Friday, March 4, 2016 / Volume 108 / Number 43

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Trials &TRIBULATIONS

# Conflicts of interest: Avoiding repercussions of violating professional conduct rules

As the New York Rules of Professional Conduct point out, "[l]oyalty and independent judgment are essential aspects of a lawyer's relationship with a client" ([22 NYCRR 1200.0] rule 1.7, Comment [1] [rev. May 2013]).

It is important to both the attorney and the client that the attorney provides competent representation without running afoul of his ethical obligations. Every lawyer knows (or should know), it is equally important to ensure that the opposing attorney has not gained some advantage as a result of some previous involvement or representation.

Failing to adhere to the rules regarding conflicts of interest can lead to disqualification and even prohibit an attorney from collecting attorneys' fees in connection with the matter. In this article, these repercussions are demonstrated by addressing two of the Rules of Professional Conduct, Rule 1.11 governing conflicts of interest involving former and current government officers and employees and Rule 1.7 governing conflicts of interest involving current clients, how these rules were violated, and how such violations can be avoided.

Under Rule 1.11, former government officers and employees are prohibited from representing a client in any matter in which they "personally and substantially" participated when in service with the government, unless the government waives the conflict in writing ([22 NYCRR 1200.0] rule 1.11[rev. May 2013]).

With respect to the potential adversary, the rule prohibits an attorney from representing a private client against an adversary about whom the attorney garnered "confidential government information" when working for the government, where that confidential information would create a "material disadvantage" for the adversary [Rule 1.11(c)].

By VICTORIA GLEASON
Daily Record Columnist

Additionally, Rule 1.11 provides that a lawyer presently serving as a current public officer or employee may not participate in any case in which he "personally and substantially" participated prior to employment with the government, unless there is no one else authorized to represent the client ([22 NYCRR 1200.0] rule 1.11(d)(1)[rev. May 2013]). Failing to adhere to Rule 1.11, as with many of the conflict of interest rules, can lead to disqualification of an attorney, as demonstrated in the recent case of *Adelle Goodwine v. City of New York*, 2016 WL 379761 (SDNY 2016).

In *Goodwine*, both sides moved to disqualify counsel on different grounds, although only defendant's motion was made on conflict of interest grounds. Plaintiff Adelle Goodwine ("Goodwine") had worked at the New York City Department of Information Technology & Telecommunications ("DoITT") and brought claims against DoITT and others for employment discrimination. Plaintiff moved to substitute Attorney Hagan ("Hagan") as her counsel. Defendant then moved to disqualify Hagan because she had formerly worked as DoITT's Director of Equal Opportunity Employment.

The Court analyzed the propriety of Hagan's representation under Rule 1.11 and determined that disqualification was mandated. In reaching its decision to disqualify Hagan, the Court found that Hagan had "personally and substantially" participated in addressing plaintiff's complaints on DoITT's behalf after reviewing a notebook maintained by Hagan while employed by DoITT. There were several references to Goodwine in the notebook regarding discrimination lawsuits she and others had filed against DoITT. Most significantly, there was a notation stating "Find out about Adele Goodwine," made in connection with a meeting Hagan attended with the Commissioner of DoITT.

> "Failing to adhere to the rules regarding conflicts of interest can lead to disqualification and even prohibit an attorney from collecting attorneys' fees in connection with the matter.

The Court found that this notation particularly demonstrated Hagan's substantial participation, despite the fact that there was no indication whether Hagan did, in fact, make any efforts to learn about Goodwine.

In a situation such as the one presented in *Goodwine*, even if Hagan did have a disqualifying conflict under Rule 1.11(a), the Rules of Professional Conduct provide a mechanism through which the firm

*Continued on next page*

*Continued from previous page*

employing Hagan could possibly still represent the client – by creating a firewall. This entails effectively isolating the disqualified attorney from any involvement in the case.

