IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1990

IN THE SUPREME COURT
STATE OF WYOMING
FILED
DEC 17 1990
JERRILL D. CARTER, CLERK

IN THE MATTER OF THE AMENDMENTS)
OF RULES 1.9, 1.10 AND 4.4 AND COMMENTS)
OF THE RULES OF PROFESSIONAL)
CONDUCT FOR ATTORNEYS AT LAW)

ORDER AMENDING RULES 1.9, 1.10 AND 4.4 AND COMMENTS THERETO OF THE RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS AT LAW

The court having deemed it necessary and proper to amend Rules 1.9, 1.10 and 4.4 and Comments thereto of the Rules of Professional Conduct for Attorneys at Law as set forth herein; it is therefore

ORDERED that Rules 1.9, 1.10 and 4.4 and Comments thereto of the Rules of Professional Conduct for Attorneys at Law shall be, and they are hereby amended, effective this date, to read as follows:

Rule 1.9, amended as attached.

Rule 1.10, amended as attached.

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A LAWYER SHALL NOT PRESENT, PARTICIPATE IN PRESENTING, OR THREATEN TO PRESENT CRIMINAL CHARGES SOLELY TO OBTAIN AN ADVANTAGE IN A CIVIL MATTER.

Comment. --

[1] * * * * *

(2) THE CIVIL ADJUDICATIVE PROCESS IS PRIMARILY DESIGNED FOR THE SETTLEMENT OF DISPUTES BETWEEN PARTIES, WHILE THE CRIMINAL PROCESS IS DESIGNED FOR THE PROTECTION OF SOCIETY AS A WHOLE. THREATENING TO USE, OR USING, THE CRIMINAL PROCESS TO COERCE ADJUSTMENT OF PRIVATE CIVIL CLAIMS OR CONTROVERSIES IS A SUBVERSION OF THAT PROCESS; FURTHER, THE PERSON AGAINST WHOM THE CRIMINAL PROCESS IS SO MISUSED MAY BE DETERRED FROM ASSERTING HIS LEGAL RIGHTS AND THUS THE USEFULNESS OF THE CIVIL PROCESS IN SETTLING PRIVATE DISPUTES IS IMPAIRED. AS IN ALL CASES OF ABUSE OF JUDICIAL PROCESS, THE IMPROPER USE OF CRIMINAL PROCESS TENDS TO DIMINISH PUBLIC CONFIDENCE IN OUR LEGAL SYSTEM.

(3) STATUTES IN SOME STATES REQUIRE LAWYERS TO GIVE NOTICE OF POTENTIAL CRIMINAL PROSECUTION AS PART OF THEIR BRINGING A CIVIL ACTION. IF AN ATTORNEY IS REQUIRED TO GIVE SUCH NOTICE AND THE ATTORNEY KNOWS THAT THE INDIVIDUAL IS REPRESENTED BY COUNSEL, THE ATTORNEY SHOULD SEND THE NOTICE TO BOTH THE INDIVIDUAL AND HIS OR HER COUNSEL CONTEMPORANEOUSLY.

FURTHER ORDERED that comments numbered [7] through [15] to Rule 1.10 be deleted; and that comments numbered [3] through [5] to Rule 1.9 be renumbered [9] through [11] respectively; and it is

FURTHER ORDERED that the foregoing amendments of Rules 1.9, 1.10 and 4.4 and Comments thereto of the Rules of Professional Conduct for Attorneys at Law be published in the advance sheets of the Pacific Reporter and in the Wyoming Reporter and thereafter be spread at length upon the journal of this court.

Dated this 12th day of December, 1990.

BY THE COURT:

WALTER URBIGKIT
CHIEF JUSTICE

Rule 1.9. Conflict of interest: former client.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter ~~(a)~~ 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 consents after consultation except that when the former client is a governmental entity, consent is not permitted; or

~~(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.~~

(b) A LAWYER SHALL NOT KNOWINGLY REPRESENT A PERSON IN THE SAME OR A SUBSTANTIALLY RELATED MATTER IN WHICH A FIRM WITH WHICH THE LAWYER FORMERLY WAS ASSOCIATED HAD PREVIOUSLY REPRESENTED A CLIENT WHOSE INTERESTS ARE MATERIALLY ADVERSE TO THAT PERSON AND ABOUT WHOM THE LAWYER HAD ACQUIRED INFORMATION PROTECTED BY RULES 1.6 AND 1.9(c) THAT IS MATERIAL TO THE MATTER, UNLESS THE FORMER CLIENT CONSENTS AFTER CONSULTATION.

