THE MARYLAND BAR JOURNAL

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# Solo & Small Firm Practice

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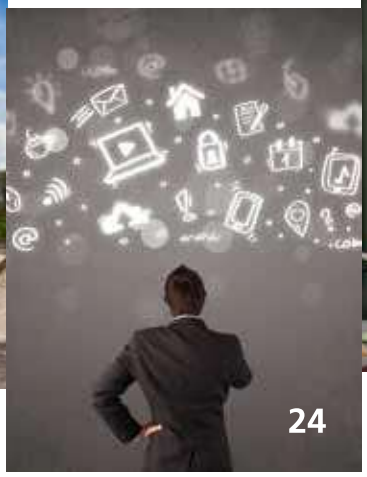




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# "Solo & Small Firm Practice"

## Features

**4** **Conflicts of Use; Conflicts of Representation**
*By Kenneth A. Vogel*

**18** **Employment Law Pitfalls for Solo and Small Firm Practitioners**
*By L. Jeanette Rice*

**24** **Solo Seeking IT Support**
*By Charity Anastasio*

**32** **April Fools! Effective 4.1.2017 You Can Now Advertise Yourself as a Specialist**
*By Robert Zarbin*

**38** **Going Out on Your Own? What Entity Should You Choose?**
*By Stuart Levine*

## Departments

**46** **Ethics Docket 2017-02** *By the Ethics Committee*
Rule 4.2 Communication with Person Represented by Counsel Guidance

# Conflicts of Use; Conflicts of Representation

By Kenneth A. Vogel

Below is a real-life small law firm ethics conflict of interest dilemma.

Thomas is a local land owner. He owns a small urban apartment complex situated on one-half acre in a residentially zoned area. The complex contains eight two-story duplex bungalows, for a total of 16 units. The small, non-descript houses nonetheless enjoy historic protection because they form a part of the historic fabric of the neighborhood, not for their elegance but simply because they were built 90 years ago. The driveway from the bungalows leads out onto a side-street feeder road, which connects to a main commercial boulevard just one-half a block away.

Adjacent to Thomas's property is a 1-½ acre parcel of land facing the main commercial street. The neighboring property owner is MMCO, a major office building developer. What appears to be a large, surface parking lot is not really one lot at all. It is an assemblage of contiguous parcels. To the surveyor, Thomas's neighbor has multiple pieces of vacant land.

Different parcels of MMCO's property have different zoning from one another. The parcels which face the main commercial street are zoned for retail or office use. The lot immediately adjacent to Thomas's land is zoned for surface or underground parking. Assuming that a developer wishes to build something on the main street – a retail strip center or a small office building, for example the parking would be behind that shopping center which abuts Thomas's land. That provides a buffer between the commercial development and the residential neighborhood behind it. The local zoning ordinance permits construction of up to 50,000 sq. ft. on the assemblage as a matter of right. By meeting a few administrative hurdles, it can go up to 60,000 sq. ft. A transitional strip is part of the city's master plan.

Thomas receives a notice of a proposed re-zoning next door. MMCO proposes to build a 300,000 sq. ft. office building on the now vacant parking lot. The proposed site plan is for a 200 foot high office building to face the major street. MMCO also proposes a 70-foot-tall parking structure on the zero lot-line running the full length of MMCO's property line contiguous Thomas's property. The parking structure will be located just 3 feet from the bedroom windows of the bungalows. The office building tower will put the bungalows in perpetual shade. The parking garage entrance is immediately next to our client's driveway. The garage will hold over 1,000 cars. This will, Thomas contends, clog the side street and make access to his property difficult.

Thomas believes that this new proposed construction will destroy the property value of his bungalows. After all, he reasons, who wants to live in an apartment with a parking garage just three feet from your bedroom window? An existing traffic light from the side street onto the main road already causes traffic to back up on the side street, blocking the bungalow's driveway. Imagine trying to get in and out of your driveway through the stacking of entering and exiting the parking garage!

