

**Boston Bar Association Ethics Committee
Opinion 2004-1**

Summary of Opinion

A lawyer seeking to move to a new firm or job may reveal to the prospective firm or employer, without the consent of the affected clients or ex-clients, "conflict-checking information" including the identity of the lawyer's previous clients and the general subject matter of the work done for those clients, but (a) only if such revelation would not be embarrassing or detrimental to the client whose information the lawyer reveals, and (b) only if the information revealed is limited to that reasonably necessary and appropriate for the conflict-checking purposes. As an additional precaution, a law firm receiving conflict-checking information may be required by the firm supplying it to designate, if possible, one member of the firm or an administrative employee of the firm to review such information without sharing the information with the rest of the firm, while comparing that conflict-checking information with information in the Firm's database.

Facts

A third year law student working in Massachusetts for a law school clinic offering legal services to the elderly has accepted employment with a large firm on the West Coast. As a precondition to his joining the firm, in the context of a standard conflict-checking process, the law firm has asked the student to supply the names of all clients with whom he has worked as a law student, and the general subject matter of those cases (e.g., social security, landlord/tenant). In order to comply with this request, the student would need to reveal to his new firm the names of all of the elderly clients to whom he has given advice and representation at the clinic, and some general information about the subject matter of his work for the clients. He has inquired of his faculty supervisor whether he has any permission under the rules governing practice in Massachusetts to reveal his clients' identities and the general subject matter of the representation without seeking permission of the individuals to reveal that information. The project within the clinic at which the student works represents only elders, defined as persons age 60 or over. Some, but not all, of the elder clients are disadvantaged or low-income, and low-income status is not a prerequisite for obtaining legal services at the elder project within this law school clinic.

Discussion

The question presented by the law student and his supervisor is one faced by lawyers in the Commonwealth every day. It applies to any lawyer who moves from one job to another—thus, to virtually every lawyer at some time in his or her career. It is also clear to us that the answer we offer to the student is the same as it would be if the

question were asked by a lawyer changing firms.¹ For the sake of our discussion, then, we treat the question as though it were asked by a lawyer.

The resolution to the question, however, is not readily apparent from the plain language of the Massachusetts Rules of Professional Conduct. A lawyer who changes jobs confronts a tension among Rule 1.10(d), which governs imputed conflicts created by a lawyer's joining a new firm,² Rule 1.7 Comment [1], which states that a lawyer "should adopt reasonable procedures ... to determine whether there are actual or potential conflicts of interest" in the lawyer's work, and Rule 1.6, which protects "confidential information relating to the representation of a client." Our opinion seeks to harmonize the three rules in a principled way, while recognizing the need to avoid needless roadblocks to attorney mobility.

Rule 1.10(d) prohibits a law firm from representing a client if one of its lawyers formerly represented, or learned relevant information from an association with a lawyer who represented, the client's adversary. A law firm thus needs to be certain that a lawyer it hires is not "tainted" with impermissible information about a client's adversary. Law firms, of course, know this all too well. Before they hire any lawyer, therefore, they ask the lawyer the names of all clients whom she represented before, lest the lawyer join the firm and irrevocably infect important ongoing work. It is a responsibility of a law firm, for its clients' benefits as well as its own, to conduct a rigorous conflict check before employing a new lawyer.³

¹ See, e.g., *Pisa v. Streeter*, 491 F. Supp. 530, 532 (D. Mass. 1980)(finding that a law student was equivalent to a lawyer for ethics purposes). For a discussion of when law students are treated as non-lawyer assistants, and when they are treated as lawyers, see Peter A. Joy and Robert R. Kuehn, *Conflict of Interest and Competency Issues in Clinical Practice*, 9 CLINICAL L. REV. 493 (2002).

² The considerations we discuss here regarding a lawyer's moving from one job to another apply to all settings, whether law firms, government organizations (with respect to which the conflict rules are less absolute—see Rule 1.11), legal aid organizations, and the like. For simplicity, we will refer to the places of employment as "law firms," despite that term's inevitably narrow scope.

³ See New York State Bar Association, Committee on Professional Ethics, Op. 720 (1999)(noting that New York's Disciplinary Rule 5-105(E) requires lawyers to develop effective conflict-checking procedures); Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Op. 2003-3 (outlining methods by which lawyers may comply with DR 5-105(E), but without confronting the questions addressed here). A similar, but slightly different obligation applies when a firm hires a non-lawyer who has been previously employed at another firm. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1536 (1988) concluded that a firm may continue representing a client whose interests conflict with interests of clients of the former employer on whose matters the non-lawyer has worked as long as: (1) the non-lawyer is screened from receiving information about or working on lawsuits involving those clients; and (2) the non-lawyer does not reveal any information relating to those clients to the new firm. That Informal Opinion permits screening of non-lawyers, an expedient that is not available under the ABA's Model Rules with respect to lawyers who have worked on existing matters while at a previous firm.

