

Navigating Conflicts of Interest in the In-House and Outside Counsel Context

Association of Corporate Counsel,
Central Pennsylvania Chapter

Harrisburg, PA

April 25, 2019

Presenters

Thomas S. Schrack, Shareholder, State College

Carolyn M. Smith, Shareholder, Hershey

Philip K. Miles, Shareholder, State College

Sean M. Burke, Managing Director and Shareholder,
Hollidaysburg

FIRST HYPO

Lebron Lawyer is employed by Kobe Company as its counsel. Kobe Company recently issued an RFP for bids for a contract to design certain apparel for the company. At a recent board meeting, Lebron overheard the board chair's side conversation with a representative of Magic Company about the RFP. Magic is a qualified designer company and intends to submit a bid. Lebron checked the bid specifications, and feared that the board chair may have made false statements about the RFP requirements. The Magic representative relied on the chair's statements and took it back to his company.

FIRST HYPO (cont.)

Lebron asked the board chair about the conversation, and the board chair said that he was just “going by memory” in his statements. In the same breath, he noted that he holds 5% ownership in Barkley, Inc., a new inexperienced company which is also expected to submit a bid. He asked Lebron for his opinion as to whether it is a conflict.

Lebron tells the board chair that he does not believe it is a conflict. Magic submits its bid two days after the due date, and its bid is 20% higher than the next lowest bidder.

Barkley turns out to be the lowest bidder and wins the contract award.

FIRST HYPO (cont.)

Barkley performs under the contract and delivers the apparel to Kobe. A few weeks after the apparel went on the market, Pippen Player was wearing the apparel and it broke, resulting in significant injury and requiring Pippen to retire. Pippen sued Kobe Company and its board for damages.

What should Lebron do, and what should he have done?

Let's back up...

RPC 1.0 provides the term “‘firm’ or ‘law firm’ denotes 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.”

A smaller part of the RPCs typically concern in-house counsel (client trust accounts, fee disputes, etc. typically not an issue) – however, there are still many rules that apply to in-house counsel, and compliance with them is critical.

Due to the nature of the position, in-house counsel may have a higher level of accountability.

There is a “watchdog” aspect that goes beyond the typical outside counsel concern – e.g., dealing with outsiders (regulators, the media).

As demonstrated by the first hypothetical, one important thing to remember is – “WHO IS THE CLIENT?”

Rule 1.13

Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Rule 1.13

Organization as Client

This is the entity theory of representation.

The lawyer works for the organization, along with the officers, directors, and employees, on the same “legal” level.

The lawyer must exercise independent judgment to determine what is in the best interest of the entity, even if others on that level disagree.

Rule 1.13. Organization as Client (cont.)

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . .

Rule 1.13. Organization as Client (cont.)

..... In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

Rule 1.13. Organization as Client (cont.)

.....

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

Rule 1.13. Organization as Client (cont.)

In simpler terms, Rule 1.13(b) instructs the lawyer how to proceed when the lawyer becomes aware of a violation of a legal obligation to the organization or a violation of law that might be imputed to the organization.

The lawyer must attempt to remedy the situation by taking reasonable measures in the organization's best interest.

Rule 1.13. Organization as Client (cont.)

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 1.13. Organization as Client (cont.)

(e) 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.

Applying this in the in-house counsel context can be challenging.

Others in the organization (senior management, board members) may view in-house counsel as their personal attorney.

To avoid a conflict and other problems (attorney-client privilege preservation), the in-house counsel must recognize when to advise those individuals to seek independent counsel.

SECOND HYPO

- Hakeem O'Lawyerwon graduated *summa cum laude* with a B.S. in Biology; took graduate-level health science courses; and graduated *magna cum laude* from Law School, where he served as Law Review Managing Editor.
- Hakeem O'Lawyerwon went on to work as an associate attorney at Premier Law Firm, and, as part of a team of attorneys, represented Rocket East Hospital.
- Raptor West Hospital contacts Premier about assigning one of its attorneys to serve as Raptor West's outside counsel for health litigation matters.
- Premier Law Firm and Hakeem O'Lawyerwon fail to disclose prior representation of Rocket East Hospital.