Thomas hires the small law firm of Able and Baker (A&B). He wants to find out his rights on opposing MMCO's re-zoning application. A&B is a small, well known boutique law firm specializing in zoning. The partner handling Thomas's matter is Mr. Baker. Thomas signs an engagement letter and pays A&B a retainer of $10,000. Mr. Baker files a written protest letter against the project with the zoning board. The letter, a part of the public record, clearly states that A&B represents Thomas. As the zoning applicant, MMCO has knowledge of A&B's letter opposing its re-zoning request. Also, MMCO referenced A&B's letter in its side conversations with Thomas.

A senior executive at MMCO then calls the Able and Baker law firm. He speaks with Mr. Able. MMCO tells Mr. Able that it wants to hire A&B to represent them on various zoning projects throughout the city. MMCO's senior executive does not tell Able about the zoning project in which Mr. Baker submitted the opposition to MMCO's project. A general telephone discussion between Mr. Able and prospective client MMCO occurs. Mr. Able tells MMCO that he needs to do a conflict check before A&B can agree to represent MMCO. Mr. Able thereafter sent a retainer letter to MMCO and discloses to them (after the initial telephone call from MMCO) that the firm also represents Thomas on a different matter, namely the opposition against MMCO on Thomas's parcel. A&B did not request a disclosure and conflict waiver letter from Thomas because MMCO told Able that based on the disclosure, they did not want A&B to represent them on any legal matter. MMCO never made a payment on A&B's retainer agreement.

MMCO then sends a letter from its outside counsel to A&B stating that the phone conversation between MMCO and A&B constitutes legal representation. It alleges that in the telephone call MMCO gave confidential information about their general case, business strategies and mentioned the specific project at issue during the call. A&B never billed MMCO, never received any money from MMCO and never performed any legal work on MMCO's behalf. Nor did MMCO have any further conversations with Able about that or any other matter. MMCO's lawyer contends that an attorney client relationship between exists between A&B and MMCO. He demands that law firm A&B withdraw from further representing Thomas. MMCO claims that A&B cannot ethically continue to represent Thomas on any matter adverse to MMCO, including the zoning dispute where Baker had already filed public objections. Given A&B's zoning specialty and MMCO's expansion plans, this demand would

permanently remove A&B from representing any other client at any time where A&B might oppose MMCO, not just the project in question.

A&B disagrees. It says that the law firm never undertook representation of MMCO in any matter. A&B denies receiving or disclosing any confidential information from MMCO. Nonetheless, A&B is fearful of a fight with MMCO. Perhaps it comes to the conclusion that keeping Thomas as a client isn't worth the risk? A&B accedes to MMCO's demands and withdraws from representing Thomas as his attorney. Creating a Chinese wall isn't an option for a small law firm like A&B. The threat by MMCO could cause A&B to trigger a claim under its professional malpractice insurance, which has a deductible of $15,000. The insurance deductible is more than Thomas's fee.

- A&B does not thereafter represent MMCO on this or any other project.
- Has MMCO done anything wrong in contacting A&B?
- Has A&B law firm done anything wrong in withdrawing from representing Thomas?
- The author posted this scenario on the MD State Bar Association Listserv.

Among the replies:

R.S., Esq. from Baltimore writes "Sounds like dirty pool to me."

M.G., Esq., a Bethesda attorney states "This is actually a tactic that I have seen used before. It is likely a deliberate attempt to prevent clients from having the experienced counsel of their choice in the fight against the big company. When the written protest was filed, no doubt a copy was sent to the company, who then sent it to their attorney. Depending on what the ethics rules say, the big company attorney who contacted A&B may be in some disciplinary trouble, as he knew that the client was represented by A&B.

"In addition to disciplinary trouble there is a possible claim for interference with the contract between the client and A&B. If you can come up with some decent damages, you might file it against both the attorney and the company. An interesting case for punitive damages possibly."

