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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I am an associate general counsel in a corporate law department for Company A. Previously, I was a partner at a law firm in its corporate transactions practice group, advising and representing a number of clients, including one I will call Company B, about business contracts and sales and acquisitions of business units. Today, at one of our law department meetings, I learned that Company B is threatening to sue Company A, alleging that it has breached a contract that I drafted and negotiated for Company B a year before I went in-house. Is this a conflict issue for me? If so, is it an issue if someone else in the law department handles the matter?

A: Your question raises issues that frequently arise in law firms when a lawyer changes firms or the lawyer or the lawyer's current firm otherwise becomes adverse to a former client of the lawyer. Law firms have conflict checking and resolution mechanisms for identifying and dealing with these issues in the context of Model Rule 1.9, the rule concerning conflicts with and duties to former clients. These same issues can arise in the context of corporate law departments, which often do not have the same mechanisms for conflicts. For example, Rule 1.9(a) provides that any lawyer who has previously represented a client in a matter shall not thereafter represent a party adverse to the former client in "the same or a substantially related matter." In the context of your question, that means you could not now represent or advise Company A adverse to Company B (even within the law department) on the contract matter if, as is likely, it is substantially related to your prior work for Company B. Moreover, the requirements of Rule 1.9(c) preclude you from using or disclosing any information relating to the prior matter.

In addition, the issue goes beyond you to concern the entire law department of which you are now a part. Model Rule 1.0 (c) specifically defines "Firm" or "law firm" to include "lawyers employed in the legal department of a corporation or other organization." This understanding implicates the imputation of conflicts under Model Rule 1.10(a), which provides that "when lawyers are associated in a firm [or law department], none of them shall knowingly represent a client when any one of them would be prohibited from doing so by Rules 1.7 or 1.9," subject to certain exceptions. That means that if none of the exceptions apply, and you are conflicted out of a representation adverse to the former client, the entire law department is disqualified as well, unless there is an effective waiver per Rule 1.10(c).

Fortunately, the modern version of Rule 1.10(a)(2) (not adopted in every jurisdiction), provides a screening mechanism that can be implemented by a firm or law department to avoid full disqualification by imputation. It requires that the disqualified lawyer be timely screened from any participation in the matter, that written notice describing the screening measures and providing other specified information is promptly given to the former client, and that certifications of compliance be given to the former client in a manner specified in the rule. Of course, this process requires that the conflict is timely identified to begin with, which argues for implementation of some mechanism or process within the corporate law department, formal or informal, by which adversity with former clients of law department lawyers can be understood. In your case, you are aware of the issue, and if the matter is "the same or substantially related," your law department should proceed to implement the screening described in Rule 1.10(a)(2) if it has been adopted in your jurisdiction. If it has not been adopted in your jurisdiction, then to avoid disqualification of all law department lawyers from involvement in the matter, you would need to pursue a waiver based on informed consent from the adverse party, perhaps conditioned on screening you from the matter.

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 132 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.