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# Conflicts of Interest

## The Rules of Professional Conduct

by Ralph A. DeMeo and William D. Anderson

**T**he Florida Bar serves as an official arm of the Supreme Court of Florida.<sup>1</sup> In this capacity, the Bar is charged with the duty of administering the standards of professional responsibility applicable to the practice of law in the State of Florida. These standards, approved and adopted by the Supreme Court of Florida, are set forth in the Rules Regulating The Florida Bar.<sup>2</sup> Thus, Florida attorneys with specific questions relating to ethical dilemmas should in the first instance refer to the published canons of ethics governing attorney conduct in Florida.

At the present time, many of the requests for advisory opinions received by ethics counsel for The Florida Bar deal with issues related to perceived conflicts of interest, the focus of this article. The following is an analysis of the most frequent problems which confront attorneys relating to conflicts, as determined by the number of inquiries received by Bar headquarters.

### Frequent Ethical Issues Relating to Conflicts

Ch. 4 of the Rules Regulating The Florida Bar establishes the Rules of Professional Conduct, which set forth the ethical standards governing attorney behavior for members of The Florida Bar. Although the Florida rules are similar to those found in the American Bar Association Model Rules of Professional Conduct, and the earlier ABA Model Code, differences exist in both the text and the substance of the various sets of rules. Many of these differences are apparent in the rules relating to conflicts of interest in the relationship between an attorney and his clients or between an attorney and his employers. Thus, it is important that Florida attorneys understand the scope and significance of Florida's rules governing such conflicts in order to avoid improper behavior and the possibility of disqualification or disciplinary proceedings. A review of the relevant Florida rules, decisions of the various Florida courts, and opinions of the Professional Ethics Committee of The Florida Bar is, therefore, in order.

#### • *Representing Persons Adverse to Former Clients*

Rule 4-1.9 establishes the general framework by which Florida attorneys must safeguard the interests of former clients.<sup>3</sup> The text of that rule provides that:

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) 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 consents after consultation; or
- (b) Use information relating to the representation to the disadvantage of the former client except as Rule 4-1.6 would permit with respect to a client or when the information has become generally known.

Substantively, this rule imposes upon lawyers a duty of loyalty and prohibits the use of confidential information to the disadvantage of a former client. In practice, however, many attorneys misunderstand the nature of the ethical obligations owed to former clients, often due to confusion over the precise definition of the language set forth in the rule.

Rule 4-1.9(a) prohibits an attorney from representing another person in the same

or a substantially-related "matter" where the new client's interests are "materially adverse" to a former client, unless the former client consents after consultation. Thus, the rule presents two distinct interpretational dilemmas for the practitioner: Determining what constitutes the same or a substantially-related matter, and recognizing interests that are materially adverse. The comment accompanying the rule states that with regard to the same matter, "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests is clearly prohibited" (emphasis added). Less clearly defined, however, is the concept of a "substantially related" matter that creates a conflict within the meaning of Rule 4-1.9.

Some helpful guidance on this issue is provided by the decision in *Junger Utility & Paving Co. v. Myers*, \_\_\_ So.2d \_\_\_, 14 FLW 2650, (Fla. 1st DCA 1989).<sup>4</sup> In that case, one of Junger's vehicles was involved in an accident with the plaintiffs, who subsequently obtained the Dewrell firm to represent them in a negligence action. The Dewrell firm, however, also represented Junger on several other matters at the time of the accident, and the evidence showed that "Junger sought and obtained the advice of his attorney at the Dewrell firm the day after the accident regarding how to handle investigators attempting to view the company truck involved in the accident." Thereafter, the Dewrell firm continued to represent Junger on unrelated matters, and indicated a desire to represent the plaintiffs in the litigation arising from the accident. This relationship was resisted by Junger.

When Junger discovered that the Dewrell firm was representing the plaintiffs, it filed a motion to disqualify counsel. Citing the former client provisions of Rule 4-1.9, the court concluded that counsel should have been disqualified by the trial judge.<sup>5</sup> "To disqualify a private law firm from representing a party whose interests are adverse, the former client need show only that an attorney-client relationship existed, thereby giving rise to the irrefutable presumption that confidences were disclosed during the course of that relationship . . ." 14 FLW at 2650 (emphasis added). Thus, once the Dewrell firm provided its client with any advice, however limited in scope, regarding the accident that was the focus of the litigation, it was ethically forbidden from representing any other party in the

## *The general rule has been broadly construed to limit the simultaneous representation of husbands and wives*

litigation.

With regard to the second interpretational problem posed by the former client rules, the principles embodied in Rule 4-1.7 determine whether the interests of the present and former client are "materially adverse" for purposes of Rule 4-1.9.<sup>6</sup> In *Brent v. Smathers*, 529 So.2d 1267, 1269 (Fla. 3d DCA 1988), the court disqualified an entire law firm in a case where "the material adverse interest is all too obvious." In *Brent*, the law firm of Smathers and Thompson had previously represented both Brent and Smathers (a member of the firm) in their capacity as personal representatives of an estate and cotrustees of a trust. Later, Brent sued Smathers and McKenzie in an action alleging breach of fiduciary duty in the administration of the same trust and estate. Defendant Smathers sought to have his own firm represent him in the lawsuit, despite the fact of the prior representation of Brent as a cotrustee. In disqualifying the firm, the court held that "there is clearly an appearance of impropriety—in the form of an undermining of the loyalty and trust upon which an attorney-client relationship is based." *Brent* at 1270. When faced with situations where the material adversity of interests is less obvious than in the *Brent* case, Florida lawyers should be governed by this "appearance of impropriety" standard absent the consent of the former client.