A.W., Esq. from Rockville writes, "Depends on the state's attorney ethics code. Many states have changed their codes so that a conversation concerning potential employment does not create a conflict against another party. The purpose was to defeat common strategies such as


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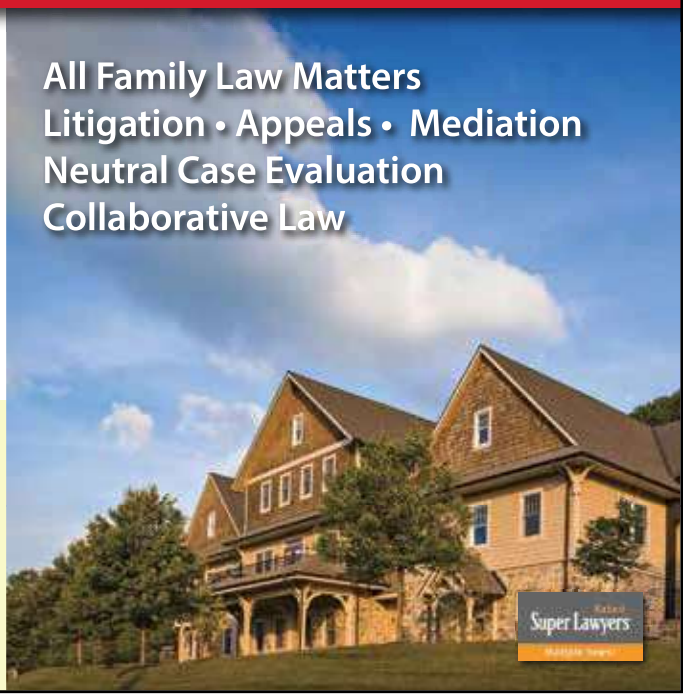


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a husband talking to every divorce attorney in a small town from conflicting them all out of representing the wife in a divorce.

"If it was the in house attorney who called the law firm, and it can be proven he knew of the prior representation, I would make the following two arguments:

"1) By talking to the attorney of the represented opposing party, he knowingly waived confidentiality, and therefore no subsequent conflict.

"2) His behavior was designed to interfere with opposing parties representation, and that is unethical.

"But I like # 1. He knew he was talking to opposing counsel. He had no expectation of confidentiality. If he didn't actually know, someone in his legal department likely knew, and therefore he is presumed to have known.

"Also, the two partners can "wall" themselves off from each other on this matter, but there can be no representation of the company until the case is over. This is a good reminder that a conflict check should be done before even talking to a potential client."

*The American Bar Association Newsletter*, April 2016 edition, published an article entitled *"The once and future client"* for its "Eye On Ethics" column. The article cites ABA Model Rule 1.18; Formal Opinion 90-358.

ABA Model Rule 1.18 Duties to Prospective Client, adopted by the ABA in 2002 pursuant to the ABA Ethics 2000 Commission's (E2k) recommendation has been adopted by many jurisdictions. The ABA Center for Professional Responsibility's Policy Implementation Committee's website provides an approach to the prospective client issue.

The ABA Standing Committee on Ethics and Professional Responsibility has also issued an ethics opinion on this topic. *See*, Formal Opinion 90-358 *Protection of Information Imparted by Prospective Client* (1990).

Under Model Rule 1.18(a), anyone who consults a lawyer about possibly entering a lawyer-client relationship becomes a prospective client.

Prospective clients gain entitlement to the protection of client confidentiality to the same extent as a former client. While the lawyer owes the prospective client the same duties of confidentiality as would apply to a former client under Model Rule 1.9 *Duties to Former Client*, the lawyer's duty of loyalty is not as restrictive; Model Rule 1.18(c) uses a different standard to for the purposes of determining disqualification than does Model Rule 1.9, stating that when the information received could be *significantly harmful* (see discussion below), to the prospective client, the lawyer may not "represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter." The *Restatement (Third) of the Law Governing Lawyers* § 15(2) (2000) takes a similar approach.

## What is "Significantly Harmful" Information Under A.B.A. Model Rule 1.18?

Under Model Rule 1.18, if the prospective client is determined to have revealed information that "could be significantly harmful" then the lawyer and his firm will be prohibited from representing an adverse party in the same or related matter. Just what exactly is significantly harmful information is of course a factual question that will depend upon the particulars of each case. *See* N.Y. City Formal Ethics Op. 2006-2 (2006).

