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OPINION

Attorney conflicts of interest: recent decisions and lessons

By Thomas E. Peisch

Although most Massachusetts lawyers are familiar with the basic conflicts of interest principles, applying them to actual cases can be tricky and difficult.

Two recent decisions — one by the Board of Bar Overseers and another by a U.S. magistrate judge — make crystal clear that the penalties for misunderstanding or ignoring the conflicts rules can be high and include reputational damage and harm to a lawyer's business.

Conflicts of interest basics

The conflicts of interest provisions are codified in Rules 1.7-1.10 of the Massachusetts Rules of Professional Conduct. See SJC Rule 3:07.

The duty imposed on lawyers to avoid conflicts of interest is rooted in the proposition that lawyers owe fiduciary duties to their clients and former clients in every circumstance. See *Hendrickson v. Sears*, 365 Mass. 83, 91 (1974) ("The relation of attorney and client is highly fiduciary in its nature").

Included in the basics are the following:

- A lawyer may not represent a client if that client's interests are directly adverse to another client's interests. Rule 1.7(a)
- A lawyer may not represent a client if the lawyer's work is "materially limited" by the representation of another client or by the lawyer's own interests. Rule 1.7(b)
- Strict limits exist as to a lawyer's ability to enter into business transactions with a client and otherwise to deal with a client. Rule 1.8
- A lawyer may not represent a client in a matter adverse to a former client if the subject of both matters is "the same or ... substantially related." Rule 1.9(b)
- The proscriptions and limitations set forth above apply to a lawyer associated with other attorneys in a firm, even if the lawyer was not involved in the past representation or is not involved in the current one. Rule 1.10

The notion of "imputed" disqualification set forth in Rule 1.10 is perhaps the most troublesome and least-understood of the conflicts of interest provisions as will be shown below.

In enforcing the rule, courts have grappled with phrases like "substantially related" and "interests that are materially adverse" and "neither substantial involvement nor substantial material information" — all which are fact-intensive inquiries regarding the nature of an attorney's work and the information gleaned from it. See *U.S. Filter Corp. v. Ionics, Inc.*, 189 F.R.D. 26, 30 (D. Mass. 1999) (commenting "[t]hese are phrases that require a decision-maker to make an evaluative rather than bright-line determination [and] an exercise of discretion leading to a single choice after taking into account an array of factors").

At all times, the courts attempt to balance a client's right to counsel of his or her choice with the public's right to the legal profession's highest ethical standards. *Mailer v. Mailer*, 390 Mass. 371, 373 (1983) (no disqualification of husband's divorce lawyer where wife consulted, but did not retain, lawyer five years earlier).

Recent decisions

A close examination of the two decisions mentioned at the outset may be helpful in demonstrating how these inquiries have been undertaken in the context of different practice environments.

In the first situation, a litigation lawyer and an employment law colleague in one of the nation's largest law firms ("mega-firm") were asked to represent a corporation in an unfair competition lawsuit brought by a competitor. See Admonition No. 08-11, 24 Mass. Att'y Discipline Rep. 860 (2008).

The competitor alleged that the corporation had hired away a number of the competitor's employees who, in turn, had violated certain contractual and common-law confidentiality obligations.

Unfortunately for mega-firm, another of its partners had earlier given estate planning and employment law advice to the competitor's then-owners. At the time of the advice, mega-firm's trusts and estate counsel had neglected properly to record all the

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names of mega-firm's clients into its conflict-detection system.

After the litigation began, the competitor confronted mega-firm with the conflict. Remarkably, mega-firm's ethics advisor took the position that no conflict existed, since mega-firm's estate planning lawyer had given no advice on the employment law issues and had acquired no confidential information regarding the matters in dispute.

Those arguments were strong enough to convince the judge hearing the unfair competition case to refuse to disqualify mega-firm.

The BBO disagreed, and in a hard-hitting board memorandum held that mega-firm's litigation and employment law partners had violated Rules 1.7 and 1.10(a) in its representation of the corporation.

The BBO ordered that the litigation and employment law partners at mega-firm each receive admonitions for their conduct, since the Rules of Professional Conduct do not appear to authorize sanctions against law firms.

The BBO was particularly critical of mega-firm's conflicts-detection system and of mega-firm's stubborn refusal to acknowledge the troubling position it found itself in when the conflict was discovered.

The two sanctioned lawyers took no appeal of the BBO's action to the Supreme Judicial Court. See SJC Rule 4:01, § 8(6).

While mega-firm may have escaped sanctions, and while its identity remains anonymous, two of its partners now have records of discipline that will stay with them for eight years. See *id.* at §8(2)(d).

In the second situation under consideration here, Employee Law Boutique was prosecuting a class-action lawsuit against an employer for alleged violation of the federal wage and hour laws. See *O'Donnell v. Robert Half Legal Int'l, Inc.*, 641 F. Supp. 2d (D. Mass. 2009).

While the case was pending, Employee Law Boutique hired an associate who had been employed and laid off by the law firm that was defending the employer in the case. Although warned that the employer might object, Employee Law Boutique persisted with the hiring of the associate and took the position that no conflict existed.

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U.S. Magistrate Judge Robert B. Collings disagreed and ordered Employee Law Boutique disqualified from the case on the eve of trial. Collings' reasoning was uncomplicated and straightforward and focused on the provisions of Rule 1.10(d), which address situations when law firms hire lawyers who previously have worked for adversaries.

The judge ruled that although the associate had billed a small amount of time to the defense of the employer, it did not amount to "substantial" involvement in the case. However, he held that the associate *had* received "substantial material information" regarding the case by attending intra-firm meetings and by assisting one of the partners in writing an article for Massachusetts Lawyers Weekly on one issue presented by the case.

The judge concluded by challenging Employee Law Boutique on the "enormous risk" it had taken in hiring the associate at the outset.

As a result of the ruling, the plaintiff class was forced to engage new counsel several years into the dispute on the eve of trial, with all of the extra expense and delay that resulted.

As far as the public record reveals, the BBO has not taken any disciplinary action against the Employee Law Boutique as a result of these events. It is difficult to make a significant distinction between the two situations.

What is the average practitioner to take from these two unhappy cases? First and foremost, the disciplinary rules as to conflicts of interest are real and will be enforced against lawyers and law firms of all sizes and shapes. As the preamble to the disciplinary rules points out, "[v]irtually all difficult ethical problems arise from conflicts ... ." See SJC Rule 3:07, Preamble.

Second, every law firm, from a single-lawyer office to an operation the size of mega-firm, must have a sophisticated conflicts-detection system.

Third, such a system must be used in every matter, even ones that do not result in a formal retention.

Finally, all Massachusetts lawyers must use common sense in dealing with any conflict of interest situation. In the two instances discussed here, had the involved lawyers been more sensitive in their approach to the concerns raised, the significant unpleasantness discussed in both cases might well have been avoided. MLW