AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 09-455 **October 8, 2009**

Disclosure of Conflicts Information When Lawyers Move Between Law Firms

When a lawyer moves between law firms, both the moving lawyer and the prospective new firm have a duty to detect and resolve conflicts of interest. Although Rule 1.6(a) generally protects conflicts information (typically the "persons and issues involved" in a matter), disclosure of conflicts information during the process of lawyers moving between firms is ordinarily permissible, subject to limitations. Any disclosure of conflicts information should be no greater than reasonably necessary to accomplish the purpose of detecting and resolving conflicts and must not compromise the attorney-client privilege or otherwise prejudice a client or former client. A lawyer or law firm receiving conflicts information may not reveal such information or use it for purposes other than detecting and resolving conflicts of interest. Disclosure normally should not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.[1]

Many lawyers change law firm associations during their careers. New York's highest court noted more than a decade ago that the "revolving door" is a modern-day law firm fixture.[2] Usually these changes are voluntary, but often they are not. The Model Rules of Professional Conduct recognize lawyer mobility. Comment [4] to Rule 1.9, "Lawyers Moving Between Firms," states that the rule on duties to former clients should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel or unreasonably hamper lawyers from forming new associations and accepting new clients. The February 2009 amendment of Rule 1.10(a) to permit screening of lawyers moving between firms to prevent imputed disqualification of the new firm is grounded on that premise. The importance of clients being free to choose counsel after a change of association is also identified in Comment [1] to Rule 5.6.

The Need for Conflicts Analysis

When a lawyer moves between law firms, the moving lawyer and the new firm each have an obligation to protect their respective clients and former clients against harm from conflicts of interest. A moving lawyer whose current clients may wish to become clients of the new firm must determine whether the new firm would have disqualifying conflicts of interest in representing those clients.[3] The prospective new firm has a corresponding duty to determine the conflicts in its current representations that could arise if the moving lawyer actually joins the firm. Comment [3] to Rule 1.7 advises lawyers to adopt reasonable procedures, appropriate for the size and type of firm and practice, "to determine in both litigation and non-litigation matters the persons and issues involved" to ascertain whether proposed new matters are permitted under the conflicts rules. Comment [2] to Rule 5.1(a) includes policies and procedures designed to "detect and resolve" conflicts of interest among those measures that law firm managers must establish to give reasonable assurance that all lawyers in the firm conform to the Rules.

The obligation to detect and resolve conflicts of interest derives from the common law as well as the lawyer ethics rules.[4] When lawyers move between firms, early detection and resolution of conflicts of interest is also prudent risk management. "A common and often serious problem for law firms is the conflict of interest involving a newly hired lawyer … and his or her former clients or adversaries. Accordingly … it is essential to conduct prior conflict screening as thoroughly as possible before making hiring decisions."[5] Other authorities have deemed it essential in order to facilitate the necessary conflicts screening to include client identification and subject matter in the new firm's conflicts database for all former clients of lawyers joining the law firm.[6]

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[1] This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2009. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] *Graubard Mollen Dannet & Horowitz v. Moskovitz*, 653 N.E.2d 1179, 1180 (N.Y. 1995).

[3] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-414 (September 8, 1999) (Ethical Obligations When a Lawyer Changes Firms) n.12.

[4] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121, cmt. *g* (2000); and RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 3.9 (2003).

[5] ANTHONY E. DAVIS AND PETER R. JARVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 109 (2d ed. 2007).

[6] LAWRENCE J. FOX AND SUSAN R. MARTYN, RED FLAGS: A LAWYER'S HANDBOOK ON LEGAL ETHICS § 6.07 (ALI-ABA 2005).

Tension between Confidentiality and Conflicts Analysis

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis.[7] This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source."[8] Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.[9]

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client. Examples cited in Comment [5] to Rule 1.6 include facts that must be admitted in litigation or a disclosure that facilitates a satisfactory conclusion to a matter, disclosures clearly necessary to advance a client's representation. Another example was recognized in ABA Formal Opinion 98-411,[10] which found limited disclosure outside a law firm in a lawyer-to-lawyer consultation impliedly authorized "when the consulting lawyer reasonably believes the disclosure will further the representation by obtaining the consulted lawyer's experience or expertise for the benefit of the consulting lawyer's client." This interpretation is consistent with general agency law: an agent's implied authority is limited to acts "necessary or incidental" to achieving the principal's objectives.[11] There may well be instances where client representations are advanced by lawyers moving between firms, but most such moves appear to take place for the sake of the lawyer rather than advancement of the client's representation. Absent a demonstrable benefit to a client's representation from the disclosure of conflicts information, it is unlikely that the disclosure would be "impliedly authorized" within the generally understood and accepted meaning of that exception.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary … to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules. Compliance with Rule 1.7 would therefore not seem to fall within the exception. Comment [12] also notes that the disclosure must be "required" by the other law. Because the movement of lawyers between firms is not mandated by some external law, it is unlikely that disclosure of conflicts information to comply with Rule 1.7 qualifies as required by other law outside the Rules. Finally, as explained in Comment [12], when disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. Such a discussion at the time conflicts information is provided often would not be practicable.

