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## **An Ethics Primer for Business Lawyers**

William Freivogel

Author contact information:  
William Freivogel  
Chicago, IL

wfreivogel@yahoo.com  
312-642-4567

# AN ETHICS PRIMER FOR BUSINESS LAWYERS

By: Bill Freivogel  
www.freivogel.com  
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## Introduction

The author is Chair of the Professional Responsibility Committee of the ABA Section of Business Law. In that capacity he has written for the Section's electronic newsletter, "eSource," a series of short articles geared for lawyers who practice business law but who are not legal ethics experts. This guide, which incorporates much of that material, should be useful to litigators, as well as transactional lawyers.

## Conflicts of Interest – Current Clients.

The basic rule is ABA Model Rule 1.7(a)(1), of which all states have a version. It provides that a lawyer, or law firm, may not take on a matter that is directly adverse to a current client. The rule does not care whether the new matter against the client has any relationship whatever to the other matter being handled for the client. In the blink of an eye we have glossed over two important concepts: (1) what is "directly" adverse; and (2) what is a "current" versus "former" client. Before getting to those concepts, let's discuss the relationship point.

*No relationship.* Law Firm's Newport Beach office represents Ajax Corp. in a property tax dispute with Orange County, and that matter is pending. Now NJ Bancorp asks Law Firm's Newark office to represent it in a major loan transaction in which Ajax Corp. is the borrower. The matters could not be more unrelated. Yet, Law Firm would have a current client conflict that could only be cured with a waiver. Many fine lawyers think that rule is silly. Tough; that's the rule.

*Current client.* As we will discuss, the above rule changes if the client is a former one instead of a current one. Then, relationship, or the lack thereof, matters. So, is the client current or former? Suppose the Orange County tax dispute was resolved a few months before the NJ Bancorp loan came in, and Law Firm has no other matters pending for Ajax Corp. We would love to give you some guidelines for this, but we cannot. State and federal courts around the country have wildly disparate views of what is "current" and what is "former." For example, in *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055 (W.D. Wash. 1999), the law firm had done nothing for the client for a year. Yet, because the client pretty much limited what it did have to that law firm, the court held the client was current. In contrast, in *Artromick Int'l Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991), about a year had elapsed since the law firm had done any work for the client. A small invoice remained outstanding. The firm sent at least one piece of promotional material to the client during that year. Nevertheless, the court refused to disqualify the firm when it showed up on the other side of a case. For a very recent, and

nuanced, discussion of when a current client becomes a former client, *see Metropolitan Life Ins. Co. v. The Guardian Life Ins. Co. of America*, 2009 U.S. Dist. LEXIS 42475 (N.D. Ill. May 18, 2009).

*Direct adversity.* Handling a lawsuit on behalf of Client A against Client B is obviously direct adversity. Likewise, sitting across the table from a current client in a major and contentious workout negotiation is direct adversity. Beyond those clear examples, things can be fuzzy. For example, Law Firm represents Family Patriarch in a variety of matters, including his estate plan. At the same time Law Firm represents the Patriarch's son on a variety of matters, some of which are pending. Patriarch, disgusted with his son over something, asks Law Firm to remove the son from his will. That seems "direct," doesn't it? Yet, the influential ABA Standing Committee on Ethics and Professional Responsibility ("ABA Ethics Committee"), in its Formal Opinion 05-434 (December 2004), held that in that precise situation Law Firm would not have a conflict and would not need a waiver from the son.

*Lesson: "don't try this at home."* This is about issue spotting. Hopefully, when you are confronted with these issues you will have access to personnel who have a better handle than you on the nuances of conflict-of-interest law.

## **Conflicts of Interest – Former Clients**

As we saw above, the most important rule with respect to current clients is that a lawyer may not be directly adverse to a current client even though the adverse matter bears no relationship to matters the lawyer handles for that client. The rules shift subtly when the lawyer is asked to take a position adverse to a *former* client. When does a current client become a former client? We discussed that above. What we learned is that courts vary dramatically in their analysis of the current-vs.-former client issue.

Let us assume that the client in question is clearly *former* rather than *current*. That takes us to ABA Model Rule 1.9(a), which provides that a lawyer may take a position "materially adverse" to a former client if the matter is not "substantially related" to what the lawyer had done for the former client. More has been written about what is "substantially related" than just about any issue under the ethics rules. While it is easy to oversimplify, let us just say that the substantial relationship test is about *information*. Did the lawyer learn something from, or about, the former client in the earlier representation that would give the lawyer an advantage in opposing the former client in a current matter?

A clear case: Lawyer is representing Client in a contentious merger negotiation with Opponent. After many weeks of wrangling, Client becomes fed up with Lawyer and fires Lawyer, saying, in effect, "I never want to see you again. Here is your fee. Goodbye." A month later Lawyer shows up on Opponent's legal team in that same negotiation. Lawyer obviously learned much information from, and about, Client in the earlier phase of the negotiation that would be enormously useful to Opponent. That is precisely what Model Rule 1.9(a) was designed to prevent.

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