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ETHICAL DILEMMAS

ATTORNEYS MUST WEIGH POTENTIAL CONFLICTS OF INTEREST BEFORE TAKING ON A NEW CLIENT

By RACHEL SIFORD

The Code of Professional Responsibility is the holy grail of legal ethics, especially when dealing with conflicts of interest.

Attorneys often have conflicts of interest in the workplace, but it is always the attorney's responsibility to offer his client undivided loyalty.

"Any time a business, financial or personal interest has the potential to impair our judgment in representing a potential client, a conflict exists," Bernie Kennedy, co-managing member of the Garden City office of Bond, Schoeneck & King, said in an email.

Conflicts of interest can occur with existing clients. An attorney cannot, for instance, represent a client in one court and sue that client in another.

And an attorney cannot take on a new client if it might adversely affect a current client. Most lawyers do a "conflict search" before taking on a new client, which is a computer-based search that allows attorneys to see if any possible conflicts exist. The attorney does this by inputting all the parties in a case that may be adverse to the client, and then checking to see whether the firm has had any history with those adverse groups or individuals. If so, the attorney may not be able to take on the new client.

These conflict searches are particularly necessary in larger firms with multiple offices, because even if a lawyer did not represent an adverse party personally, someone else in the firm may have, which can also be reason for the attorney not to take the case.

Many facets to potential-client conflict of interests can halt an attorney from taking a case. Thomas McNamara, a partner at East Meadow-based Certilman Balin Adler & Hyman, gave an example of when one attorney in a firm meets with a potential client and learns confidences and secrets about him, and then that attorney is not retained. Then, a month later, the party the original prospect is suing calls a different attorney in the firm and asks for a consultation.

"The question presented is, 'Can you represent this client adverse to someone who consulted but did not become a client?'" McNamara said. "If it is two different attorneys in the same firm, it would be possible if you can build an ethical wall around the attorney who spoke in the first consultation."

Even if the attorney is not retained, the initial consultation is still protected under client-attorney privilege and using that information against the prospect would be forbidden. An ethical wall would ensure that the specific lawyer who knows those confidences will not have anything to do with the case.

When attorneys switch firms, they sometimes bring conflicts of interest with them, since they may have previously represented a client that their new firm is now suing.

"In this day and age, attorneys switch law firms a lot more frequently," said Omid Zareh, a partner at Weinberg Zareh & Geyerhahn in Manhattan. "New partners may bring a lot of conflicts of interest to a law firm if they are not careful."

Zareh was the former vice chair of the ethics committee at the Nassau County Bar Association and recently held a seminar on conflicts of interest in law.

Attorneys also have ethical duties to their former clients. Rule 1.9 of the Code of Professional Responsibility specifically lays out the duties attorneys have to their former clients. Attorneys are not to represent someone a former client sued in the same or a substantially related matter. This is to protect the previous clients' confidences revealed while the attorney was representing them.

"Now you have a new client that wants to sue a former client," McNamara said. "The rule is that you can sue the former client, as long as it's unrelated to the prior representation."

Zareh said that Code of Professional Responsibility extends beyond just current clients, because even if an attorney does not currently represent them, he still protects confidences of former clients.

"If it was a matter that was related, the attorney is presumed to have confidences and secrets of the client that the attorney could use against [him]," McNamara said. "In that circumstance, you would not be able to sue a former client."

Conflicts of interest also exist when the attorney has a personal issue with the client or the client's case.

"For example, if an attorney is asked to represent an individual in a matter that is adverse to a family member of one of her staff," Kennedy said, adding "even though the representation does not present a conflict in itself, because the adverse-interest situation might impair her judgment in handling the matter, a conflict exists."

Attorneys may have a personal ethical conflict with the nature of the case that may prevent them from giving the client their undivided loyalty.

"You are not allowed to represent that person if you have reason to believe that you might have personal differences," Zareh said. "A pro-choice person may want you to represent them; you might not be able to because you don't believe in that."

There are certain conflicts that can be waived. If the attorney believes that she can provide competent and unbiased representation, she may request consent from the parties in writing.

"On a legal basis, substantial conflict of interest could be the basis of a malpractice claim," said Thomas McGowan, a partner at Meltzer, Lippe, Goldstein & Breitstone in Mineola. "Or they could file a complaint with the agreements committee. You may find yourself having to respond to a complaint."

Attorneys must be aware of their ethical obligations to be free of any conflicts of interest in lawsuits.

"Failing to do so would be a violation of the New York Rules of Professional Misconduct, specifically Rule 1.7, subjecting an attorney to possible disciplinary violation, disqualification from representing a client and a potential claim based upon breach of fiduciary duty or malpractice," Kennedy said.

