivers from both Ajax and Bosco that would waive the conflict, but require that the new hire be screened from participating in the representation of Bosco in the litigation and from sharing information that she gained during her prior representation of Ajax.

V. Conclusion


Questions?

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