Whether information could be "significantly harmful" to a prospective client would depend, of course, on the relevant facts and circumstances of the particular situation.

The following are examples of case law and state bar ethics opinions that have addressed whether certain information that has been disclosed by a prospective client could be construed as significantly harmful in subsequent litigation.

- In *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006) a law firm was disqualified from representing a former wife in change-of-custody proceeding, when her husband already consulted with the firm and disclosed "everything he knew and his concerns about the children and his former wife."
- In *Mayers v. Stone Castle Partners, LLC, 1 N.Y.S.3d 58, 2015 N.Y. Slip Op. 00295 (2015)* the court held that disqualification was not warranted because the confidential information divulged in the consultation did not have the potential to be


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significantly harmful in litigation. The Montana Supreme Court in (*In re Perry,* Mont., 293 P.3d 170 (2013) found that three phone conversations years earlier from the wife did not convey substantially harmful information to the husband's law firm and so the firm may continue to represent the husband."

- *Compare Cascades Branding Innovation LLC v. Walgreen Co,* Not Reported in F.Supp.2d, 2012 WL 1570774 (N.D.Ill.) (2012) wherein a law firm was disqualified from representing the opponent of the prospective client company's wholly owned subsidiary in a different patent infringement action. In this case, "playbook information" – an organization's policies and standard approach to litigation that the firm learned from the prospective client was part of the confidential information obtained, and ultimately formed the basis for the disqualification."
- The State Bar of Wisconsin analyzed the types of information that could be significantly harmful to the prospective client in Opinion EF-10-03 (1210). In the Opinion, the committee stated that "Information may be significantly harmful if it is sensitive or has long-term significance in the matter, for example, if it concerns motives, litigation strategies, or potential weaknesses. Information that could substantially affect settlement proposals or trial strategy could also be significantly harmful."

## The Consultation Must Have Been Made in Good Faith

The last sentence of Comment [2] to Model Rule 1.18 states "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client", thus drawing a line against individuals who consult with the lawyer for the sole purpose of having them disqualified from representing adverse parties against them in the future." Case law and ethics opinions have addressed this issue. *See* e.g., *Matthews v. United States*, Not Reported in F.Supp.2d, 2010 WL 503038 D.Guam, (2010) (caller did not become a prospective client simply because the lawyer let him keep talking "out of courtesy.") *See also* State Bar of Virginia Ethics Op. 1794 (2004) (no duty of confidentiality owed to person who posed as prospective client and shared confidences with lawyer to create conflict of interest) and Illinois State Bar Association Opinion 12-18 (2012) (lawyer may not counsel a client to consult other lawyers in the community as a stratagem to disqualify them from representing the client's opponent.)

## Beauty Contests

Sometimes, when individuals who are looking for a lawyer to represent them in a particular matter, they will consult with several firms in an effort to determine who is the best fit. These types of consultations have been referred to as "beauty contests", and some state bar ethics opinions have analyzed the prospective client conflicts/confidentiality issues implicated in this context. *See,* e.g., the Association of the Bar of the City of New York Opinion 2013-1 (2013). (Stating that a law firm that participated in, but did not win, a "beauty contest" could represent an adverse party if it did not give any confidential information during the beauty contest. If confidential information did pass between them, then the client must give informed written consent and the law firm must implement effective screening procedures as described by Model Rule 1.18(d)(2)).

## Informed Consent and Screening to Avoid Disqualification

In the event that a lawyer has received disqualifying information, subpart (d) of Model Rule 1.18 states the lawyer may proceed with the representation if both the client and the prospective client give their informed consent in writing. In the absence of such consent, it also states that other lawyers in the firm may proceed with the adverse representation as long as the affected lawyer has taken measures to limit his exposure to more potentially disqualifying information than was reasonably necessary to determine whether to proceed with the representation and is "screened from any participation in the matter and is apportioned no part of the fee therefrom…". The firm must also notify the prospective client. *See* N.Y. City Formal Ethics Op. 2006-2 (2006) (endorsing Model Rule approach and authorizing screening to rebut presumption that other lawyers in firm gained knowledge of prospective client's "confidences and secrets"); N.C. Ethics Op. 2003-8 (2003) (second representation may not proceed unless former prospective client notified and firm promptly implements screening procedures,

but not necessary to obtain former prospective client's consent; second consultation itself can suffice to trigger screening and notice requirements if firm already became aware of potential conflict).