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to the lawyer's current firm,[12] with unpredictable and possibly

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[7] *See*, *e.g.*, Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checkin*g, 19 GEO. J. LEGAL ETHICS 489, 506-08 (2006); and Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 203-07 (2007).

[8] Rule 1.6 cmt. 3.

[9] *See*, *e.g.*, Comment [4] to Rule 1.6 (use of hypothetical to discuss representation permissible so long as there is no reasonable likelihood that listener could ascertain identity of client or situation involved); ABA Formal Op. 96-399 (Jan. 18, 1996) (Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients When Such Funding is Reduced and When Remaining Funding is Subject to Restrictive Conditions), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 384-85 (ABA 2000) (lawyers may be unable to comply with proposed condition of Legal Services Corporation funding to disclose identity of all clients); and ABA Formal Op. 01-421 (February 16, 2001) (Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions) (insurance defense lawyer may not disclose billing records relating to insured's representation to third-party auditor designated by insurer without insured's informed consent).

[10] ABA Formal Op. 98-411 (August 30, 1998) (Ethical Issues in Lawyer-to-Lawyer Consultation).

[11] *See* RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2006).

[12] *See* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 2.2.4 (2d ed. 2009 Supp.).

adverse consequences.[13] Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm. Nevertheless, as noted below, there may be unusual situations where the persons and issues involved are so sensitive that a moving lawyer may need to seek informed client consent or take alternative protective measures before disclosing that information.

Permissive Disclosure of Conflicts Information

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself."[14] Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

The need to disclose conflicts information has been recognized when lawyers change firms as well as in other contexts. As noted above, a moving lawyer with a current client that may wish to become a client of the new firm "must ensure that her new firm would have no disqualifying conflict of interest…. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation."[15] Providing guidelines for employing temporary lawyers in compliance with the Rules, ABA Formal Opinion 88-356 advises: "The second firm should make appropriate inquiry [of the temporary lawyer] and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter."[16] ABA Formal Opinion 99-415 gives guidance regarding representations adverse to an organization by its former in-house lawyer, and advises in-house lawyers to maintain logs describing those matters on which they worked because determination by the new firm of whether there was a conflict of interest with the former employer required "an inquiry into the responsibilities of the lawyer" during the former employment.[17] Further, the February 2009 revision of Rule 1.10(a) that permits screening of lawyers moving between firms to avoid imputing the disqualification of the moving lawyer to the new firm becomes relevant only if a former client conflict of the moving lawyer has been recognized by the new firm, presumably on the basis of information obtained from the moving lawyer. These opinions and amended Rule 1.10(a) clearly acknowledge that disclosure of conflicts information is permitted to facilitate compliance with the obligation to deal with conflicts of interest.

The importance of a lawyer's compliance with the Rules has justified limited disclosure of protected information in other circumstances. Rule 1.6(b) was amended in 2002 to clarify that disclosures reasonably necessary to secure legal advice about the lawyer's compliance with the Rules are proper even when not impliedly authorized under the stated exception to 1.6(a) because of the overriding importance of compliance with the Rules.[18]

As discussed above, before a moving lawyer joins a new firm, the Model Rules and the common law require the lawyer and the firm to detect and resolve conflicts of interest to protect their clients and former clients, even if only one party to the move undertakes the actual conflicts analysis. Conflicts analysis cannot be accomplished without sharing conflicts information generally about the persons and issues involved in a matter. Because conflicts information is needed to detect and resolve conflicts of interest when lawyers move between firms, as a general matter and subject to the limitations stated below, disclosure of conflicts information otherwise protected by Rule 1.6 should be considered permissible as necessary to comply with the Rules.

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[13] For a discussion of when a lawyer changing firms must give notice to clients for whom the lawyer has active matters, *see* ABA Formal Op. 99-414, *supra* note 3.

[14] Scope, Paragraph [14].

[15] ABA Formal Op. 99-414 n.12.

[16] ABA Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 41.

[17] ABA Formal Op. 99-415 (Sept. 8, 1999) (Representation Adverse to Organization by Former In-House Lawyer).

[18] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 (ABA 2006) at 125. *See also* Comment [9] to Rule 1.6 (even when not impliedly authorized, paragraph (b)(4) permits disclosure to secure legal advice because of importance of compliance with Rules).

