

FEBRUARY 2003 PROFESSIONAL RESPONSIBILITY QUESTION

In 1995, Lawyer was hired by the City ("City") as a Deputy City Attorney to handle litigation, bond issues, and zoning matters. In 1998, she was assigned by the City Attorney to perform the preliminary research on the feasibility of a new land-use ordinance. Subsequently, the City Attorney retained outside counsel to draft the ordinance, which established new zoning districts and created a wetlands preservation zone restricting development in designated areas.

In 2000, Lawyer resigned from the City Attorney's office and became employed as an associate attorney in W & Z, a private law firm. In 2002, W & Z was retained by Developer to represent it in connection with a condominium project in City, and Lawyer was assigned to the matter. Developer's project was within the wetlands preservation zone, and City had denied Developer a permit for construction of the project on the basis that the newly enacted ordinance would not allow it to be built as planned. Developer requested that Lawyer file a lawsuit challenging the validity of the wetlands provision of the ordinance as applied to its project.

Association, an organization of City landowners, independently approached Lawyer and requested that she file a lawsuit on its behalf challenging the validity of the wetlands provision of the ordinance. Developer encouraged Lawyer to represent Association, since a lawsuit by Association would put pressure on City to reach a compromise concerning Developer's project. Developer told Lawyer it would pay half of Association's legal fees.

What ethical issues confront Lawyer and W & Z? Discuss.

Answer A to Question 4

1. LAWYER'S DUTY OF LOYALTY/CONFIDENTIALITY TO FORMER CLIENTS

Lawyer ("L") was retained by City as a Deputy City Attorney for 5 years. L thus owes a duty of confidentiality to City as his [sic] former client. The duty of confidentiality means that L may not use or disclose any confidential information obtained through the representation of City in any matter. The duty of confidentiality is broader than [sic] the attorney client privilege because it covers communications from any source, and it is imposed regardless of whether the attorney is being compelled to testify.

Here L has resigned his [sic] position with City, but he [sic] is now employed by W & Z. He [sic] may not represent clients for W & Z in a manner that uses information obtained through his [sic] representation of City. Therefore by being assigned to Developer's case L should consider whether his [sic] duty of confidentiality to City is implicated.

The duty of confidentiality is designed to foster the full, open and candid communication of clients with their attorneys. If L violates this duty owed to his [sic] former client City, he [sic] will be subject to discipline.

2. W & Z'S DUTY OF CONFIDENTIALITY TO L'S FORMER CLIENT -- IMPUTED DISQUALIFICATION

Here the issue of confidentiality arises again because if one lawyer employed by a firm is unable to take on the representation because of a conflict of interest or confidentiality problem with a former client, the disqualification is imputed to the entire firm and no lawyer in the firm may take on the representation.

Here however, L's former client is a government employer. Because the government has a strong interest in employing qualified attorneys, special rules have been created to allow firms to represent clients against the government even if one of the attorneys in the private firm formerly represented the government.

If a lawyer is employed by a firm and has confidential information regarding a government matter obtained through previous representation of the government, the firm may properly represent another client against the government if:

1. The lawyer who previously represented the government is completely screened from handling any portion of the representation against the government;

2. The lawyer who previously represented the government shares in NO PART of the fees produced from the representation of a client against the former government client; and
3. The firm notifies the government of the possible conflict of interest so that the government can ensure that proper preventative measures are taken.

Therefore, if [sic] W & Z may properly represent developer if L is properly screened off of the case. Here, however, L has actually been assigned to the case of Developer against the City. Therefore the proper screening techniques have not been used. This will be improper for both L and W & Z if L formerly represented the City on a “matter” concerning Developer’s case.

Does Developer’s case involve a “matter” on which L formerly represented the City?

Although L formerly represented City, if L has no confidential information regarding the current pending representation against City, neither L nor W & Z would be disqualified. L will be deemed to have confidential information if L represented City on the same “matter” the current representation now involved.

Unlike the prosecution of a criminal, the drafting of regulations, ordinances or codes will not be considered a matter that would disqualify L from representing a private sector client against City. Part of L’s duties were litigation though, so it is possible he [sic] could be deemed disqualified. Moreover, the private sector client is directly asserting a direct claim attacking the validity of the rules, precisely the work that L was performing for City. However L performed only preliminary research on the feasibility of the proposed ordinance; the actual drafting was performed by outside counsel. Therefore, even if this was considered a matter for which L could be disqualified, a strong argument exists that L probably did not obtain any confidential information.