(c) A LAWYER WHO HAS FORMERLY REPRESENTED A CLIENT IN A MATTER OR WHOSE PRESENT OR FORMER FIRM HAS FORMERLY REPRESENTED A CLIENT IN A MATTER SHALL NOT THEREAFTER:

(1) USE INFORMATION RELATING TO THE REPRESENTATION TO THE DISADVANTAGE OF THE FORMER CLIENT EXCEPT AS RULE 1.6 OR RULE 3.3 WOULD PERMIT OR REQUIRE WITH RESPECT TO A CLIENT OR WHEN THE INFORMATION HAS BECOME GENERALLY KNOWN; OR

(2) REVEAL INFORMATION RELATING TO THE REPRESENTATION EXCEPT AS RULE 1.6 OR RULE 3.3 WOULD PERMIT OR REQUIRE WITH RESPECT TO A CLIENT.

Comment. --[1] * * * * *

[2] The scope of a "matter" for purposes of ~~Rule 1.9(a)~~ THIS RULE may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse

interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

LAWYERS MOVING BETWEEN FIRMS. [3] WHEN LAWYERS HAVE BEEN ASSOCIATED IN A FIRM BUT THEN END THEIR ASSOCIATION, THE QUESTION OF WHETHER A LAWYER SHOULD UNDERTAKE REPRESENTATION IS MORE COMPLICATED. THERE ARE SEVERAL COMPETING CONSIDERATIONS. FIRST, THE CLIENT PREVIOUSLY REPRESENTED BY THE FORMER FIRM MUST BE REASONABLY ASSURED THAT THE PRINCIPLE OF LOYALTY TO THE CLIENT IS NOT COMPROMISED. SECOND, THE RULE SHOULD NOT BE SO BROADLY CAST AS TO PRECLUDE OTHER PERSONS FROM HAVING REASONABLE CHOICE OF LEGAL COUNSEL. THIRD, THE RULE SHOULD NOT UNREASONABLY HAMPER LAWYERS FROM FORMING NEW ASSOCIATIONS AND TAKING ON NEW CLIENTS AFTER HAVING LEFT A PREVIOUS ASSOCIATION. IN THIS CONNECTION, IT SHOULD BE RECOGNIZED THAT TODAY MANY LAWYERS PRACTICE IN FIRMS, MANY TO SOME DEGREE LIMIT THEIR PRACTICE TO ONE FIELD OR ANOTHER, AND MANY MOVE FROM ONE ASSOCIATION TO ANOTHER SEVERAL TIMES IN THEIR CAREERS. IF THE CONCEPT OF IMPUTED DISQUALIFICATION WERE APPLIED WITH UNQUALIFIED RIGOR, THE RESULT WOULD BE RADICAL CURTAILMENT OF THE OPPORTUNITY OF LAWYERS TO MOVE FROM ONE PRACTICE SETTING TO ANOTHER AND OF THE OPPORTUNITY OF CLIENTS TO CHANGE COUNSEL.

RECONCILIATION OF THESE COMPETING PRINCIPLES IN THE PAST HAS BEEN ATTEMPTED UNDER TWO RUBRICS. ONE APPROACH HAS BEEN TO SEEK PER SE RULES OF DISQUALIFICATION. FOR EXAMPLE, IT HAS BEEN HELD THAT A PARTNER IN A LAW FIRM IS CONCLUSIVELY PRESUMED TO HAVE ACCESS TO ALL CONFIDENCES CONCERNING ALL CLIENTS OF THE FIRM. UNDER THIS ANALYSIS, IF A LAWYER HAS BEEN A PARTNER IN ONE LAW FIRM AND THEN BECOMES A PARTNER IN ANOTHER LAW FIRM, THERE MAY BE A PRESUMPTION THAT ALL CONFIDENCES KNOWN BY A PARTNER IN THE FIRST FIRM ARE KNOWN TO ALL PARTNERS IN THE SECOND FIRM. THIS PRESUMPTION MIGHT PROPERLY BE APPLIED IN SOME CIRCUMSTANCES, FOR EXAMPLE, WHERE THE CLIENT HAS BEEN REPRESENTED ON MANY MATTERS BY NUMEROUS LAWYERS IN THE FIRM. THIS PRESUMPTION MAY, HOWEVER, BE UNREALISTIC IN OTHER

CIRCUMSTANCES, FOR EXAMPLE, WHERE THE CLIENT HAS BEEN REPRESENTED IN A SINGLE MATTER OF SHORT DURATION BY ONLY ONE OR TWO LAWYERS IN A LARGER FIRM SUCH THAT BROAD DISSEMINATION OF CLIENT CONFIDENCES WITHIN THE FIRM IS UNLIKELY. FURTHERMORE, SUCH A RIGID RULE EXAGGERATES THE DIFFERENCE BETWEEN A PARTNER AND AN ASSOCIATE IN MODERN LAW FIRMS.