For the conflict checking process to work, though, the prospective hire must be capable of sharing with the new law firm the identity of her former clients and, at times, the subject matter of her prior representation. (For the sake of the remaining discussion, let us refer to this bundle of information as "conflict-checking information.") She may share conflict-checking information, of course, only if not prohibited by Rule 1.6. To that Rule's scope we now turn.

Rule 1.6(a) of the Massachusetts Rules of Professional Conduct forbids a lawyer from revealing "confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation," with other exceptions not applicable here. The question we must answer here is whether the language just quoted allows a lawyer to reveal to a prospective new employer the fact that she represented a client, and enough information about that representation to satisfy the inquiries required by Rule 1.10—in other words, the conflict-checking information.

We conclude that Rule 1.6(a), properly interpreted in light of the Rules' overall scheme, permits a lawyer to reveal the names of clients and the general nature of the representation, but only in situations where doing so would not injure the interests of the client, and where no other feasible alternative for avoiding conflicts is available. In arriving at this conclusion, we do not suggest nor offer any opinion about other issues raised by lawyers changing firms, such as whether a lawyer may reveal information about amounts of money earned by a lawyer from certain clients. We leave those questions for a future inquiry.

We begin with the most obvious potential source of authority for such disclosure—the clients themselves. If lawyers and law firms request, at the beginning of any client representation, permission to release client identity and the general subject matter of the representation for the limited purpose of screening conflicts, the resulting consent from the client plainly satisfies Rule 1.6 and authorizes the sharing of the information.

Of course, not all lawyers have included such a request in their initial engagements, and for a multitude of reasons many engagements will occur without it. The question therefore remains whether the lawyer may reveal conflict-checking information without explicit consent of the client. The Committee concludes that a lawyer may share conflict-checking information within reasonable limits as described below, either because that information is not "confidential" under Rule 1.6, or because such information, even if otherwise covered by Rule 1.6, fits that rule's exception for revelations "impliedly authorized in order to carry out the representation."

We first consider whether the conflict-checking information qualifies as "confidential information," and thus presumptively fits within the ambit of Rule 1.6. Unlike the ABA's Model Rule 1.6, the Massachusetts version of the rule does not protect *all* client information relating to the representation. Massachusetts's Rule 1.6 protects only "confidential" information. The Comments to Rule 1.6 are, in the Committee's opinion, surprisingly opaque about the meaning of the word "confidential." Comment [5A] offers extreme examples (fog at the airport is not confidential; obscure but technically public record of a secret marriage would be confidential) which do not offer enough guidance to lawyers faced with more ordinary situations. While the Comment does refer to "widely available or generally known" information as not confidential, it does not establish in a clear fashion that only such information qualifies as not confidential.

Given the ambiguity of the Massachusetts Rule and Comments, the Committee opts to interpret the term "confidential information" in a way that seems most reasonable, and consistent with the protection of client interests. Following the lead of the Restatement (Third) of the Law Governing Lawyers (2000), we conclude that in most instances client identity and general subject matter of the representation should not be deemed "confidential" under Rule 1.6. After explaining that revelation of confidential client information is prohibited "if there is a reasonable prospect that doing so will adversely affect a material interest of a client or prospective client," the Restatement expressly concludes that client identity ordinarily does not constitute confidential client information. Restatement, § 60(c)(1). The Committee's conclusion is consistent with the Restatement's position.

Additionally, the Committee interprets Rule 1.6(a) to permit the sharing of most conflict-checking information on the grounds that such sharing is "impliedly authorized in order to carry out the representation." We interpret Rule 1.6(a) in this way because any other reading leaves a lawyer in this state unable to comply with Rule 1.7's insistence that she develop "reasonable procedures" to check for conflicts (see Rule 1.7, Cmt. [1]), or which would leave her unable to change jobs during her career. Lawyer mobility is an important value in Massachusetts and in the profession as a whole. In particular, lawyer mobility helps clients as well as lawyers, as the Comments to Rule 5.6 note, in insuring the freedom of clients to choose a lawyer to represent them. Avoiding conflicts of interest is more than an important value—it is an essential element to effective representation of clients. Without some implicit authorization to share limited conflict-checking information, Rule 1.7's requirement of reasonable procedures to check conflicts and Rule 5.6's protection of lawyer mobility and a client's right to choose its lawyer could not be reconciled.

We therefore conclude, for the two independent reasons described here, that a lawyer in Massachusetts has permission to reveal limited, non-detrimental client information to prospective employers in order to facilitate those employers' conducting a

reasonable and necessary conflict-check.⁴ This authorization, however, is not unfettered. It cannot be understood to permit wholesale revelation of embarrassing or harmful information, even if that information might serve an important, or even useful, conflict-checking purpose.