### • *Representing Husbands and Wives*

Interestingly, the Florida rules contain no language that specifically prohibits an attorney from engaging in the simultaneous representation of a husband and wife in matters of family law, probate law,<sup>7</sup> or in business dealings. This silence, how-

ever, should not be interpreted as an outright approval of such engagements by Florida attorneys. Rule 4-1.7, the general rule governing conflicts of interest, has been broadly construed by the Ethics Committee of The Florida Bar to limit the simultaneous representation of husbands and wives.

As long ago as 1971, the Professional Ethics Committee of The Florida Bar rendered Opinion 71-45 (Reconsidered) stating that Florida's "no-fault" divorce laws did not permit an attorney to represent both parties to an action for dissolution of marriage. The committee reasoned that even in a no-fault divorce the potential for conflict of interest between the parties precluded effective representation by a single attorney. Further, in 1979 the committee determined that an attorney could not ethically prepare a settlement agreement for both parties to a divorce and then represent one of the parties in obtaining the dissolution. See Professional Ethics of The Florida Bar, Opinion 79-7. Each of these decisions was rendered in accordance with the dictates of the old Code of Professional Responsibility.

On October 15, 1986, the committee noted that the Rules of Professional Conduct would soon become operative in Florida, and rendered the most recent opinion governing the simultaneous representation of spouses in dissolution proceedings. Opinion 86-8 stated that:

A lawyer may act as a mediator between the two parties to a divorce and may prepare a settlement agreement reflecting the decisions made during mediation as long as the lawyer adheres to certain precautions and standards. A lawyer who acts as a mediator may not thereafter represent either of the parties in securing the dissolution of marriage or in any other matter related to the mediation. (Emphasis added.)

Thus, despite the lack of any specific language in the Florida rules regarding the simultaneous representation of parties to a dissolution, that practice is strictly forbidden in even the simplest of matters.<sup>8</sup>

### • *Attorneys Moving Between Firms*

*Moves Within the Private Sector*—The Florida rules governing imputed disqualification of attorneys exist to protect the duty of loyalty that lawyers owe to their clients. As such, Rule 4-1.10 sets forth the general rules governing the imputed disqualification of attorneys working in private firms.<sup>9</sup> "For purposes of the Rules of Professional Conduct, the term 'firm' includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services

organization."<sup>10</sup> Thus, in effect the provisions of Rule 4-1.10 treat a firm of lawyers as essentially one attorney for purposes of maintaining the duty of loyalty owed to clients.<sup>11</sup>

In certain circumstances, two or more lawyers can constitute a "firm" for purposes of Rule 4-1.10 even though the lawyers have no formal partnership agreement. The lawyers do not constitute a firm merely by virtue of sharing office space or occasionally assisting each other. However, if the lawyers project the public impression of being a firm or conduct themselves as a firm, then they must abide by the guidelines imposed by Rule 4-1.10. Rules Regulating The Florida Bar, Rule 4-1.10, Comment. In an opinion rendered under the old Code of Professional Responsibility, the Ethics Committee advised an attorney who rented an office from another attorney and occasionally performed legal research and other services on an hourly basis for the other attorney that the two could not serve as opposing counsel. See Professional Ethics of The Florida Bar, Opinion 77-3.

Traditionally, a per se rule of disqualification was imposed upon an entire firm. Under this approach, one partner in a law

firm is conclusively presumed to have access to all confidences of all firm clients. Thus, when the lawyer moved to a new firm, the second firm was also presumed to have knowledge of the same confidences. The old Code of Professional Responsibility at Canon 9 dealt with imputed or vicarious disqualification by proscribing "even the appearance of professional impropriety." But this nebulous approach provided little guidance as to the definition of impropriety and hinged disqualification upon the subjective judgment of a former client.

Rule 4-1.10 modifies these blanket prohibitions and limits imputed disqualification to the conflict situations addressed in Rules 4-1.7 (general rule on conflict of interest); 4-1.8(c) (preparing an instrument giving the lawyer or his relative any substantial gift from a client); 4-1.9 (conflict of interest relating to former client); or 4-2.2 (lawyer as intermediary). Rules Regulating The Florida Bar, Rule 1.10(a).

Paragraph (a) applies to lawyers who are currently associated in a firm. The more complicated problems involving lawyers moving from one firm to another are addressed by paragraphs (b) and (c). Under paragraph (b), when a lawyer joins a

firm the imputed disqualification of the firm is contingent upon the lawyer's actual possession of client knowledge protected by Rules 4-1.6 and 4-1.9(b).

In such conflict situations, some jurisdictions permit a disqualified lawyer to be isolated from the other lawyers in the firm in order to avoid disqualification of the firm. Such a screening procedure, commonly known as a "Chinese Wall," was disallowed by the Fifth District Court of Appeal in *Edward J. DeBartolo Corp. v. Petrin*, 516 So.2d 6 (Fla. 5th DCA 1987). An associate of the firm which represented DeBartolo resigned and became a partner in the firm representing Petrin. The record also conclusively showed that the attorney was privy to confidential communications regarding DeBartolo's strategy in the pending suit. In rejecting the Chinese Wall as a defense against disqualification when a private attorney joins another private firm, the court strictly interpreted Rule 4-1.10(b) as turning solely on the possession of confidential client information. *Id.* at 7.

Paragraph (c) permits the firm to represent a client whose interests are materially adverse to those of a client represented by a lawyer formerly associated with the firm if two conditions are met: 1) The matter



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