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Court of Appeals Discusses Disqualification Standards for Former Client Conflicts

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The former client conflict rule—RPC 1.9—has long been used by Washington’s state and federal courts as a basis to disqualify counsel. RPC 1.9 contains two independent tests for a former client conflict. Under RPC 1.9(a), a former client conflict exists if a lawyer takes on a matter adverse to a former client that is either the same or substantially related to a matter that the lawyer handled for the former client. RPC 1.9(a) reflects a lawyer’s continuing fiduciary duty of loyalty to a former client on a matter (or closely related work) the lawyer handled for the former client. Under RPC 1.9(c), in turn, a former client conflict exists if a lawyer could use a former client’s confidential information adversely to a former client in handling a matter for a new client against the former client. RPC 1.9(c) reflects a lawyer’s continuing duty of confidentiality to a former client over the confidential information learned during an earlier representation.

Division II of the Court of Appeals recently addressed both facets of the former client conflict rule in *In re Estate of Eickhoff*, 2015 WL 4251643 (Wn. App. July 14, 2015) (unpublished). Although plowing no new ground, *Eickhoff* succinctly summarizes both concepts. *Eickhoff* involved a will contest. The lawyer representing the personal representative had earlier represented the decedent’s son in a sealed paternity and custody matter. The son was

challenging the will and moved to disqualify the personal representative's lawyer. The trial court denied the motion and awarded CR 11 sanctions—finding that the motion was frivolous. Division II reversed the sanction award. Although Division II did not reach the merits of disqualification because it also affirmed summary judgment for the personal representative, it outlined the standards applicable to disqualification for former client conflicts. With RPC 1.9(a), the Court of Appeals reiterated the formula used to determine whether two matters are “substantially related,” noting (at *3) that “courts must (1) reconstruct the scope of the facts of the former representation, (2) assume the lawyer obtained confidential information from the client about all these facts, and (3) determine whether any former factual matter is sufficiently similar to a current one that the lawyer could use the confidential information to the client's detriment.” With RPC 1.9(c), the Court of Appeals separately analyzed whether confidential information that the lawyer presumably learned about the son during the earlier paternity matter would be relevant to attack his credibility in the will contest.

Particularly as it relates to confidential information learned during an earlier representation, *Eickhoff* highlights that the “old” and “new” matters do not necessarily need to be related for confidential information to play a potential role

in, for example, cross-examining a former client and, therefore, triggering a disqualifying former client conflict under RPC 1.9(c).

ABOUT THE AUTHOR

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