For further information on Model Rule 1.18, see the annotations to the rule in the eighth edition of the ABA Annotated Model Rules of Professional Conduct (2015). *See also* the chapter entitled, "Prospective Clients" (last updated in 2011) as it appears at page 31:151 of the ABA/BNA Lawyers' Manual on Professional Conduct and chapter 18 Duties to Prospective Clients as it appears at page 716 of the 2014-15 edition of Rotunda and Dzienkowski's Lawyer's Deskbook on Professional Responsibility.

The Maryland Attorneys' Rules of Professional Conduct are found in the newly enacted Maryland Rules of Procedure, Title §19-300. They are similar to, but not identical to, the ABA Model Rules.

## Maryland Rule §19-301.18 (1.18). Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule §19-301.9 (1.9) would permit with respect to information of a former client.

(c) A lawyer subject to section (b) of this Rule shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in section (d) of this Rule. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in section (d) of this Rule.

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

As the reader now knows, Able and Baker withdrew from representing the client. Does A&B have any liability to its now former client? A&B wrote a letter to the zoning administrator on Thomas's behalf. Thomas paid its fee. A&B did not refund any earned legal fees to its now former client. Should it have? Thomas was harmed in that he then had to get replacement counsel. Is the inability to get counsel of one's choice a harm from which damages flow? Was the tactic of MMCO a tortuous interference with Thomas's attorney-client relationship? While Thomas was able to find competent replacement counsel, one with a higher stature, his new counsel does not have the same cordial relationship with the city planners, a main reason that Thomas hired Baker.

## Green Mail

Property law does not appear to provide a nuisance remedy. A right to sunlight, views or fresh air unobstructed by neighboring properties is not a common law right. There is no local or state statute which creates such a right. If MMCO is successful in re-zoning its property, and if MMCO overcomes any administrative appeals and court suits, it can build its building without compensating Thomas. Thomas's actions will delay MMCO, but if Thomas loses, MMCO will develop its office building. On the other hand, if Thomas wins, MMCO's project is defeated.

MMCO views any payment to Thomas as "Green Mail." Green Mail refers to a practice by which a corporation pays money to an aggressor in order to stop an act of aggression. Thomas's view is the opposite. His position is that MMCO can build what it wants to the maximum amount of the current zoning, namely 50 to 60,000 sq. ft. It is the plan for the 300,000 sq. ft. office tower that harms Thomas. Thomas believes that he should therefore be compensated.

## The Next Attorney

A&B completed Phase I of its representation of Thomas at the point that MMCO demanded its withdrawal. A&B sent a disclosure letter to Thomas stating that it would like to represent Thomas for Phase II of the fight. The disclosure letter reported that A&B never performed any legal services for MMCO and had no communications with MMCO since the earlier conversation. Thomas replied

that he wished A&B to continue working for him. Shortly thereafter, based on escalating threats from MMCO, A&B informed Thomas that it would no longer represent him.

Thomas then hires another small law firm, C&D, to take over representing him. C&D is another well-known firm which successfully represented homeowners' associations and community activist groups in the city. It has stopped other projects dead in the water.

C&D has to spend time getting up to speed and reviewing A&B's work. That cost Thomas money. C&D's hourly rates exceed A&B's. Might A&B be liable for the difference in the hourly rates between its rate and C&D's higher rates? Or for the additional time? Is it even possible to say that A&B would have worked more efficiently or been more effective than C&D, thereby spending less time and costing the client money than C&D? Are lawyers fungible?

