

Ethics Opinion 2007-6

- **Rules: 1.7 and 1.9**
- **Subject: Conflict of interest among clients, limitation of representation.**
- **Summary: Attorney is precluded from representing two co-owners of a parcel of real estate against a third co-owner when the Attorney had previously represented all three clients in a matter relating to the same parcel of real estate.**

I. Facts

Commencing in 1991 and in subsequent months Attorney represented a client (Wife) in the probate of Wife's mother's estate and of Wife's step-father's estate. Wife and Wife's sister were the co-executrices of the estates. Wife, Wife's sister and Wife's brother (Brother) were beneficiaries of the estates. The probate was concluded in 1992.

In 1997 Husband, Wife and Brother purchased a parcel of real property as joint tenants. Husband, Wife and Brother each signed a note and real estate mortgage upon the property. A default in the note secured by the mortgage occurred and Attorney was engaged to resolve the matter. In correspondence to the mortgage holder Attorney described Husband, Wife and Brother as his clients. The default was resolved and a settlement agreement was signed by Husband, Wife and Brother in 2000. Attorney closed his file shortly following the settlement. Wife informed Attorney that Brother "indirectly" paid a portion of Attorney's fees. No formal correspondence was sent by Attorney to Husband, Wife and Brother terminating Attorney's representation of any party. Attorney had no subsequent contact with Brother.

In 2005 Wife contacted Attorney regarding matters affecting the property. Wife informed Attorney that Brother was not paying "his share" of the mortgage payments or his share of "the costs" associated with the property. In addition, Brother had left a quantity of his personal property on the property detracting from its appearance.

In 2007, on behalf of Husband and Wife, Attorney sent "low key" correspondence to Brother reciting the amount Brother owed to Husband and Wife and "proposing a settlement."

Attorney received correspondence from counsel representing Brother asserting a conflict of interest on the part of Attorney resulting from the prior representation in the mortgage dispute and Attorney's representation of the executors of Brother's stepfather's estate.

II. Discussion

The primary rules applicable to this situation are Rules 1.7 and 1.9. Rule 1.7 provides in part:

Conflicts of Interest: Current Clients

(a) ...a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if it:

- (1) the representation of one client will be directly adverse to another client;

Rule 1.9 provides in part:

Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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 gives informed consent, confirmed in writing.

The first question to be determined is whether an attorney client relationship between Attorney and Brother currently exists or previously existed.

According to Attorney's statement of the facts surrounding the settlement of the mortgage default and reinstatement, Attorney represented to the mortgage holder that Husband, Wife and Brother were clients of Attorney. In addition, Attorney stated that "...most of my contacts in the matter were with Wife or Husband and Wife..." clearly implying some contacts occurred between Attorney and Brother.

The facts clearly indicate that at the time of the mortgage loan dispute an attorney-client relationship was created between Attorney and Brother.

The second question to be determined is whether the attorney client relationship between Attorney and Brother was terminated at the conclusion of the negotiations and settlement with the mortgage company in 1997-2000.

If the attorney-client relationship was not terminated then Attorney's representation of Husband and Wife against Brother is precluded by Rule 1.7. If the attorney-client relationship was terminated then Attorney's representation of Husband and Wife against Brother may be precluded by Rule 1.9 if the matters are "substantially related."

No information to support a determination the attorney-client relationship between Attorney and Brother was presented other than the passage of time and the lack of contact between them.

There is no "bright line" to determine when a client becomes a former client. Each situation depends on the particular facts and circumstances.

However in the present circumstance it makes no difference whether the attorney-client relationship between Attorney and Brother was terminated because the matters are "substantially related" within the meaning of Rule 1.9 thus precluding Attorney's representation of Husband and Wife in the current dispute.

Rule 1.9 prohibits representation of a client whose interest is adverse to a former client "... in the same or a substantially related matter ..." without consent of the former client.

The Comments to Rule 1.9 state the "scope of a 'matter' depend upon the particular facts and circumstances. Settlement of the obligations of the parties to the mortgage holder would reasonably seem to include matters involving the relative obligations of Husband, Wife and Brother among themselves thus constituting "the same" matter within the meaning of the Rule.

The Comments to Rule 1.9 also state:

[3] Matters are "substantially related" for the purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

The comment refers to a "substantial risk" that confidential factual information may have been obtained. It is not necessary that such information was actually obtained.

During the negotiations with the mortgage company in the prior representation of Brother by Attorney, information regarding Brother's financial circumstances may, and probably was, discussed.

The Comment cited above also states:

A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.

It is not possible for Attorney to establish that all prior information regarding Brother's financial circumstances or other information which may have been gained during discussions is not obsolete.

Although it may be theoretically possible for Attorney to represent Husband and Wife against Brother with the informed consent of Brother, the facts indicate such consent has not been and will not likely be given. Therefore such alternative is not considered as part of this opinion.

III. Conclusion

Brother was a client of Attorney in the matter of the mortgage negotiations. The matter involving negotiation and settlement of the mortgage default and the matter of the contribution between Husband, Wife and Brother to payments to the mortgage company and other matters relating to the ownership of the Property are substantially related. Attorney's representation of Husband and Wife in the matter adverse to Brother is precluded by Rule 1.7 and/or 1.9.

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Ethics Committee
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