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Delicate Dance:
Job Negotiations with Opposing Counsel

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Occasionally, the best candidate for an open position at your firm may be the lawyer sitting across the table from you at a deposition: the opposing counsel. Litigating against a lawyer can provide a unique vantage point to assess their skills and personality when deciding whether they would be a good "fit" for your firm. At the same time, the fact that the lawyer is opposing counsel can create clear conflicts for both the opposing counsel and the hiring firm. Further, in some practice areas involving repetitive litigation with the same lawyers such as family law, waiting until a particular case is over may not be a practical solution. Fortunately, the ABA has a very useful ethics opinion—Formal Opinion 96-400 (1996)—available on its website that can help lawyers and law firms navigate this often-delicate dance. In this column, we'll first survey the ABA opinion and then turn to the associated issue of sharing client names for conflict checking during job negotiations.

Before we do, however, three qualifiers are in order.

First, we'll focus on lawyers moving between firms in private practice. RPC 1.11(d)(vi) addresses job negotiations by governmental lawyers looking to move to private practice and OSB Formal Opinion 2005-120 (rev. 2015) discusses screening for lawyers moving from government to private practice.

Second, once a lawyer and a new firm reach an agreement, important duties remain—including client notification for the lawyer leaving their soon-to-be "old" firm and screening needed to avoid disqualifying conflicts for the "new" firm. OSB Formal Opinion 2005-70 (rev. 2024) addresses the former and OSB Formal Opinion 2005-120 also discusses the latter.

Third, in theory, many of the same considerations can come into play when discussing law firm mergers rather than hiring individual lawyers. In practice, however, merging entire businesses typically involves a more complex set of issues ranging from leases to retirement plans—in additional to potential conflicts that must be assessed and resolved.

The ABA Opinion

The primary analytical focus of ABA Formal Opinion 96-400 is on conflicts. That said, the ABA opinion notes that other duties—such as confidentiality—can also enter the mix.

The potential conflict that can arise for both the opposing counsel and the hiring firm is a "material limitation" conflict—whether a lawyer's professional judgment on behalf of the client will be materially impacted by a personal or business interest of the lawyer or law firm involved. At the time Formal Opinion 96-400 was issued in 1996, "material limitation" conflicts were found in ABA

Model Rule 1.7(b) and the opinion uses that reference. In 2002, the ABA moved that conflict classification to Model Rule 1.7(a)(2) and Oregon followed the revised approach when we moved to professional regulations based on the ABA Model Rules in 2005. In both the ABA and Oregon formulations, conflicts under Rule 1.7(a)(2) are typically waivable by the clients involved.

ABA Formal Opinion 96-400 notes that timing can play a key role in whether a conflict exists. A quick and informal comment over lunch along the lines of "if you are ever thinking of making a change, keep us in mind," is unlikely to trigger a conflict. By contrast, detailed negotiations likely cross that threshold. As the ABA opinion puts it (at 5) speaking to the factors for whether a conflict exists: "They are certainly met at the point that the lawyer agrees to participate in a substantive discussion of his experience, clients or business potential, or the terms of an association."

ABA Formal Opinion 96-400 counsels that if the discussions are moving beyond preliminaries, both sides should discuss the conflict with, and obtain the informed consent of, their respective clients. The ABA opinion notes that client consent should ordinarily occur before both sides proceed into detailed negotiations as that is when the risks involved may likely be most pronounced.

"Informed consent" in this context is no different than in other situations. Under RPC 1.0(g), informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Again as in other situations, the clients involved are under no legal obligation to grant a waiver.

Sharing Client Names

Although it had long been the practice for lawyers to provide a list of client names and the general nature of the matters involved for conflicts checks in the hiring process, there was not a specific rule in Oregon until 2014. The ABA in 2012 amended Model Rule 1.6 on confidentiality to generally permit lawyers to provide client lists and general information on the matters involved to prospective employers so the later could run conflict checks. Oregon followed in 2014 with what is now RPC 1.6(b)(6):

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . .
>
> (6) . . . to detect and resolve conflicts of interest arising from the lawyer's change of employment[.]

Even in this circumstance, however, the information permitted is subject to both the "reasonably necessary" predicate and an additional qualifier in the subsection involved: "but only if the information revealed would not compromise the attorney-client privilege or otherwise prejudice any of the clients."

ABOUT THE AUTHOR

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