The parties attempted to reach a settlement. The case did not settle. Under the proposed terms of the settlement, Thomas would have stopped opposing MMCO's re-zoning application. MMCO would have compensated Thomas pennies on the dollar for the (speculative) diminution in value of Thomas's property. None of C&D's other clients are fighting this MMCO project. If Thomas ended his fight, meaningful opposition to this project from another source was unlikely. Without organized opposition, MMCO's project is likely to go forward. C&D agreed that it would not represent another neighbor in opposition to this specific MMCO project as it would undermine Thomas's settlement with MMCO.

In the future, it is possible that one of C&D's clients, present or new, could fight a different MMCO project. As part of its settlement negotiations with Thomas, MMCO wants to permanently neutralize C&D from ever opposing them on any MMCO project at any time. They want C&D to agree to never represent another client against it.

This immediately attempts to create a conflict of interest between Thomas and his attorneys, C&D. If Thomas wants the settlement, should he try and push C&D to agree to this term? When C&D refuses, as it must, is it putting its law firm's self-interest over that of its client? This attempt created a theoretical conflict only. C&D stated that under no circumstances would they ever agree to represent MMCO, and Thomas did not make that request of C&D in order to facilitate a settlement.

## The Donald Trump Connection

If the fact scenario above strains your sense of belief and fair play, consider this. On March 25, 2016, *The Washington Post* reported the story of New Jersey attorney Glenn Zeitz. In 1996 Zeitz represented an elderly but feisty widow who refused to sell her home in Atlantic City to Donald Trump for his casino expansion. The widow, Vera Coking, was in active litigation with Mr. Trump regarding damage to her home caused by Trump's construction, and due to Trump's attempt to have Ms. Coking's home taken by Atlantic City by eminent domain. While the dispute was raging, Mr. Trump personally called Mr. Zeitz at home. He asked Zeitz to represent him on another eminent domain case in Atlantic City where Trump took a contrary legal position in a fight with casino magnate Steve Wynn. When Zeitz refused, Trump told Zeitz to rush a settlement of the Coking case so as to eliminate the conflict of interest.

Candidate Trump denied to be interviewed for the story. His spokeswoman said, "This story and these statements are completely false. Additionally, it is ancient history."

## Maryland Ideals of Professionalism

The Maryland Ideals of Professionalism are found in the Maryland Rules of Procedure, Appendix 19-B state "A lawyer should aspire (1) to put fidelity to clients before self-interest." As applied to the situation at hand, if Thomas wants to settle the dispute with MMCO, and if MMCO will not agree to a settlement absent C&D's consent to its demands about C&D's future legal activities with other clients, has C&D violated its professional obligation to Thomas or failed to live up to these ideals?

This author believes that C&D is not obligated to be pushed into any agreement contrary to C&D's best interests as a law firm, even if it is contrary to the best interests of Thomas.

In addition, C&D's other land use clients, in particular non-profit community activists, oppose spot zoning requests filed by other developers on other parcels. Indeed, C&D is suing the city to try and overturn city approval of a different project from a different developer, but with a similar set of legal issues. If C&D successfully opposes spot zoning generally, the ripple effect can negate MMCO's spot zoning approvals on its parcels next to Thomas's property, even without opposition from Thomas.

This is a known risk that MMCO has to take. It cannot force C&D into a conflict where it abandons its other clients in order to facilitate Thomas's settlement agreement.

## Maryland Rule §19-301.7 (1.7) Conflict of Interest: General Rule

(a) Except as provided in section (b) of this Rule, a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

MMCO is nothing if not Big and Bad. It knows that pursuant to MD Rule §19-305.6 (5.6), described below, C&D cannot be forever barred by agreement from representing clients on any project in opposition to MMCO. C&D will not agree to close its land use law practice fighting developers.

## Maryland Rule §19-305.6 (5.6). Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

## Comments to Rule §19-305.6 (5.6)

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

[2] Section (b) of this Rule prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

## Can Lawyers Be Made Slaves?

To avoid bumping up against Maryland Rule §19-305.6 (5.6), but to still neutralize C&D in the future, MMCO tried to create within the proposed Thomas settlement agreement an attorney-client privilege between C&D and MMCO. In other words, MMCO wants C&D to represent both Thomas and MMCO in form only. As MMCO's attorney, C&D could then be precluded from ever representing a different client in opposition to any MMCO project that could come down the road.

