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## **New Year's Resolutions: Consistency in Conflict Checks and Closing Files**

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Most lawyers don't relish running conflict checks. Rather, most see them as a mundane task to avoid at minimum professional embarrassment and perhaps an even more unpleasant outcome. But, conflict checks only provide protection if they are done consistently—both in terms of entering accurate information into your firm's records system and then carefully evaluating the results. In this column, we'll first look at the critical importance of systematically entering and evaluating conflict check information. We'll then turn to an equally important related task—consistently closing old files.

### ***Conflict Checks***

In *In re Knappenberger*, 338 Or 341, 355, 108 P3d 1161 (2005), the Oregon Supreme Court disciplined a lawyer who missed a conflict because his conflict system consisted solely of a client address list and his own memory. The Supreme Court criticized the lawyer for having “no real procedure for checking for conflicts.” Although conflict systems understandably vary with firm size and practice, the Supreme Court was clear: you need one. Regardless of the sophistication of the program used, at base the conflict system needs to reflect the names of clients and opposing parties on current and former matters.

Even the best system, however, will not work unless it is used. In *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 at \*1 n.1 (WD Wash Aug 3, 2006) (unpublished), for example, the federal district court in Seattle observed pointedly in disqualifying a large law firm for failing to detect a conflict because the firm had not run a timely conflict check: “The Court notes that appearing in court and giving notice of representation before a conflicts check has been run is not advisable on any level.”

When entering information into a conflict system, it is essential that the data is both accurate and complete. In *Atlantic Specialty Insurance Company v. Premera Blue Cross*, 2016 WL 1615430 (WD Wash Apr 22, 2016) (unpublished), for instance, the federal district court in Seattle disqualified a large law firm from representing the defendant because the firm was representing an affiliate of the plaintiff in unrelated litigation in Portland. When retaining the law firm, the affiliate in the Oregon case had defined its “corporate family” broadly to include the plaintiff in the Washington case. The law firm apparently didn’t include all of the related names in its conflict system and only discovered the problem when the plaintiff in the Washington case objected.

Although running a comprehensive conflict check is clearly critical, carefully evaluating the results is equally important. In *Admiral Ins. Co. v.*

*Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 (D Or Dec 5, 2002)

(unpublished), for example, the federal district court in Portland disqualified a firm from representing the plaintiff. The law firm involved had taken on the work even though one of its shareholders had earlier spoken with the defendant and entered it in its conflict system.

In short, conflict systems only work as well as the quality of the information entered and evaluated.

### ***Closing Files***

Courts have described our responsibility to current clients as a “duty of undivided loyalty.” This, in turn, means that current clients generally have an unrestricted ability to “veto” any adverse representation. By contrast, our duties to former clients are much narrower and generally focus on the matters in which we represented them and the associated confidential information we obtained. Lacking either of those “matter” or “information” triggers, we may have a former client—but not a former client conflict and do not need anyone’s permission to proceed with a new engagement adverse to the former client.

If we have not definitively closed a file, the dividing line between a current and former client can be difficult to discern. Under the “reasonable expectations of the client” test articulated by the Supreme Court *In re Weidner*, 310 Or 757,

770, 801 P2d 828 (1990), an attorney-client relationship exists if the client subjectively believes that the lawyer is representing the client and that subjective belief is objectively reasonable under the circumstances.

Even if work for a particular matter has been completed, in the absence of a “file closing” letter or the equivalent, a client may reasonably believe that a current attorney-client relationship still exists. OSB Formal Ethics Opinion 2005-146 (2016 rev), for example, concludes that clients who receive periodic notices from a lawyer about completed work—such as lease renewal or trademark maintenance fee reminders—may meet the *Weidner* test for being considered current clients. Opinion 2005-146 (at 2) emphasizes that a clear “end of engagement” letter (whether paper or electronic) can solve this ambiguity:

“The recipients of the periodic notices, absent any other facts, may or may not have a subjective and sufficiently reasonable belief that the lawyer-client relationship is a continuing one. If, for example, Lawyer has clearly stated in writing that no such continuing relationship exists, none would exist. In the absence of such a clear statement, the clients may reasonably believe that there is a continuing relationship with Lawyer, making them current clients.”

### ***Summing Up***

New Year’s resolutions are often easier made than done. A few risk management resolutions consistently implemented, however, can pay important dividends to a law firm throughout the year.

## ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.