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**Blast from the Past:
New OSB Opinion on Former Client Conflicts**

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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.]"

All former client conflicts are waivable under Oregon DR 5-105(D). As our example highlights, however, simply stating the question usually supplies the answer. If you have a former client conflict, the practical likelihood of a former client granting a waiver in most instances is remote. At the same time, if you don't have a former client conflict, Oregon DR 5-105(C) 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*. The Oregon State Bar has issued a new ethics opinion that helps analyze that question. The opinion, 2003-174, is available on the OSB web site at www.osbar.org.

Opinion 2003-174 is set against the backdrop of a public defender agency confronted with a variety of former client conflict issues. But, by drawing on both key Oregon Supreme Court cases and earlier OSB ethics opinions, 2003-174 applies across the board to civil and criminal cases and litigators and business practitioners alike.

2003-174 begins by reviewing the two categories of former client conflicts under DR 5-105(C)—“matter-specific” former client conflicts and “information-specific” former client conflicts. As 2003-174 puts it, a “matter-specific” former client conflict occurs “when a lawyer is asked to represent a current client adverse to a former client in a matter that is the same or significantly related to work that the lawyer did for the former client.” In our example, a “matter-specific” former client conflict exists because the proposed representation of the new client involves the same transaction that the lawyer handled for the former client. Again using 2003-174’s definition, an “information-specific” former client conflict arises “when a lawyer is asked to represent a current client in a matter in which confidential information that the lawyer learned in the course of work for a former client is material to the new matter and will be used adversely to the former client.” In our example, the “information-specific” former client conflict arises because the lawyer would be using the former client’s confidential information gained in the XYZ transaction against the former client in the new litigation.

2003-174 notes that determining whether either kind of former client conflict exists in a given situation is inherently a fact-driven exercise that compares the former representation with the proposed current one and the role, if any, that confidential information acquired in an earlier representation will play in the current one.

2003-174 stresses that if neither the “matter-specific” nor the “information-specific” trigger is present, a lawyer may be opposing a former client—but there is no former client *conflict*. Given the low practical likelihood that a former client conflict will be waived, 2003-174 is a great place to start in trying to figure out if you really have a former client conflict.

ABOUT THE AUTHOR

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