SECOND HYPO cont'd...

TWO YEARS LATER ...

- Raptor West Hospital's top doc, Dr. J., is named as a Defendant in a lawsuit.
- Raptor West Hospital is also named as a Defendant in the lawsuit, on claims of corporate negligence and vicarious negligence for the actions of Dr. J.
- Rocket East Hospital is also named as a Defendant in the lawsuit.
- Raptor West Hospital asks Hakeem O'Lawyerwon to represent Raptor West and Dr. J.

SECOND HYPO

- Does Hakeem O'Lawyerwon have a conflict?
 - May Hakeem O'Lawyerwon, Raptor West's hot shot new outside corporate counsel, undertake the requested representation in this litigation?

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.
- (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.

Rule 1.9. Duties to Former Clients (cont'd)

(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.

Duties to Former Clients (cont'd)

- The enduring duty to preserve client confidences precludes an attorney from later agreeing to represent an adversary of the former client unless the former client provides an informed written consent waiving the conflict.
- If the attorney fails to obtain such consent and undertakes to represent the adversary, the former client may disqualify the attorney by showing a substantial relationship between the subjects of the prior and the current representation.
- To determine whether there is a “substantial relationship” between successive representations, a court must first determine whether the attorney 1) had a direct professional relationship with the former client, in which the attorney personally provided legal advice and services 2) on a legal issue that is closely related to the legal issue in the present representation.

Duties to Former Clients (cont'd)

- If the former representation involved such a direct relationship with the client, the former client need not prove that the attorney possesses actual confidential information; instead, the attorney is presumed to possess confidential information.
- Defenses? Case law reflects tactics used, such as describing the lawyer at issue as a “junior associate” at the time of prior representation
 - Courts have found that even a *de minimis* level of involvement with a prior client/case is sufficient to presume the attorney acquired confidential information about that client/case.
 - *Pound v. DeMera DeMera Cameron*, 135 Cal. App. 4th 70 (2005) (finding that participation in a one-hour phone call about a case three years earlier was sufficient to presume that an attorney acquired confidential information.)

SECOND HYPO

- Hakeem O'Lawyerwon likely has a conflict; now what?
 - May Hakeem O'Lawyerwon represent Raptor West Hospital and Dr. J.?
 - May anyone at Premier Law Firm represent Raptor West Hospital?
 - May anyone at Premier Law Firm represent Rocket East Hospital?

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 the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10(b) or (c).

Rule 1.10. Imputation of Clients of Interest: General Rule (cont'd)

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

Rule 1.10. Imputation of Clients of Interest: General Rule (cont'd)

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

Rule 1.10. Imputation of Clients of Interest: General Rule (cont.)

- (d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.
- (e) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) of Rule 1.8 that applies to any one of them shall apply to all of them.
- (f) The disqualification of lawyers in a firm with former or current government lawyers is governed by Rule 1.11.
- (g) The disqualification of lawyers in a firm with a former judge, arbitrator, mediator or other third-party neutral is governed by Rule 1.12
- (h) Where a lawyer in a firm is disqualified from a matter due to consultation with a prospective client pursuant to Rule 1.18(b) and (c), disqualification of other lawyers in the same firm is governed by Rule 1.18(d).
- (i) The disqualification of a lawyer when another lawyer in the lawyer's firm is likely to be called as a witness is governed by Rule 3.7.

