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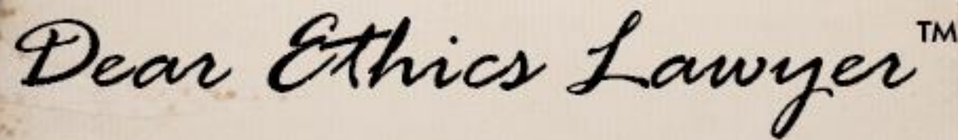

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

My firm has represented a wealthy family in estate planning matters for many years. In addition, for at least 25 years, the firm has represented a business owned by family members in a variety of general business matters for which time has been billed to a general file in the company's name. The business has been in decline, and time was last billed to the company's general file about a year ago, but the general file has never been closed. Can the firm now undertake an action adverse to the company if the substance of the action has nothing to do with any prior representation?

A: This question boils down to whether the company in question is a current or former client. If a current client, bringing an action against it, even on an unrelated matter, would be a concurrent conflict under Model Rule 1.7. If it is a former client, Rule 1.9 would permit adversity in a matter that is not substantially related to anything the firm did for the company (provided the firm also doesn't use or reveal any information related to its work for the company). This is a question of fact involving all the circumstances of the relationship, and is not a bright line test. It is often framed as whether the client has a reasonable belief that the firm still represents it. In this case, the absence of work for the client for a significant period of time weighs toward "former client," but the overall length and depth of the relationship (extending to the family of owners) cuts the other way. In addition, the fact that the law firm still maintains an open client file and probably cannot point to a specific date or event that ended the relationship weighs in favor of a "current client" determination.

The firm should look at other facts: does the year of no work vary from a previous pattern of regular work; what communication has the firm had with the company in that period and do they look like communications with a current client; has the company engaged other counsel to do what the firm previously did; are the related family representations still active so that the family that owns the business could reasonably believe the firm's lawyers are its lawyers, etc.?

Firms have commonly used ongoing "general files" as a matter of convenience to encompass numerous projects of various size without having to open and close additional files. But this same open-ended convenience creates the appearance of an evergreen relationship that is unhelpful to establish an end date (and also requires more diligence to attach conflict information to the file for each small matter that gets lumped into it). A better practice is to send a communication noting the conclusion of each discrete matter as it happens, something that can be done appropriately as an expression of gratitude, not as a dis-invitation to future work. Not having done this before the adverse matter arose, can the firm now send a closing letter to terminate the relationship, and then undertake the adverse action? This may implicate the judicially-created (and somewhat inconsistently applied)

"hot potato rule" in which certain courts have treated a "fired" client as a current client for conflicts purposes if the firm dropped the client "like a hot potato" for the purpose of taking an action against it. The Ethics Lawyer recommends that you consult ethics counsel concerning the specific facts of this situation before proceeding.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.