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Where are the attorney-client limits?

Simon R. Malko

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Many attorneys incorrectly assume that an attorney-client relationship automatically ends when the work for the client is complete. That is not always the case.

Some courts have held that the attorney-client relationship continues, even after the billable work is complete, if the client has a reasonable belief that the engagement is open-ended. This issue often arises when an attorney tries to take on a new engagement adverse to a client for whom the attorney previously performed some work.

The ethics rules impose tight restrictions on when an attorney can be adverse to an existing client but provide much more liberal standards for engagements adverse to a former client. Thus, if an attorney does not confirm that an engagement has concluded, the attorney may be disqualified from taking on a future engagement adverse to a client.

Conflicts rules

Georgia Rule of Professional Conduct 1.7 generally prohibits an attorney from being adverse to an existing client unless certain conditions are met and the client consents. Moreover, with limited

exceptions, it is not ethically permissible for an attorney to be adverse to an existing client in litigation, even if the litigation is wholly unrelated to the attorney's engagement for that client. 1

By contrast, Rule 1.9 requires only consent from the former client if the attorney intends to be adverse to a former client "in the same or a substantially related matter" to the lawyer's prior engagement.

No client consent is necessary if the attorney's new engagement adverse to a former client is unrelated to the prior work. Furthermore, there is no general prohibition against suing a former client.

Thus, whether it is ethically permissible for an attorney to accept a new engagement adverse to a client will often turn on the determination of whether that client is a former client or current client.2

When does a client

become a "former client"?

The comments to Georgia Rule of Professional Conduct 1.3 provide, in relevant part, the following general guidance regarding the termination of an attorney-client relationship:

"If an attorney's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If an attorney has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will serve on a continuing basis."

Ga. R. Prof. Cond. 1.3 Although there is little Georgia authority applying these principles, cases from other jurisdictions (applying ethics rules analogous to the Georgia Rules of Professional Conduct) offer some relevant guidance.

For example, in *SWS Finan. Fund v. Salomon Bros.3*, a law firm worked for over a year preparing a compliance manual for an investment bank client. Six months after completing that project, the law firm was hired by a different client to sue the investment bank on an unrelated matter. The investment bank moved to disqualify the law firm on the ground that its attorney-client relationship with the law firm was ongoing.

The court found that, even though no billable work had been performed in six months, the attorney-client relationship still existed. Among other things, the court noted significant ongoing interactions between the parties after the billable work ceased. In reliance on the comment to Rule 1.3 quoted above, the court found that the investment bank was entitled to assume that the law firm would continue to be its counsel on an ongoing basis and it was the law firm's responsibility to clear up any such doubt.

Similarly, in *Qwest Corp. v. Anovian Inc.4*, the defendant in a lawsuit moved to disqualify the plaintiff's law firm on the ground that the defendant had an existing attorney-client relationship with the plaintiff's law firm (albeit on an unrelated matter) at the time the lawsuit was filed.

The law firm argued that its work for the defendant was a discrete assignment that concluded before the lawsuit was filed.

The court disagreed and granted the disqualification motion based on an affidavit from the defendant stating that he did not believe that his attorney-client relationship was concluded.

An important take-away from these cases is that the client's belief can be a significant factor in determining whether an attorney-client relationship has concluded.

While it might seem obvious to an attorney that the engagement is over as soon as the attorney stops billing the client for work, that point might not be so obvious to the client. This might be especially true if the attorney-client relationship has existed for a long time or the attorney has maintained close contact with the client in the hope of new assignments.

Practice pointers

At the conclusion of an engagement, many attorneys fail to send any correspondence documenting that the assignment is complete. In some instances, this is because the attorney hopes the relationship will be ongoing and is concerned that sending an official "termination notice" might offend the client.

A prudent attorney should nevertheless seek to document that the specific engagement has ended. This can be accomplished in a cover letter accompanying the final invoice or an email thanking the client for the opportunity to work on a specific matter.

Alternatively, the attorney can include a statement in the engagement letter clarifying that the engagement is complete upon the submission of the final bill and later making it clear that the final bill has been sent.

If done tactfully, these suggestions are unlikely to hurt the prospects for future work from the client and, at the same time, they give the attorney flexibility to accept a future matter adverse to the former client if such an opportunity arises.

1 See Rule 1.7 [cmt. 7]

*2 It is important to note that an attorney generally may not take advantage of the more liberal provisions of Rule 1.9 by firing an existing client once a conflict arises. Courts have almost universally rejected attorneys' attempts to treat a client like a "hot potato" and terminate an existing relationship when there is an opportunity for a new engagement adverse to that client. See e.g., Snapping Shoals Elect. Membership Corp. v. RLI Insur. Corp., 2006 WL 1877078, at *2 (N.D. Ga. July 5, 2006).*

3 790 F. Supp. 1392 (N.D Ill. 1992)

*4 2010 WL 1440765, at * 6-7 (W.D. Wash. April 8, 2010)*

Simon R. Malko is a partner in the Litigation Practice Group at Morris, Manning & Martin.