Therefore L probably is not disqualified, but L must encourage W & Z to notify the government regarding the proposed representation to see whether City has any objection to L’s participation in the case. If City does not object (L and W & Z should get consent in writing) then L may represent Developer so long as he [sic] does not use any confidential information obtained from City. If City does object, then L must be completely screened from the case, and take no part in the representation, and must receive no portion of the fees paid by Developer.

3. L'S DUTY OF LOYALTY TO CURRENT CLIENTS - - MAY L REPRESENT ASSOCIATION?

If it is proper for L to represent Developer ("D"), then L owes D a duty of zealous loyalty. This loyalty may not be compromised by an [sic] conflict of interest that L might have personally, economically or professionally. No lawyer may represent a client in any matter that is directly adverse to the interests of another current client.

Here Association ("A") has asked L to represent it in a suit challenging the validity of City's ordinance (all of the above discussion regarding loyalty and confidentiality to former clients applies to A). L is presumably already representing D in a suit regarding City's ordinance. Therefore A's proposed representation falls precisely within a matter that involves the subject matter of a current client.

Dual representation, or representation of two clients involving the same or similar subject matter may be permissible if:

- I. The lawyer subjectively reasonably believes that the representation of both clients may be undertaken without compromising his professional judgment or threatening his zealous representation of either client;
- II. Objectively, a reasonable uninvolved lawyer would agreed [sic] that the representation of both clients may be undertaken without compromising professional judgment or threatening zealous representation of either client; and
- III. Both the current and future client consent after full disclosure and consultation of the possible conflict of interest. In California the consent must be obtained in writing.

Here L may subjectively believe that it is reasonable to represent both clients. Both D and A are challenging the validity of City's ordinance. Therefore the goals appear to be the same. As noted by Developer, A's suit may actually pressure City into settling his claim early. However, L must be extremely careful, because it is very, very likely that a conflict that does not currently exist may arise later in the representation. If the City wants to grant a special use exception or a variance to D, in order to make his suit go away, but leaving the ordinance intact, then D and A's interests are materially adverse and dual representation is improper.

An objective uninterested lawyer may agree dual representation is proper, depending

on D and A's final goals. It is likely that a third party lawyer would disagree.

Therefore L must fully advise D and A of the possible conflict, especially the likelihood of a waiver, variance or special use exception for D. If both clients consent (in writing in CA) after full consultation, and both the objective and subjective tests are satisfied, then L may undertake the representation. However it appears in this case that such representation would be inappropriate.

4. DUTY OF CONFIDENTIALITY TO CURRENT CLIENTS

In addition to the duty of loyalty implication discussed above, dual representation presents a confidentiality issue because L will necessarily obtain confidential information from both D and A if he [sic] undertakes dual representation. Therefore in the event that an actual conflict of interest arises later in the representation, then it would be improper for L to continue representing either D or A, because he [sic] has obtained confidential information that could potentially be used against the former client. Therefore the only proper remedy would be to withdraw, and it could possibly present substantial prejudice to withdraw late in the representation.

W & X are also prevented from continuing the representation of either D or A if L would be, because of the imputed disqualification rules. There is no screening procedure available for representation of current private sector clients with actual conflicts of interest.

The fact that L was approached by A independent of his [sic] employment with W & X will not allow W & X to represent D. L's employment with W & X prevents either L or W & X from representing D and A if the interests are adverse.

5. DUTY OF LOYALTY AND INDEPENDENT PROFESSIONAL JUDGMENT

Payment of a client's legal fees by a third party is proper only where the payment is consented to by the client, where the lawyer reasonably believes that the payment by a third party will not affect his independent, professional judgment, and so long as no confidential information is disclosed to the third party paying the fee.

Here D has offered to pay half of A's legal fees. L may only allow this arrangement if A consents, and if L reasonably believes that his decisions will be completely unaffected by D's payment. L must zealously, competently and single mindedly represent A if he takes on the representation. L must not make decisions on A's behalf, while considering the fact that L is paying part of the fee. Moreover L must not disclose any of A's

confidential information to D even though D is paying part of the fee.

Here, because of the possibility of an actual conflict between D and A, D's payment of A's fees is probably inappropriate.

Answer B to Question 4

Ethical Issues Confronting Lawyer and W & Z

The ethical issues that confront both Lawyer and her firm W & Z arise as a result of Lawyer's past employment with City and a possible conflict between clients. Because Lawyer is a member of W & Z, any conflicts that she may have are imputed to the firm. The ethical issues that arise, and the steps that Lawyer and W&Z can take to avoid them, are discussed below.

