

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-443
Issued: November 17, 2017

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

Question 1: When law firms are considering merger what client information may be disclosed without client consent?

Answer: Firms may exchange basic information (client names, whether the client is a former or current client, adverse parties, and, if necessary, a brief statement of the nature of the representation) so that the firms may identify possible conflicts of interest; without client consent, firms may not exchange information protected by the attorney-client privilege or that might adversely affect a material interest of a client. The lawyer may not reveal client identity or the nature of the representation if the lawyer knows or should know that the client might object to disclosure.

Authority: KRPC rules and comments designed to further lawyer mobility: Rule 1.9 and comment 4, comment 3 to Rule 1.7, Rule 1.10(d), comment 7 to Rule 1.17; ABA Formal Op. 09-455, ABA Rule 1.6(7) and comment 13, Restatement of the Law Governing Lawyers, sec.60, Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice, James Fisher, 36 J. Legal Prof. 167 (2011).

Question 2: When a lawyer is considering a move from one firm to another what client information may the lawyer provide to the new firm without the client consent

Answer: The lawyer may provide basic information (client names, whether the client is a former or current client, adverse parties, and, if necessary, a brief statement of the nature of the representation) for the new firm to run a conflicts check. The lawyer should also tell the new firm which clients, if any, the lawyer anticipates will go with the lawyer to the new firm. Without client consent, the lawyer may not provide information protected by the attorney-client privilege or that might adversely affect a material interest of a client. The lawyer may not reveal client identity or the nature of the representation if the lawyer knows or should know that the client might object to disclosure.

Authority: KRPC rules and comments designed to further lawyer mobility: Rule 1.9 and comment 4, comment 3 to Rule 1.7, Rule 1.10(d), comment 7 to Rule 1.17; ABA Formal Op. 09-455, ABA Rule 1.6(7) and comment 13, Restatement of the Law Governing Lawyers, sec.60, Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice, James Fisher, 36 J. Legal Prof. 167 (2011).

Question 3: When an exchange of basic information reveals a possible conflict, how may firms determine if merger is feasible?

Answer: If necessary to determine the feasibility of a merger, firms may agree on a procedure that identifies conflicts while safeguarding client confidences. Possible procedures include: 1) lawyers from each firm exchanging information under a confidentiality agreement; and 2) jointly seeking advice from a lawyer not affiliated with either firm under a confidentiality agreement. The person selected must agree that all information is confidential and opine only on the feasibility of merger and what is necessary to merge the firms (client consent for example).

Authority: Rule 1.6(b)(4) and comment 7, comment 31 to Rule 1.7, Lawyer Mobility and Legal Ethics: Resolving the Tension between Confidentiality Requirements and Contemporary Lawyers' Career Paths, Eli Wald, 31 J. Legal Prof. 199, 244 (2007).

Discussion

1) The Model Rules and Kentucky Rules send mixed signals about disclosing information “relating to the representation of a client.” (Rule 1.6(a). The language of 1.6(a) is broader than “confidences and secrets” (the language of the Code of Professional Responsibility), and the rule does not contain an exception for information “generally known” (although Rule 1.9(c) does provide such an exception). Comment [4] to Rule 1.6 opines that client identity is protected by Rule 1.6, and Ky. Op. E-253 opines that client identity may not be revealed without the client’s consent.

On the other hand, the Model and Kentucky Rules are designed to further lawyer mobility. “[T]he rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association It should be recognized that many move from one association to another several times during their careers.” Comment [4] to Rule 1.9. The Model and Kentucky Rules reject “double imputation” in lateral moves (Rule 1.9(b). For a conflict to exist the moving lawyer must have information protected by Rule 1.6 that is material and adverse to the former client. Under Rule 1.9, the focus is on the moving lawyer’s possession of client confidential information; the former firm’s conflicts are no longer imputed to the moving lawyer.

The Rules further facilitate lawyer mobility by providing for screening (1.10 (d)), so that the moving lawyer’s conflicts are not imputed to the other lawyers in the firm. Screening requires conflict checking (comment [3] to Rule 1.7), and conflict checking requires disclosure of enough information “relating to the representation of the prior client” to enable the new firm to screen effectively. Fisher at 209.

2) In ABA Formal Opinion 09-455, as a matter of necessity, the ABA Committee construed Rule 1.6 to allow disclosure of confidential information for conflicts checks and screens. In 2012 the ABA codified the opinion in Rule 1.6(b)(7) and new comments 13 and 14.

The Restatement states the “law of lawyering” as follows

[T]he lawyer may not use or disclose confidential information as defined in section 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose the information. (section 60).

This definition is similar to the definition of “secret” in the Code of Professional Responsibility: “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.” ABA Model Rule 1.6(b)(7) is similar to the Restatement: in law firm mergers and changes of employment information may be exchanged, “if the revealed information would not compromise the attorney client privilege or otherwise prejudice the client.”

