

ABA CLARIFIES THE SCOPE OF PERMISSIBLE DISCLOSURE OF CONFLICTS INFORMATION WHEN LAWYERS MOVE BETWEEN LAW FIRMS

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Lawyer mobility is a common feature of modern law practice. See N.H. R. Prof. Conduct 1.9 comment 4. There has been great uncertainty about whether and to what extent a lawyer considering a lateral move between firms, and the firm considering the lateral hire, may disclose confidential client information in order to assess potential conflicts of interest created by the transition. In a recent ethics opinion issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility, the committee addresses this uncertainty by explaining the scope and timing of permissible disclosure, together with important guidelines and limitations. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-455 (2009).

Formal Opinion 09-455 was prompted by a concern shared among several scholars "that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis." Id. at 2. Importantly, New Hampshire Rule of Professional Conduct 1.6 broadly renders confidential all "information relating to the representation of a client." N.H. R. Prof. Conduct 1.6(a). Information otherwise protected by Rule 1.6 may be disclosed with client consent, see id., or "to the extent that the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or
- (2) to secure legal advice about the lawyer's compliance with these Rules; or
- (3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

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(4) to comply with other law or a court order.”

Id. 1.6(b).

Against this backdrop, the committee recognizes that “[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6.”¹ Formal Op. 09-455, at 2. While obtaining client consent would obviate the need for an exception, the committee recognizes that this is not practical for a variety of reasons, including the fact that a moving lawyer may entertain offers from several firms, and consent of all present and former clients of each would be necessary. Id. Thus, the committee recognizes that lawyers in both the migrating lawyer’s firm and the hiring firm ordinarily “should be permitted to disclose the persons and issues involved in a matter, the basic information needed for a conflicts analysis.” Id. at 3.

In arriving at its conclusion, the committee is guided primarily by the spirit of the Model Rules more than any strict textual analysis. Central to the committee’s analysis is the proposition, incorporated into New Hampshire’s Rules of Professional Conduct, that the professional conduct rules are “rules of reason . . . interpreted with reference to the purposes of legal representation and of the law itself.” N.H. R. Prof. Conduct, Statement of Purpose. The committee reasons that Rule 1.6 must yield to avoid frustrating the need recognized within the Model Rules and the common law for conflicts analysis by the lawyer and the new firm “before a moving lawyer joins a new firm,” Formal Op. 09-455, at 3.

The scope of the permissible disclosure is limited to that “reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.” Formal Op. 09-455, at 4. Disclosure is unnecessary where conflicts “that would likely frustrate a contemplated move can be discovered . . . before disclosure of client-specific information,” Id. Situations where disclosure would be unnecessary, and a lateral hire would be precluded, include where the lawyer and new firm “are adverse in numerous existing matters or regularly represent commonly antagonistic groups.” Id. If disclosure is permissible, it might be limited to “client lists or the general nature of the practices” where this reveals “the absence or presence of potential conflicts.” Id. If this degree of disclosure reveals the absence of potential conflicts, the lawyer presumably may make the lateral move to a new firm without further disclosure. If, however, this degree of disclosure is insufficient to detect or analyze potential conflicts, the scope may be expanded to the “persons and issues involved in the relevant matter.” Id.

Whatever amount of disclosure the lateral lawyer is permitted to make, the disclosure may not compromise attorney-client privilege if the identity of the client or nature of the representation are privileged. Examples given by the committee include where a client is “planning a hostile takeover, contemplating a divorce, or appearing before a grand jury.” Id. Furthermore, in the absence of informed consent from the client,

¹New Hampshire Rule of Professional Conduct 1.6 differs from Model Rule 1.6, but these differences are not germane to the issue discussed in the ABA opinion.

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disclosure is not permitted where it would “otherwise prejudice a client or former client.” Id.

Where it is necessary to engage in more intensive factual disclosure than the persons and issues involved in the relevant matters, the lawyer must forgo the move, seek client consent, “or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6.” Id. One such alternative method stems from Model Rule 1.6(b) (4)², an exception permitting disclosure in order for a lawyer to seek legal advice regarding compliance with the Rules. Pursuant to this exception, the lawyer and/or firm may hire an independent or intermediary lawyer “to receive and analyze conflicts information in confidence” Id. at 5. The committee, however, cautions that this method may not “compromise any privilege nor frustrate the reasonable expectations of a client.” Id. Nor is it permissible to use an intermediary if the client forbids the moving lawyer from revealing information to any other person. Id.

The committee also mentions the possibility of screening the lateral hire pursuant to recent amendments to ABA Model Rule 1.10(a)(2), to avoid imputation of a migrating attorney’s conflicts or confidential information to the hiring firm. For a fuller discussion of the ABA’s new screening rule, see [Advisory on the Law of Lawyering in New Hampshire No. 21](#), issued on April 15, 2009. New Hampshire has not yet adopted a similar screening provision.

Finally, as to the timing of disclosure, the committee, in keeping with the principle of minimal disclosure, reminds lawyers that disclosure may not be made until it becomes “reasonably necessary” in the negotiating process. Id. This varies with the degree of practice experience the moving lawyer has, in that relatively newer lawyers normally perform conflicts analyses later in employment negotiations. “In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial phase” Id. The committee suggests that conflict analysis be deferred until the point of “substantive discussions.” Id.

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²This exception is codified in New Hampshire as 1.6(b)(2).