To do this, the firm must act "promptly and reasonably" to notify all employees working on the matter that the disqualified attorney is prohibited from participating in the case; ensure that the disqualified attorney does not have access to any information regarding the case by implementing a screening procedure; ensure that the disqualified attorney does not receive any fees in connection with the case; and provide written notice to the government agency in which the disqualified attorney previously worked ([22 NYCRR 1200.0] rule 1.11(b)(1)[rev. May 2013]). Even if the firm can effectively screen off the disqualified attorney, however, it is still not permitted to represent the client if doing so would "create the appearance of impropriety." ([22 NYCRR 1200.0] rule 1.11(b)(2)[rev. May 2013]).

Not only can a conflict of interest lead to disqualification – it can also prevent an attorney from collecting fees. Courts have held that an attorney who violates his ethical obligations, including continuing representation in the face of a conflict of interest, can forfeit his right to any fees earned in connection with that representation. Such was the situation in the recent case of *Shelby v. Blakes*, 129 AD3d 823 (2d Dep't 2015), in which a firm violated Rule 1.7 by representing both the driver and passenger who were involved in a rear-end collision.

Rule 1.7 prohibits an attorney from representing a client if a "reasonable lawyer would conclude" that a conflict exists with another current client such that he would be representing differing interests, or if there is a "significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected" by the attorney's own interests ([22 NYCRR 1200.0] rule 1.7(a)[rev. May 2013]).

The obvious prohibition is where an attorney seeks to represent clients on both sides of a conflict – as he would certainly be incapable of providing his independent, unbiased services to each client.

In *Shelby*, the driver and his passenger were stopped at an intersection waiting to make a turn when defendant rear-ended their car. The driver and passenger retained the same law firm and commenced a lawsuit against defendant. Defendant served her answer, which included a counterclaim for liability against the driver. The counterclaim was later withdrawn after the defendant conceded liability in return for plaintiffs' offer to cap damages. About a year after defendant answered the complaint, the passenger changed attorneys and the original law firm asserted a lien for attorneys' fees on any amount the passenger recovered.

However, the passenger's new law firm then moved to disqualify the original law firm from receiving any portion of attorneys' fees on the grounds that the passenger was never told about defendant's counterclaim or the potential conflict of interest that existed in the firm's representation of both the driver and the passenger once the counterclaim was asserted. The original law firm did not believe it had a conflict of interest because it concluded that the counterclaim was frivolous since the accident involved a rear-end collision such that the driver of the car that was hit could not have any liability.

The Second Department, in reversing the lower court's holding, found that, based upon Rule 1.7(a), when the defendant asserted a counterclaim, the original firm had a conflict of interest in representing both the driver and the passenger because the driver and passenger now had differing pecuniary interests. As a result, the Second Department held that the original firm was not entitled to attorneys' fees, despite the fact that it had entered into a retainer agreement with the passenger's new firm, in which it was agreed that the original firm would receive 65% of any recoverable attorneys' fees.

The forfeiture of attorneys' fees in *Shelby* could have possibly been avoided if, once a conflict arose: the original law firm reasonably believed that it could represent both the driver and passenger competently and diligently; such representation was permitted by law; the firm was not attempting to represent two clients on opposite sides of the same case; and the firm obtained written consent from the impacted clients ([22 NYCRR 1200.0] rule 1.7(b)[rev. May 2013]).

Clearly, these steps were not taken in *Shelby*. Alternatively, once a conflict arose, the law firm could have declined to continue representation of the driver, passenger or both.

As can be seen from the two cases above, failing to properly assess or address a conflict of interest can have serious repercussions. Sometimes the existence of a conflict will be self-evident. Other times, it may be challenging to determine one way or another whether a conflict bars representation. If, after considering all of the applicable Rules of Professional Conduct, an attorney is still unsure as to whether a conflict exists, he may be able to seek guidance from the local bar association.

For example, in Rochester, the Ethics Committee of the Monroe County Bar Association fields questions regarding potential conflicts of interest and provides advisory opinions to attorneys. This is a very powerful tool, as the Committee is comprised of local attorneys who are familiar with the ethical rules and are able to neutrally analyze and discuss the situation. If an attorney does not have this tool at his fingertips and he is still unsure if an ethical boundary will be crossed by accepting the representation, the safest rule of thumb is to refer that client to another attorney.

*Victoria S. Gleason is an associate at The Wolford Law Firm LLP, where she practices in the areas of commercial and employment litigation.*