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## **Blast from the Past: The Former Client Conflict Rule**

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Put yourself on the former client's end of this telephone call:

Lawyer: "Hi, remember me? I handled the XYZ transaction for you last year before we parted company. A new client would like me to sue you over the XYZ transaction. In handling the lawsuit against you for my new client, I would like to use your confidential information against you. Can I get a conflict waiver from you?"

Former Client: "[Use your imagination.]"

In theory, former client conflicts are waivable under RPC 1.9. In practice, however, the opening example highlights that the likelihood of a former client granting a waiver is usually remote. At the same time, if you don't have a former client conflict, RPC 1.9 allows you to be adverse to a former client *without* having to ask the former client's permission. That, in turn, puts a premium on determining whether you've really got a former client *conflict* rather than simply a matter involving a former client.

In this column, we'll look at the two primary steps for determining former client conflicts. First, we'll examine the test for gauging whether a client is indeed a former one. Second, assuming so, we'll then review the twin tests under RPC 1.9 for assessing whether a former client conflict exists. The significance of the

answers extends well beyond potential bar discipline. Former client conflicts are a staple of disqualification litigation and because former client conflicts, like their current client cousins, are based on the fiduciary duty of loyalty, they also raise the specter of breach of fiduciary duty claims. Viewed in a more positive light, these analytical steps also help determine whether we can safely take on new work even if we will be opposite a former client.

***Current or Former Client?***

The first step in former client conflicts analysis is to determine whether a client can really be classified as a former rather than a current one. The distinction is significant. We owe current clients a very broad fiduciary duty of loyalty that, in turn, allows them to prohibit us from taking on virtually any adverse representation. Moreover, although many current client conflicts are waivable, a current client doesn't have to grant a waiver or even give a reason for denying one. The fiduciary duties owed former clients, by contrast, are much narrower. Reflecting the fact that the attorney-client relationship has ended, the continuing duty of loyalty narrows to the matter handled for the former client (and substantially related ones) and the continuing duty of confidentiality narrows to the confidential information learned when representing that former client (assuming it remains confidential).

Comment 17 to the "Scope" section of the RPCs as amended in 2006 notes that whether an attorney-client relationship exists is a matter of substantive

law rather than the professional rules. The Supreme Court in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), set out the controlling two-part test. The first element is subjective: does the client subjectively believe that the lawyer represents the client? The second element is objective: is that subjective belief objectively reasonable under the circumstances? Each element of the two-part test must be met. Courts have applied *Bohn's* twin tests across a spectrum from regulatory discipline (see, e.g., *In re Egger*, 152 Wn.2d 393, 410-11, 98 P.3d 477 (2004)) to disqualification (see, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F.Supp.2d 1055, 1059 (W.D. Wash. 1999)) to lawyer civil liability (see, e.g., *Stiley v. Block*, 130 Wn.2d 486, 501-02, 925 P.2d 194 (1996)).

Whether a current attorney-client relationship exists is a question of fact that depends on the particular circumstances involved. The subjective component is usually evidenced by the client's own statements (see, e.g., *Stiley*, 130 Wn.2d at 500). The objective component, in turn, is usually evidenced by the terms of an engagement agreement (see, e.g., *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000, 1003-07 (W.D. Wash. 2007)), a file-closing or "end of engagement" letter (see, e.g., *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 WL 2237708 (Aug. 3, 2006) (unpublished)), or the course of dealings between the client and the lawyer (see, e.g., *Oxford*, 45 F.Supp.2d at 1059-60).

***Former Client Conflict?***

Assuming a client is a former one, the analysis then turns to whether there is a former client conflict. RPC 1.9 controls with a two-part test, either element of which is sufficient to establish a former client conflict. First, under RPC 1.9(a), former client conflicts arise when a lawyer handles a matter for a new client against a former client that is either “the same” or “substantially related” to a matter the lawyer handled for the former client. Second, under RPC 1.9(c), former client conflicts also arise when a lawyer handles a matter for a new client against a former client in which the confidential information the lawyer learned from the former client will be both material to the new representation and will be used against the former client. If neither RPC 1.9(a) nor 1.9(c) is triggered, the lawyer (or law firm) has a former client—but not a former client *conflict*.

***RPC 1.9(a)***. Comment 2 to RPC 1.9 notes that the scope of the “matter” turns on the facts of a given case or transaction. Comment 3 to RPC 1.9, in turn, defines matters as “substantially related” “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.” In making this assessment, courts typically compare the “old” matter with the “new” one to determine whether they overlap factually. See *State v. Hunsaker*, 74 Wn. App. 38, 43-46, 873 P.2d 540 (1994); *FMC Technologies, Inc. v. Edwards*, 420

F.Supp.2d 1153, 1159-60 (W.D. Wash. 2006). As Comment 2 to RPC 1.9 puts it: “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.”

**RPC 1.9(c).** If matters are “the same” or “substantially related,” then courts usually assume that the lawyer involved possesses the former client’s confidential information from the earlier representation. *Hunsaker*, 74 Wn. App. at 47; *FMC*, 420 F.Supp.2d at 1160-61. But even if they are not, a lawyer may still have acquired disqualifying confidential information. For example, a lawyer in a small firm or a lawyer in a small practice group in a big firm neither of whom recorded time on a matter might still have discussed a former client’s confidential information with the lawyer’s partner handling the matter or attended practice group meetings where the former client’s case was reviewed confidentially. Courts typically use the same standard for confidential information under RPC 1.9(c) as the confidentiality rule itself, RPC 1.6 (see, e.g., *FMC*, 420 F.Supp.2d at 1161-62). Therefore, it embraces both the attorney-client privilege and other confidential information gained during the course of a representation. By contrast, general information about an organization (see, e.g., *Best v. BNSF Ry.Co.*, No. CV-06-172-RHW, 2008 WL 149137 (E.D. Wash. Jan. 10, 2008) (unpublished); RPC 1.9, cmt. 3) or information that has otherwise been disclosed

to the general public (see, e.g., RPC 1.9, cmt. 3) does not usually create a former client conflict.

***Application to Firms.*** Generally, if one firm lawyer has a former client conflict, the conflict will be imputed to the firm as a whole under RPC 1.10(a)'s "firm unit rule." There are, however, three exceptions that come into play when lawyers change firms. The first is RPC 1.9(b), where a lawyer from a firm on the one side of a matter joins opposing counsel but had not worked on the matter involved at the "old" firm (and does not otherwise have the former client's confidential information). In that circumstance, there is no former client conflict and the lawyer involved could actually work on the matter at the "new" firm. See RPC 1.9, cmt. 5. The second is RPC 1.10(e), where a lawyer from the one side of a matter joins opposing counsel and has worked on the matter involved at the "old" firm. In that situation, a former client conflict will not be imputed to the "new" firm if the lawyer is timely screened and does not work on the matter at the "new" firm. See *Daines v. Alcatel*, 194 F.R.D. 678 (E.D. Wash. 2000). The third is RPC 1.10(b), where the lawyers who worked on a matter have all left the firm and, therefore, the firm no longer has any "institutional knowledge" of the former client's confidential information. In that instance, the firm can oppose the former client in that matter if all of the personnel involved have indeed departed. See *Oxford*, 45 F.Supp.2d at 1061-66; *Jones*, 2006 WL 2237708 at \*3.

### ***Summing Up***

Simply because you may be opposing a former client does not mean that you automatically have a former client conflict. Nonetheless, careful analysis of whether an opponent is indeed a former client, and, if so, whether either of RPC 1.9's twin tests for a former client conflict are met can help avoid a "blast from the past."

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