To begin, C&D does not agree to represent MMCO. As C&D puts it, "Slavery has been abolished. We will never agree to an attorney-client representation with MMCO." MMCO does not want to retain C&D for any work. MMCO did not offer to pay C&D any money. The sole goal of MMCO is to attempt to permanently create a conflict of interest by which C&D can never represent any other client on any matter involving MMCO. MMCO is attempting to set up a MD Rule §19-301.9 (1.9) conflict.

## Maryland Rule §19-301.9 (1.9) Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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 gives informed consent, confirmed in writing.

(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

(1) whose interests are materially adverse to that person; and

(2) 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 gives informed consent, confirmed in writing.

(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 these Rules 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 these Rules would permit or require with respect to a client.

## Coments to Rule §19-301.9 (1.9)

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule §19-301.11 (1.11).

[2] The scope of a "matter" for purposes of this Rule depends 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 in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded for that reason alone from later representing another client in a factually 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 jurisdictions. 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.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representa-

tion; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

## Client Files

After Attorney Baker withdrew as his attorney, Thomas asked Baker for the correspondence sent by MMCO demanding its withdrawal. A&B ignored the requests. A&B transferred Thomas's file to the new law firm, but they withheld all correspondence with MMCO concerning the alleged conflict of interest.

Are MMCO's letters part of Thomas's file? Are they part of MMCO's file? Or both? Are the letters protected from Thomas by an attorney client privileged owed to MMCO?

MD Rule §19-301.16(d) (1.16(d)) provides:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, **surrendering papers** and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law (emphasis added).

In *Att'y Griev. Comm'n v. Nichols*, 405 Md. 207, 950 A.2d 778 (2008), the attorney's failure to turn over the attorney's file to the client's new attorney for six months after the client terminated the attorneys services violated (d). As a result of that misconduct and other related misconduct, the sanction was the attorney's indefinite suspension from the practice of law.

Sadly, Attorney Able passed away. It was only after Attorney Baker was reminded of A&B's ethical obligations concerning the client files that he finally turned over one threatening letter from MMCO's counsel. If there are other letters in the files, they are unknown as of this writing.

## Conclusion

It is fair to say that any time a small law firm takes on a business client, the firm risks not being able to represent its client's adversaries and competitors. Sometimes attorneys restrict their practices to a certain type of client. For example, a real estate attorney may choose to represent just landlords or just tenants. In the author's opinion, that represents more of a business development decision. Ethics do not dictate this decision. If an attorney represents tenants, he or she might not generate a lot of repeat business; individual tenants might not possess money to pay legal fees. On the other hand, landlords often hire attorneys to file actions. A busy landlord's attorney will never find himself on the wrong side of his economic bread-and-butter by representing a tenant and later becoming disqualified from representing a landlord by a conflict against his former client.

Thomas is unlikely to ever sue or file a complaint against his first law firm, Able and Baker. They did a good job for him before they withdrew. MMCO will never use A&B to represent them on any other project. It was a ruse. Karma will be complete if A&B never represents any other client on any project opposing MMCO.

Law firm C&D will not agree to participate in a settlement agreement in which its current client benefits, but which harms the law firm. C&D will not agree to refuse to represent any future client against MMCO. Nor will it create a phony attorney-client representation of MMCO as part of a zoning dispute settlement agreement between Thomas and MMCO. Why would it? Thomas has not and would not ask C&D for such acquiescence in order to facilitate Thomas's settlement agreement. MMCO is the big gorilla in town. Patently unreasonable requests do not shame MMCO from making such demands.

Small law firms who represent developers, community groups and individual property owners have to carefully navigate the dynamics of the neighborhood. Conflicts of interest – real or manufactured – jump out of alleyways. This becomes especially true as companies buy and sell land, merge into successor entities and expand their business footprint into new neighborhoods.

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