In a survey of large law firms, Fisher found that all firms required potential lateral hires to fill out a questionnaire with basic client information to be run through a conflicts’ check. The firms would consult their files to clear hits (false conflicts), perhaps seek additional information, and flag their files to create screens as needed. Fisher found no cases in which clients had been harmed by lawyers’ disclosures and concluded, “the reasonable touchstone here is harm to the client. This study found no evidence that lateral disclosures to facilitate conflicts checking put real clients at risk.” Fisher at 223.

3) The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.” Scope [XV]. ABA 09-445 interprets Rule 1.6 to reach a reasonable result and one in accord with reality. “If we accept that we are dealing with good ends here, the proper focus is not to create a hierarchy in which one good (lawyer mobility) must necessarily give way due to hypothetical risks to another good (client loyalty and confidentiality).” Fisher at 223.”

4) Conflicts created by lateral hires without attendant clients may be cured by screening on the basis of information provided by the lateral hire. The firm will need to have this information in its data base to identify conflicts created by the lateral’s prior representations. Some disclosure of client information will be necessary to establish the screen and notify the former client (as required by Rule 1.10(d)(2).

5) Mergers and lateral hires with attendant clients may potentially cause the firm to represent clients with conflicting claims. The firm may not represent clients on “opposite sides of the v.” (Rule 1.7(b)(3)) but may, with informed consent, represent clients with adverse interests. However, it is impractical and unwise to seek consent when firms are considering merger or a firm is considering a lateral hire. As stated in ABA 09-455:

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely would involve giving notice to

the lawyer's current firm, with unpredictable and possibly adverse consequences. Routinely requiring prior informed consent to disclose conflicts information would give any client or former client the power to prevent a lawyer from seeking a new association with no incentive for a client or former client to give such consent unless the client plans to follow the lawyer to the new firm.

6) If the initial exchange of information reveals a possible conflict with existing clients, the firms might agree to share information under a strict agreement of confidentiality. Another alternative might be to jointly seek advice from a middle man (Rule 1.6(b)(2)). Eli Wald refers to this as the "Middle Counsel Solution.", Eli Wald, *Lawyer Mobility and Legal Ethics*, 31 J. Legal Prof. 199, 202 (2007):

[C]onfidential conflict-checking information disclosed by the moving attorney to Middle Counsel will not be shared with the new law firm, and information revealed by the new firm will not be shared by Middle Counsel with the moving attorney. In fact, Middle Counsel is retained exactly for the purpose of protecting the confidentiality of the respective clients of the moving attorney and the new firm.

In exchanging client information, the lawyers must not disclose information that would compromise the attorney client privilege or otherwise prejudice the client. ABA Model Rule, 1.6(b)(7). Restatement section 60.

7) Client consent is required if the merger or lateral hire would result in the firm representing clients with adverse interests. The firm may not drop a client without its consent to cure a conflict. This is referred to as the "hot potato" principle, Restatement section 132, *Markham Concepts v. Hasboro Inc*, 32 Law.Man.Prof.Conduct 464 (2016), Phila.Ethics Op. 2009-4, 2009 WL 934625.

Recommended Best Practices

1) Lawyers considering a merger or lateral hire should agree, in writing, to keep confidential all disclosed information. If the merger or a lateral hiring decision is not made then upon such event all of the shared client information should be returned or destroyed. Disclosed information may not be used for any purpose other than the performance of a conflicts check.

2) All client information, including client identity, should not be disclosed until substantive discussions between the merging firms and/or the employment of a lateral have occurred and have been agreed to.

3) Potential lawyer personal conflicts (e.g., boards, ownership interests, business activities, etc.) should be revealed and discussed before the exchange of client information.

4) When substantive discussions take place, lawyers should disclose the identity of current clients and, if necessary for a conflicts' check, the nature of the relationship. In the event of a potential lateral hire, the attorney should identify the clients the attorney believes will

accompany the lawyer to the new firm. Clients who will accompany the lawyer are current clients; clients who will not accompany the lawyer to the new firm are former clients.

5) Former clients who might seek future representation by the attorney or the firm should be identified; they are former clients but the firm or attorney might feel a duty of loyalty that warrants treating them as current clients.

6) To the extent practicable, attorneys should identify former clients and the nature of the relationship for inclusion in the new firm's data base to allow the new firm to identify conflicts with former clients and screen affected counsel.

7) In the unlikely event that confidential information beyond identity and the nature of the relationship must be disclosed to determine the feasibility of a merger or lateral hire the parties may do so pursuant to an agreement of confidentiality.

Note To Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530. This Rule provides that formal opinions are advisory only.