A. Lawyer for the Government Now in Private Practice

The Model Rules provide that a lawyer who has worked personally and substantially on a matter while working for the government shall not represent that matter in private practice. The issue, therefore, is whether Lawyer worked personally and substantially on a matter involving City's ordinance respecting the wetlands preservation zone.

It does not appear that Lawyer worked personally and substantially on the wetlands preservation zone ordinance. The facts provide that the city attorney merely asked Lawyer to do the preliminary research for the project, and that outside counsel actually drafted the ordinance. Conducting this preliminary research would probably not qualify as "personal and substantial" involvement.

Furthermore, the drafting of the wetlands ordinance does not qualify as a "matter" under the Model Rules. A "matter" involves an actual dispute between parties. Drafting an ordinance is not a "matter" because it does not involve a dispute between ascertainable parties.

Thus, because Lawyer did not work personally or substantially on any "matter" and [sic] there is no conflict between her employment with the City and her representation of Developer or Association's matters challenging the ordinance.

Duties of W & Z if there is a Conflict

Even assuming there is a conflict under the Model Rules between Lawyer's representation of Developer & Association challenging the ordinance and her employment with City, W & Z may still take on the representation if Lawyer is not the individual representing the parties.

Conflicts of an attorney in a firm are imputed to the entire firm. However, if an attorney

in a firm worked personally and substantially on a matter while employed with the government, the firm may take steps to prevent the conflict from becoming imputed to all other attorney[s].

The Model Rules provide that a firm in this situation can prevent imputation by screening the ex-government attorney from the matter, not sharing any fees from the matter with that attorney and notifying the government employee. If W & Z thus screens Lawyer from its representation of Developer, did not share fees with lawyer and notified City, they could represent Developer even assuming there was a conflict. However, because Association approached Lawyer personally and not W & Z, Lawyer may not be able to represent Association if there is a conflict.

However, because as explained above there should be no conflict between Lawyer's representation of Developer & Association and her work on the zoning ordinance for City, W & Z should be able to keep lawyer on the case.

Conflict Between Developer & Association

If an attorney's representation of a client may interfere with her representation of a present or former client, a potential conflict of interest is presented and the attorney must take appropriate measures to avoid such conflict.

Association approached Lawyer and asked her to represent them in a matter that would involve similar issues as her representation of Developer. Although both Association and Developer are seeking the same result — a declaration that the ordinance is invalid — potential conflicts may still arise. For example, Lawyer may learn information during her representation of Developer that may be pertinent to her representation of Association. However, an attorney's duty of confidentiality to her client would prevent attorney from disclosing such information during her representation of Association. Because an attorney also has a duty of loyalty to her client to always represent her client's best interests, her inability to use this confidential information could create a potential conflict with her duty of loyalty to her other client.

Lawyer may still represent both Association and Developer if she obtains proper consent. Developer has already expressed its interest in having Lawyer represent both it and Association. However, Lawyer should still explain the potential conflicts to Developer and Association. If Lawyer reasonably believes that she can represent both Association and Developer adequately discloses all potential conflicts to both Developer and Association and obtains their consent, she should be able to represent both clients

under the Model Rules. The consent of the clients must also be reasonable, meaning that a reasonable attorney would advise the client of consent. Here, because Developer and Association's interests are not in conflict, consent should be reasonable. Furthermore, the California Rules require that consent be in writing.

Thus, if Lawyer obtains the written consent of both Association and Developer to represent them both on a similar matter, the Model Rules and California Rules would permit such representation.

Payment of Fees By a Third Party

An attorney's duty is to her client and not any third party. If a client's fees are being paid by a third party, a potential conflict of interest is presented between the interests of the third party and the client.

Here, Developer has offered to pay half of the attorney's fees of Association because he believes that Association's case will advance his cause. However, accepting payment from Developer for Association's fees presents a conflict for Lawyer. Developer may attempt to direct the course of Lawyer's representation of Association in order to protect his own interests. However, taking direction from a client would violate Lawyer's duty of loyalty. Lawyer should probably not accept Developer's offer to pay Association's attorney's fees.

However, if Lawyer believes that accepting payment from Developer will not interfere with her representation of Association, she may be able to accept the payment after explaining the potential conflict to both parties. Lawyer should explain to Developer that she represents Association's interests in her representation of Association, and that Developer may not influence this representation. She must also explain the potential conflicts to Association. Under California Rules, she must obtain both parties' consent in writing. However, because she would be accepting payment from a current client in her representation of a second client, this consent may not be reasonable under the Model Rules.

Whether or not Lawyer accepts payment for her representation of Association from Developer, if an actual conflict arises during her representation of Developer and Association, she must withdraw from representing one or both of the clients in order to satisfy her ethical duties.