THE OTHER RUBRIC FORMERLY USED FOR DEALING WITH DISQUALIFICATION IS THE APPEARANCE OF IMPROPRIETY PROSCRIBED IN CANON 9 OF THE ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY. THIS RUBRIC HAS A TWOFOLD PROBLEM. FIRST, THE APPEARANCE OF IMPROPRIETY CAN BY TAKEN TO INCLUDE ANY NEW CLIENT-LAWYER RELATIONSHIP THAT MIGHT MAKE A FORMER CLIENT FEEL ANXIOUS. IF THAT MEANING WERE ADOPTED, DISQUALIFICATION WOULD BECOME LITTLE MORE THAN A QUESTION OF SUBJECTIVE JUDGMENT BY THE FORMER CLIENT. SECOND, SINCE "IMPROPRIETY" IS UNDEFINED, THE TERM "APPEARANCE OF IMPROPRIETY" IS QUESTION-BEGGING. IT THEREFORE HAS TO BE RECOGNIZED THAT THE PROBLEM OF DISQUALIFICATION CANNOT BE PROPERLY RESOLVED EITHER BY SIMPLE ANALOGY TO A LAWYER PRACTICING ALONE OR BY THE VERY GENERAL CONCEPT OF APPEARANCE OF IMPROPRIETY.

A RULE BASED ON A FUNCTIONAL ANALYSIS IS MORE APPROPRIATE FOR DETERMINING THE QUESTION OF DISQUALIFICATION. TWO FUNCTIONS ARE INVOLVED: PRESERVING CONFIDENTIALITY AND AVOIDING POSITIONS ADVERSE TO A CLIENT.

CONFIDENTIALITY. [4] PRESERVING CONFIDENTIALITY IS A QUESTION OF ACCESS TO INFORMATION. ACCESS TO INFORMATION, IN TURN, IS ESSENTIALLY A QUESTION OF FACT IN PARTICULAR CIRCUMSTANCES, AIDED BY INFERENCES, DEDUCTIONS OR WORKING PRESUMPTIONS THAT REASONABLY MAY BE MADE ABOUT THE WAY IN WHICH LAWYERS WORK TOGETHER. A LAWYER MAY HAVE GENERAL ACCESS TO FILES OF ALL CLIENTS OF A LAW FIRM AND MAY REGULARLY PARTICIPATE IN DISCUSSIONS OF THEIR AFFAIRS; IT SHOULD BE INFERRED THAT SUCH A LAWYER IN FACT IS PRIVY TO ALL INFORMATION ABOUT ALL THE FIRM'S CLIENTS. IN CONTRAST, ANOTHER LAWYER MAY HAVE ACCESS TO THE FILES OF ONLY A LIMITED NUMBER OF CLIENTS AND PARTICIPATE IN DISCUSSION OF THE AFFAIRS OF NO OTHER CLIENTS; IN THE ABSENCE OF INFORMATION TO THE CONTRARY, IT SHOULD BE INFERRED THAT SUCH A LAWYER IN FACT IS PRIVY TO INFORMATION ABOUT THE CLIENTS ACTUALLY SERVED BUT NOT THOSE OF OTHER CLIENTS.

[5] APPLICATION OF PARAGRAPH (b) DEPENDS ON A SITUATION'S PARTICULAR FACTS. IN ANY SUCH INQUIRY, THE BURDEN OF PROOF SHOULD REST UPON THE FIRM WHOSE DISQUALIFICATION IS SOUGHT.

