

## **"Thrust-Upon" Conflicts Do Not Always Require Disqualification**

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Even the most prudent lawyer may sometimes come face to face with a conflicts of interest that was not apparent or did not exist when the lawyer's work began. If all affected clients will consent at that point and the matter is one that is capable of consent, the lawyer is in the clear. But what if one or both clients refuse to consent--perhaps for manifestly "tactical" reasons? From which representation or representations, if any, must the lawyer then withdraw? These questions were recently addressed in Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Formal Op. 2005-5 (June 2005) ("Opinion 2005-5").

Opinion 2005-5 defines "thrust-upon" conflicts as conflicts between two clients that (1) did not exist as the beginning of either representation, but arose during the ongoing representation of both clients, (2) were not reasonably foreseeable at the outset of the representation, (3) developed through no fault of the lawyer, and (4) are a type of conflict that can be waived, but one of the clients will not consent to the dual representation. Although these thrust-upon conflicts will generally arise as a result of changes in corporate ownership, they can arise in other unexpected manners, such as when a current client arises as the adverse party in a government investigation.

Of course, a lawyer must first assess whether the changed circumstances truly have led to a situation in which a multiple client conflict (now covered in Oregon by Oregon RPC 1.7) really exists. If not, there is no "thrust-upon" problem because there is no conflict. Opinion 2005-5 holds, however, that if a conflict does exist and one or both clients will not consent, the lawyer must be guided by the lawyer's duties of confidentiality and loyalty in determining whether to withdraw from the representation of one or both clients. When, for example, two matters for two different clients that previously appeared to be factually and legally unrelated have now become significantly intertwined, the lawyer will likely have to withdraw from representing both clients. This result can be said to be one aspect of what is sometimes referred to as the "hot potato" rule.

When the two matters remain factually and legally unrelated, however, Opinion 2005-5 asserts that a more flexible approach is both more appropriate and more consistent with prior case law. According to Opinion 2005-5, the following list of non-exclusive factors may be considered:

1. The origin of the conflict--that is, which client's action caused the conflict to arise;
2. Whether one client has manipulated the conflict to try to force a lawyer off the matter and is using the conflict as leverage;
3. The costs and inconvenience caused by a party being required to obtain new counsel, including consideration of the complexity of the representation;
4. Whether the choice would diminish the lawyer's vigor of representation toward the remaining client; and

5. The lawyer's overall relationship to each client.

Opinion 2005-5 holds that depending upon the lawyer's evaluation of these factors, the lawyer may be able to retain one client while dropping the other client over the other client's protest. This might be the case if, for example, the client to be retained would be seriously harmed by a change, the client to be dropped would not be prejudiced by continuation of the representation, the client to be dropped was the one that refused to consent and the actions of the client to be dropped created the conflict. *See also* Restatement (Third) of the Law Governing Lawyers § 132 cmt. j (2000); ABA Model Rule 1.7 cmt. 5.

Opinion 2005-5 also notes that there may be steps that a lawyer can take in advance to avoid subsequent thrust-upon conflicts. For instance, a lawyer might seek an advance conflicts waiver to cover one or more contingencies. *Cf.* ABA Formal Opinion 05-436 (regarding future conflicts of interest); OSB Legal Ethics Op No 1991-122 (same). Similarly, a lawyer might seek clearly to state in an engagement letter whether, or to what extent, companies in a subsidiary, parent or brother-sister relationship with a client will also be regarded as clients. *Cf.* OSB Legal Ethics Op No 1991-85.