A lawyer may only reveal conflict-checking information without client consent if the information revealed, and the act of revealing it, would not be embarrassing or detrimental to the client. A lawyer who is known to work exclusively or predominantly in the areas of bankruptcy, or divorce, or criminal defense, for example, must ensure that her disclosure of her client list, or other necessary conflict-checking information, does not thereby reveal important confidential information about her clients, information which the clients likely would insist not be revealed. The risk is that those lawyers, by the very acknowledgement that a person is a client of such a firm, will have revealed some possibly sensitive information about the nature of the person's legal situation. It is no doubt true that lawyers working in those areas have more limited mobility because of this restriction, but that implication seems necessary and inevitable. Those lawyers may need to resort to more creative measures to check for conflicts when they attempt to change firms.⁵

The Committee, relying on the practices of its members' firms, suggests that law firms receiving conflict-checking information institute procedures to limit access to the

⁴ In so concluding, we join the District of Columbia Bar, which issued an opinion in 2002 arriving at the same result as we do here. See D.C. Bar Opinion 312 (May 2002). The D.C. Bar, though, had a more explicit basis on which to ground its conclusion. The District of Columbia has adopted a version of Rule 1.6 which maintains the distinction, first expressed in the Model Code of Professional Responsibility, between "secrets" and "confidences." "Secrets" refer to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing, or would likely be detrimental, to a client." "Confidences" refer to information protected by the attorney-client privilege. Because only secrets and confidences are protected by DC Rule 1.6, and because most conflict-checking information does not qualify as either a secret or a confidence, the DC Bar concluded in a straightforward way that lawyers in that jurisdiction have permission to reveal conflict-checking information. See also N.Y. State Bar Ass'n Comm. Prof. Ethics, Op 720 (August 1999) (similarly relying upon the "secrets" and "confidences" distinction, but cautioning that "[a]lthough the fact that the client consulted a lawyer and the general nature of the consultation will usually not be privileged, the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless [in some circumstances] constitute 'secrets' of the client which the lawyer may not disclose").

Oddly, we have found no authority from any jurisdictions other than DC or New York addressing this issue. Because we are certain that every firm in every state conducts conflict-checking, we are puzzled that no other ethics committee has attempted to square those practices with the language of Rule 1.6.

⁵ The opinion of the New York State Bar ethics committee lists some possible mechanisms for checking conflicts when the client identity should not be revealed to the new firm. These mechanisms include the moving lawyer's identifying the opposing litigants on all of her cases, and her learning from the new law firm the names of all of its clients. See Op. 720, *supra* note 3.

information it receives. One firm uses a retired partner, who otherwise does not participate in the daily activities of the firm, to screen any conflict-checking information received, disclosing that information to other members of the firm only if necessary to fulfill the conflict-checking task. Another firm employs paralegals in a separate conflict-checking unit, and like the above firm screens those paralegals from the remainder of the firm's employees. The goal is to limit, within reason, the sharing of information received through the conflict-checking process, to respect the new lawyer's former clients' privacy as much as possible.

The Committee also concludes that a lawyer should consider reasonable alternatives before revealing conflict-checking information, regardless of the nature of the lawyer's current or past employment. Not all former clients will create inevitable risks of conflicts with the new firm's clients. As one example, consider a legal aid lawyer on the East Coast who opts to relocate to San Diego to work for a mergers and acquisitions firm. If that lawyer is asked by her new firm, as a matter of course, for a list of all of her clients, she might confidently negotiate with the new firm for an exemption from its usual protocols, given the small likelihood of any conflict materializing.

We now turn to the student's question and attempt to answer it in light of the above discussion. First, as noted earlier, the student is subject to the same conflict-checking obligations as a lawyer, so the analysis above applies equally to him. Second, the student's clients, being represented by an elder law service, would not necessarily find their connection to that program as embarrassing or harmful, in view of the fact that the only criterion of eligibility is having achieved the age of 60. Thus, absent any other consideration the student would have implied permission to reveal the clients' conflict-checking information to his prospective employer. But it seems in his case that other considerations do apply. The student's new employer was a large firm on the West Coast. The chances of a conflict arising between his clinic clients and his new firm's work are virtually non-existent. The student might, therefore, seek to obtain a waiver from the firm's usual protocol, as such a waiver appears to be reasonable. If that waiver is not forthcoming, however, the student may reveal the names of his clients and, if asked by the prospective employer, the general subject matter of the representation.⁶

⁶ In fact, the student resolved his issue in exactly that way, and the firm accepted his request for the waiver.