Imputation (cont'd)

- Hakeem O'Lawyerwon's conflict can be imputed to Premiere Law Firm for representation of Rocket East and Raptor West.
- Normally, an attorney's conflict is imputed to the law firm as a whole on the rationale that attorneys, working together and practicing law in a professional association, share each other's, and their clients', confidential information. *Advanced Messaging Techs., Inc. v. Easylink Servs. Int'l Corp.*, 913 F.Supp.2d 900 (U.S.D.C. Central District of CA, 2012); *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839 (2006); *Dynamic 3D Geosolutions LLC v. Schlumberger Ltd.*, 837 F.3d 1280 (U.S.C.A. Federal Circuit, 2016).

- General Rule: Presuming an attorney possesses confidential information requires presuming the same of his/her law firm (“the Vicarious Presumption Rule”) *People ex re. Dept. of Corporations v. SpeeDee Oil Change Sys., Inc.*, 20 Cal. 4th 1135 (1999).
- Courts typically do not analyze how much work a tainted attorney performed in the cases for which disqualification is sought. Under “the Vicarious Presumption Rule,” once an attorney is presumed to have confidential information, his firm is presumed to have it too.
- The presumption that a firm possesses confidential information is irrebutable and disqualification is compelled.

SECOND HYPO – 2nd Half

- Suppose Hakeem O'Lawyerwon obtains a conflict waiver from former client Rocket East, or court finds no “substantial relationship” between successive representations on basis that legal services previously provided are not closely related to legal issue in present representation.
- During the course of his representation, Dr. J. shares information with Hakeem that is helpful to his defense, but harmful to the defense of Raptor West.
- Hakeem O'Lawyerwon again has a conflict; now what?

SECOND HYPO – Overtime

- Years of protracted discovery go by with Hakeem O'Lawyerwon representing Dr. J. and conflict counsel representing Raptor West.
- The case is ripe for a status conference and, upon application for same, they receive an Order assigning to case to Judge Stockton.
- Judge Stockton is the father of Hakeem O'Lawyerwon's wife.
- Does Hakeem finally have a conflict forcing him out of representation?
 - Judicial recusal

- The importance of in-house counsel and outside counsel effectively communicating, cooperating and coordinating with themselves and with each other is paramount.

Rule 1.7

Rule 1.7. Conflict of Interest: Current Clients:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a 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 1.7. Conflict of Interest: Current Clients (cont'd).

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

THIRD HYPO

- Barry Bird is Associate General Counsel for Defense Corp.
- Defense hires an engineer from Hero Corp.
- Barry Bird drafts her new employment contract
- Hero hires Barry Bird as its Associate General Counsel
- Hero sues Defense for tortious interference in its contractual relations because the engineer had a noncompete.

Same Issues as Hypo #2

- Barry Bird would likely have a conflict of interest;
- That conflict can be imputed to whole in-house counsel, and even outside counsel (3D *Geosolutions, LLC v. Schlumberger Ltd.*)

When can you use a screen?

- **Rule 1.10. Imputation of Conflicts of Interest: General Rule**
- (b) [T]he firm may not knowingly represent a person in the same or a substantially related matter . . . unless:
 - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
 - (2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

Run the Conflict Check

- Maintain a database of clients, adverse parties, related contacts, and counsel (electronically will make your life easier);
- Inquire about potential conflicts via direct communication
- Who should be included on the conflict check?

When is screening effective?

- (1) the substantiality of the relationship between the attorney and the former client,
- (2) the time lapse between the matters in dispute,
- (3) the size of the firm and the number of disqualified attorneys,
- (4) the nature of the disqualified attorney's involvement and
- (5) the timing of the wall.

Dworkin v. General Motors Corporation, 906 F. Supp. 273 (E. D. Pa. 1995)

How to set an effective screen

- (1) the prohibition of discussion of sensitive matters,
- (2) restricted circulation of sensitive documents,
- (3) restricted access to files,
- (4) strong firm policy against breach, including sanctions, physical and/or geographical separation, to determine its effectiveness.

James v. Teleflex, Inc., 1999 U.S. Dist. LEXIS 1961 (E. D. Pa. 1999)(citing *Dworkin*, 906 F. Supp. at 280).

Questions???

Thank you for your time
and attention!