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Conflicts Revisited, Part 2: Former Client Conflicts

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Last month we began our conflict review with a look at current client conflicts. This month, we'll continue our survey with former client conflicts. Next month, we'll conclude with a discussion of structuring representations to eliminate conflicts altogether.

Former Client Conflicts Defined

Former client conflicts come in two varieties.

First, under RPC 1.9(a), a former client conflict exists if a lawyer (or firm) takes on a matter for a new client that is either the same or "substantially related" to a matter the lawyer (or firm) handled for a former client. OSB Formal Ethics Opinion 2005-11 refers to these as "matter-specific" former client conflicts. This kind of former client conflict reflects the continuing fiduciary duty of loyalty we owe former clients on the matters we handled for them.

Second, under RPC 1.9(c), a former client conflict also exists if a lawyer (or firm) takes on a matter for a new client against a former client that would involve the use of the former client's confidential information against the former client. OSB Formal Ethics Opinion 2005-17 refers to these as "information-specific" former client conflicts. This kind of former client conflict reflects the continuing fiduciary duty of confidentiality we also owe former clients.

A former client conflict exists if either element is triggered. In theory, all former client conflicts are waiveable. In practice, however, the probability is low that a former client will grant permission for a former lawyer to either “switch sides” or to use the former client’s confidential information adversely. At the same time, if neither alternative is triggered, we have a former client but not a former client *conflict*. Therefore, most former client conflict analysis turns on two predicate questions: (1) is a client a current or former one? and (2) if a former client, is the new matter the “same or substantially related” to the work we did for the former client?

Current or Former?

As we discussed last month, current clients have a very broad right to object to any representation by their lawyer or law firm against them. In fact, current clients don’t need to even have a reason to deny a conflict waiver. With former clients, however, our continuing fiduciary duties telescope down to the two alternatives expressed in RPC 1.9(a) and 1.9(c). The distinction between “current” and “former,” therefore, can be central to the question of whether we need a conflict waiver to proceed.

The test in Oregon for determining whether a current attorney-client relationship exists is twofold: (1) does the client subjectively believe that a current attorney-client relationship exists? and (2) is that subjective belief objectively reasonable under the circumstances? This dual standard, which is

sometimes referred to as the “reasonable expectations of the client test,” was set out by the Supreme Court in *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990). If work has been completed and the client has been told (preferably in writing) that the firm has closed its file, then the client will more likely be classified as “former” rather than “current.” In that instance, unless the new matter triggers one of the alternatives found in RPC 1.9(a) or 1.9(c), the firm will be able to proceed with the new work adverse to the former client without a conflict waiver.

Substantially Related?

If a client falls in the “former” category, then the analysis usually turns to the question of whether the new matter is the same or “substantially related” to the matter the lawyer (or firm) handled earlier for the former client. The RPCs include two important definitions that bear on this question. First, RPC 1.0(i) defines a “matter” as “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties[.]” Second, RPC 1.9(d) defines matters as “substantially related” if “(1) the lawyer’s representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client’s

position in the subsequent matter.” Despite the utility of these definitions, there are many court decisions in both the disciplinary and disqualification contexts that illustrate how difficult they can be to apply to any given set of facts.

Summing Up

Former client conflict analysis may be challenged in multiple venues, including bar complaints, disqualification motions and civil damage claims for breach of fiduciary duty. Getting it “right,” therefore, is as central to risk management as it is to business development.

ABOUT THE AUTHOR

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