



Watch the Rationalizations

A Conflict Is a Conflict

By Winston N. Harless

Who could ever forget a recent former president's strained rationalization on the meaning of the term "is"? In essence, if one means "never happened before and not happening now," that's one definition. If one means "happened before, but not happening now," that's another definition. Despite its allure, lawyers faced with conflicts issues are well served to avoid similarly strained rationalizations in determining whether a conflict is a conflict.

Absent informed consent from a former client—confirmed in writing—Model Rule of Professional Conduct 1.9 prohibits a lawyer who formerly represented a client in a matter from representing 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. Most lawyers easily understand and appreciate the prohibition against switching sides in the "same" matter. Nonetheless, lawyers may sometimes fail to recognize a "substantially related matter." A recent memorandum opinion from the United States District Court for the District of Delaware demonstrates the point.

In *Madukwe v. Delaware State University*, 552 F. Supp. 2d 452 (D. Del. 2008), former employees brought employment discrimination and related claims against the defendant university and several of its high-ranking officials. However, the plaintiffs' law firm had previously represented the university for more than twenty-five years. The firm had defended the university against employment discrimination allegations identical to those brought in the case at issue. Further, at times, the specific lawyer handling the claims at issue had represented the university. Over the years, the firm handled a variety of labor matters, such as grievance arbitrations and unfair labor practice proceedings; participated in drafting, revising, and interpreting university staff personnel policies; assisted in drafting the university's professional employee handbook; and sometimes served as the exclusive outside counsel for the university. Ultimately, when the university hired a new president and vice president, the university became less reliant on the firm, and the attorney-client relationship ended approximately one year before the employment terminations at

issue. Significantly, some of the allegations related to the terminations occurred during the time the firm represented the university in employment-related matters.

Shortly after termination, the plaintiffs retained the law firm. One of firm's lawyers attended an initial grievance proceeding with one of the plaintiffs, which resulted in the university's outside counsel requesting in writing that the firm voluntarily withdraw, citing conflicts of interest pursuant to Rules 1.6: Confidentiality of Information, 1.9: Duties to Former Clients, and 1.10: Imputed Disqualification of Delaware's Professional Rules of Conduct. The firm responded that no conflict existed, because no lawyer associated with the firm had ever represented the university with regard to that particular plaintiff's employment or any matter substantially related to that employment. The firm also stated that it did not have and, in any event, would not reveal or use any confidential information it may have obtained during its representation of the university. Lawyers from the firm subsequently accompanied the plaintiffs at other proceedings, including a mediation meeting with the Delaware Department of Labor. However, no further discussion regarding the contended conflict occurred until after suit was filed. The parties agreed to delay scheduling and discovery until the representation issues were resolved.

In their motion for disqualification, the defendants argued that the firm's prior representation of the university was such that it was essentially "switching sides" in its current representation. The plaintiffs argued that disqualification was inappropriate because the litigation bore nothing more than a superficial similarity to any prior matters, and because the firm had never advised the university with respect to these specific plaintiffs, nor learned any confidential information relevant to the current litigation.

Despite the rationalization, the court found that the nature and scope of the firm's prior representation was sufficiently similar to its current representation to opine that the matters at issue substantially related to matters occurring during the prior representation. The court required "no stretch of the imagination" to conclude that the firm's lengthy relationship with the university likely permitted it to acquire confidential information about how the university handled, avoided, or prevailed in court in situations identical to those at issue—noting

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the firm's access to a university document describing risk management strategies and possession of closed files. The court rejected the argument that because the university had hired a "new regime" and possibly handled matters in a new way meant that any confidential knowledge previously obtained was outdated. Although recognizing that such an argument might prevail in appropriate cases, the court noted

that the "new regime" had been in place at least eighteen months before the attorney-client relationship ended. The court also rejected a waiver argument, concluding that while the university could and should have done more to preserve the conflict issue, its 14-month delay—under the totality of the circumstances—did not result in a waiver of the right to object to the representation. The court reasoned, in part, that the litigation was in the early stages,

and that it was not entirely uncommon for a client to be represented by different attorneys during the prelitigation and litigation phases of a case.

Finding no satisfaction in disqualifying any lawyer, and regretting any hardship to the plaintiffs, the court nevertheless recognized the expectations of conduct embodied in the Model Rules, and that the rules must be enforced. The lesson for lawyers is what it is. **FD**