This conclusion is consistent, although not congruent, with a comment to the current ethics rules of one state and at least four bar association opinions. Comment [5A] to Colorado Rule 1.6 (which defines protected information substantially the same as Model Rule 1.6) states that a lawyer moving or contemplating a move from one firm to another may disclose client identity and the basic nature of the representation to insure compliance with the conflicts rules. Boston Bar Association Opinion 2004-1 concluded that without implicit authorization to share limited conflicts information, the requirement of Rule 1.7 to check for conflicts of interest as well as the protection of lawyer mobility and a client's right to choose a lawyer under Rule 5.6 could not be reconciled.[19] Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.[20]

Limitations on Disclosure

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest. As noted in Comment [3] to Rule 1.7, conflicts information typically includes the persons and issues involved in the relevant matter, and disclosure of that information would be permitted. In some cases, conflicts of interest that would likely frustrate a contemplated move can be discovered even before disclosure of client-specific information is necessary. For example, if it is recognized that moving lawyer's current firm and the prospective new firm are adverse in numerous existing matters or regularly represent commonly antagonistic groups (*e.g.*, landlords and tenants or management and unions), then discussions regarding a potential move probably would proceed no further. In other cases, simply comparing client lists or the general nature of the practices of the moving lawyer and the prospective new firm will often reveal the absence or presence of potential conflicts without the need for additional disclosure; initial disclosures of conflicts information thus can often be limited to names of clients or areas of practice. In any case, if information beyond the persons and issues involved appears necessary for conflicts analysis, alternative measures such as those discussed below should be considered.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client.[21] There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege.[22] There are also situations (*e.g.*, clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

In some situations, resolving whether a lawyer's move to a new firm would result in a conflict of interest requires fact-intensive analysis of information beyond just the persons and issues involved in a representation. Such an analysis will often be required in determining whether there is a "substantial relationship" between two matters for purposes of Rule 1.9. In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer. If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.

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[19] Boston Bar Ass'n Eth. Comm. Op. 2004-1 (May 20, 2005) ("The 'Do's and Don'ts' of Revealing 'Conflict-checking Information'"), available at http://www.bostonbar.org/sc/ethics/op04_1.pdf. Massachusetts Rule 1.6(a) protects only "confidential information relating to representation of a client."

[20] *See* D.C. Bar Ass'n Eth. Op. 312 (April 2002) (Information That May Be Provided To Check Conflict When a Lawyer Seeks to Join a New Firm), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion312.cfm; New York State Bar Ass'n Eth. Op. 720 (August 27, 1999) (Successive Representation; Moving Lawyer; Conflict Check.), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&CONTENTID=18917&TEMPLATE=/CM/ContentDisplay.cfm; and Association of the Bar of the City of New York Eth. Op. 2003-03 (Oct. 2003) (Checking For Conflicts of Interest), available at http://www.abcny.org/Ethics/eth2003-3.html.

[21] *See* ABA Formal Op. 98-411, *supra* footnote 9 and accompanying text (consulting lawyer in lawyer-to-lawyer consultation impliedly authorized to disclose certain information relating to the representation without client consent, but may not waive attorney-client privilege or otherwise prejudice client).

[22] *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 88-93 (5th ed. 2007).

An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of a client. It also conforms to Rule 1.6(b)(4), which expressly permits disclosure of protected information to secure legal advice about a lawyer's compliance with the Rules. The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer's conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected. Procedures involving use of intermediary lawyers when lawyers move between firms have been described by Professors Tremblay,[23] and Wald,[24] as well as by Professors Hazard and Hodes.[25] If a client has instructed the moving lawyer not to reveal particular information to any other person, including other firm lawyers, that information cannot properly be imparted to the intermediary lawyer.[26]

In every case, a lawyer or law firm receiving conflicts information has a duty not to reveal that information. Use of conflicts information by the receiving lawyer or firm should be limited to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.

Timing of Disclosure

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage. [27]

In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association. In another context, ABA Formal Op. 96-400[28] explored at length the issue of when a lawyer considering potential employment with an adverse firm or party must consult with and seek consent of the involved client. The analysis there concluded that participation in substantive discussions by the moving lawyer and the prospective employer best identified the point at which such consideration needed to occur. Thus, conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place.

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[23] 19 Geo. J. Legal Ethics at 544.
[24] 31 J. Legal Prof. at 227.
[25] *See* GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, THE LAW OF LAWYERING § 14.4, note 2 at 14-40 (3d ed. 2009 Supp.).
[26] *See* Comment [5] to Rule 1.6.
[27] *See, e.g.*, *Roberts & Schaefer Co. v. San-Con*, 898 F. Supp. 356, 363 (S.D.W.Va. 1995) ("Lawyers and law firms must consider and address the effects of mergers and new associations on their clients well in advance of when such events occur.").
[28] ABA Formal Op. 96-400 (January 24, 1996) (Job Negotiations with Adverse Firm or Party), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) 391 n.9.