[6] PARAGRAPH (b) OPERATES TO DISQUALIFY THE LAWYER ONLY WHEN THE LAWYER INVOLVED HAS ACTUAL KNOWLEDGE OF INFORMATION PROTECTED BY RULES 1.6 AND 1.9(b). THUS, IF A LAWYER WHILE WITH ONE FIRM ACQUIRED NO KNOWLEDGE OF INFORMATION RELATING TO A PARTICULAR CLIENT OF THE FIRM, AND THAT LAWYER LATER JOINED ANOTHER FIRM, NEITHER THE LAWYER INDIVIDUALLY NOR THE SECOND FIRM IS DISQUALIFIED FROM REPRESENTING ANOTHER CLIENT IN THE SAME OR A RELATED MATTER EVEN THOUGH THE INTERESTS OF THE TWO CLIENTS CONFLICT. SEE RULE 1.10(b) FOR THE RESTRICTIONS ON A FIRM ONCE A LAWYER HAS TERMINATED ASSOCIATION WITH THE FIRM.

[7] INDEPENDENT OF THE QUESTION OF DISQUALIFICATION OF A FIRM, A LAWYER CHANGING PROFESSIONAL ASSOCIATION HAS A CONTINUING DUTY TO PRESERVE CONFIDENTIALITY OF INFORMATION ABOUT A CLIENT FORMERLY REPRESENTED. SEE RULES 1.6 AND 1.9.

ADVERSE POSITIONS. [8] THE SECOND ASPECT OF LOYALTY TO CLIENT IS THE LAWYER'S OBLIGATION TO DECLINE SUBSEQUENT REPRESENTATIONS INVOLVING POSITIONS ADVERSE TO A FORMER CLIENT ARISING IN SUBSTANTIALLY RELATED MATTERS. THIS OBLIGATION REQUIRES ABSTENTION FROM ADVERSE REPRESENTATION BY THE INDIVIDUAL LAWYER INVOLVED, BUT DOES NOT PROPERLY ENTAIL ABSTENTION OF OTHER LAWYERS THROUGH IMPUTED DISQUALIFICATION. HENCE, THIS ASPECT OF THE PROBLEM IS GOVERNED BY RULE 1.9(a). THUS, IF A LAWYER LEFT ONE FIRM FOR ANOTHER, THE NEW AFFILIATION WOULD NOT PRECLUDE THE FIRMS INVOLVED FROM CONTINUING TO REPRESENT CLIENTS WITH ADVERSE INTERESTS IN THE SAME OR RELATED MATTERS, SO LONG AS THE CONDITIONS OF PARAGRAPHS (b) AND (c) CONCERNING CONFIDENTIALITY HAVE BEEN MET.

[3] [9] Information acquired by the lawyer in the course of representing a client may not subsequently be REVEALED BY THE LAWYER OR used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[4] [10] Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[~~5~~] [11] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is OR WAS FORMERLY associated, see Rule 1.10.

Rule 1.10. Imputed disqualification: general rule.

(a) * * * * *

(b) Deleted.

[e] [B] When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, AND NOT CURRENTLY REPRESENTED BY THE FIRM,unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

[d] [C]A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment. -- *Definition of "Firm".*

[1] * * * * *

[2] * * * * *

[3] * * * * *

[4] * * * * *

[5] * * * * *

Principles of Imputed Disqualification.

[6] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one (1) lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another,

the situation is governed by ~~paragraphs (b) and (c)~~ RULES 1.9(b) AND 1.10(b). RULE 1.10(b) OPERATES TO PERMIT A LAW FIRM, UNDER CERTAIN CIRCUMSTANCES, TO REPRESENT A PERSON WITH INTERESTS DIRECTLY ADVERSE TO THOSE OF A CLIENT REPRESENTED BY A LAWYER WHO FORMERLY WAS ASSOCIATED WITH THE FIRM. THE RULE APPLIES REGARDLESS OF WHEN THE FORMERLY ASSOCIATED LAWYER REPRESENTED THE CLIENT. HOWEVER, THE LAW FIRM MAY NOT REPRESENT A PERSON WITH INTERESTS ADVERSE TO THOSE OF A PRESENT CLIENT OF THE FIRM, WHICH WOULD VIOLATE RULE 1.7. MOREOVER, THE FIRM MAY NOT REPRESENT THE PERSON WHERE THE MATTER IS THE SAME OR SUBSTANTIALLY RELATED TO THAT IN WHICH THE FORMERLY ASSOCIATED LAWYER REPRESENTED THE CLIENT AND ANY OTHER LAWYER CURRENTLY IN THE FIRM HAS MATERIAL INFORMATION PROTECTED BY RULES 1.6 AND 1.9(c).

Comments [7] through [15] deleted in their entirety.