Conflicts Revisited: Former Client Conflicts

December 1, 2019 | in General

DECEMBER 2019 BAR BULLETIN

By Mark Fucile and Mark Johnson

After addressing current client conflicts in last month's issue of the Bar Bulletin, this month we conclude our two-part review of the conflict RPCs and pertinent decisional authority by analyzing former client conflicts.

As we did in the first installment, we'll begin by surveying the rule. After that, we will discuss associated waivers. Finally, we will conclude with an examination of the consequences for failure to comply and practical steps to avoid those untoward results.

Former Client Conflicts

Under RPC 1.9(a), former client conflicts come in two variants, each predicated on whether a matter for a new client that is adverse to a former client is "the same or ... substantially related" to a matter in which the firm1 previously represented the former client.2

Comment 3 to RPC 1.9 applies "substantially related" to two situations: "Matters are 'substantially related' for purposes of this Rule 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."3

The former is grounded in the duty of loyalty and is intended to prevent a firm from "switching sides" in the same or a closely related matter.4 In FMC Technologies, Inc. v. Edwards,5 for example, a law firm was disqualified for representing defendants in a trade secrets case adverse to a former executive whom the firm had represented in an earlier phase of essentially the same litigation. Similarly, in In re Carpenter,6 a lawyer was disciplined for representing one former co-client against another in litigation growing out of their earlier joint representation.

The situation in which a lawyer is privy to a former client's material factual information is grounded in the client's right not to have confidential information gained in the prior matter used against it in the present matter. Ordinarily, general knowledge about a former client does not trigger a conflict. Comment 3 to RPC 1.9 puts it this way: "[G]eneral knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation[.]"

In Best v. BNSF Railway Company,7 for example, the court denied a motion to disqualify where plaintiff's counsel had previously represented the defendant railroad in accidents at highway crossings, but in the litigation at hand was representing claimants against the railroad on hearing-loss claims. In doing so, the court concluded that any general knowledge the lawyer had obtained about the railroad in his earlier work would not be relevant to the hearing-loss claims.

By contrast, Comment 3 to RPC 1.9 counsels: "[K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude ... [a subsequent adverse] representation." The Court of Appeals in Plein v. USAA Casualty Insurance Company,8 concluded that specific knowledge of a carrier's coverage practices gained through an extensive prior relationship was sufficient to trigger the confidential information prong of the substantial relationship test when the law firm involved later took on a coverage case against the carrier.

Although the twin tests for substantial relationship are alternative, courts generally assume that if a new matter is closely related to a former one, the lawyer or firm involved will also have disqualifying confidential information. By contrast, if the matters are not the same or substantially related, courts will not presume that the lawyer has disqualifying confidential information.

Instead, this must be established under RPC 1.9(c)(1), which generally prohibits a lawyer from "us[ing] information relating to the [former] representation to the disadvantage of the former client[.]"9 The Court of Appeals in State v. Hunsaker described this distinction:

[T]his court recently held that "[t]he plain language of RPC 1.9 indicates actual proof of disclosure of confidential information is not necessary if the matters are substantially related." However, if the matters are not substantially related, the court will not presume that confidential information was disclosed requiring disqualification.10

Kennedy v. Phillips, for example, discusses how a lawyer's knowledge of a former client's pattern of conduct might meet RPC 1.9(c)(1)'s test if it was relevant to the subsequent matter involved.11

Waivers

In theory, all former client conflicts are waivable. Although technically the waiver of the former client conflict must only come from the former client, many, if not most, circumstances require a corresponding waiver from the current client to be represented under RPC 1.7(a)(2), which governs "material limitation" conflicts that we discussed in the last issue.

In practice, however, former clients rarely grant waivers in this circumstance given that the request effectively asks the former client's permission for the law firm to switch sides and to use the former client's confidential information adversely to it. Therefore, most of the mental energy in a former client conflict analysis is devoted to two questions: (1) is the person or entity involved a current or former client; and (2) if a former client, is the new matter related to the old one.

The first question tracks back to what we discussed last month: Current clients have an unrestricted ability to "veto" any adverse representation for any reason — good, bad or none at all. Former clients, by contrast, have a much narrower veto right that is focused on the particular matter handled for the former client and the nature of any confidential information the lawyer obtained.

If the lawyer hasn't taken proactive steps to document the completion of work, the line between current and former client status can be amorphous. The test for whether an attorney-client relationship has ended was discussed extensively by the Court of Appeals in Hipple v. McFadden12 and generally mirrors the standard articulated by the Supreme Court in, among other decisions, Bohn v. Cody,13 i.e., as to whether an attorney-client relationship has been formed.

The key element is whether the client "has no reasonable expectation of continued representation."14 As a matter of risk management, therefore, it is important to consistently use end-of-engagement letters to document that the representation has been completed and the client is now a former client.

Absent such a demarcation, a court may conclude that a client retains current client status. For example, in Oxford Systems, Inc. v. CellPro, Inc.,15 the court found that a company that used a Seattle law firm periodically, but not continuously, was still a current client and disqualified the law firm using that broader standard.

The second question goes to the core definition of a former client conflict discussed above. The practical significance is that if the new matter is not related to the old matter (and we don't have otherwise

relevant confidential information), then we have a former client, but not a former client conflict, and we don't have to ask anyone's permission to proceed with the new matter.

Consequences and Practical Risk Management

As the cases discussed above illustrate, former client conflicts can lead to both regulatory discipline and disqualification. In still other instances, claims for breach of the fiduciary duty of loyalty may result.16 Moreover, none of these consequences is mutually exclusive.17

Paralleling our earlier discussion, three of the most important risk management steps a firm can take to assist in supporting a former client argument are: (1) to clearly define the scope of the work the firm is being retained to do; (2) to consistently close completed files; and (3) to send an end-of-
representation letter.

Closing completed files will allow a firm to more confidently classify a person or entity as a former — rather than a current — client, with the attendant narrowing of the former client's ability to object to the firm's adverse representation in a new matter. In addition, firms should also close matters internally. While not necessarily dispositive, courts in

both the regulatory and disqualification contexts have examined whether firms listed files as “open” or “closed” in drawing the line between current and former client status.18

Although, ultimately the question of whether a matter is the same or substantially related will turn on the particular facts of the representation involved, an engagement letter defining the scope of representation plays a critical role in both evaluating that history internally and, if challenged, defending the firm’s conduct.19

Mark J. Fucile, of Fucile & Reising LLP, handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a former chair of the WSBA Committee on Professional Ethics and is a past member of the Oregon State Bar Legal Ethics Committee. He is a co-editor of the WSBA Law of Lawyering in Washington, the WSBA Legal Ethics Deskbook and the OSB Ethical Oregon Lawyer. He also teaches legal ethics as an adjunct professor for the University of Oregon School of Law at its Portland campus. He can be reached at 503-224-4895 and Mark@frllp.com.

Mark Johnson is an elected Fellow in the American College of Trial Lawyers and a past president of the Washington State Bar Association. He has been listed in every edition of The Best Lawyers in America since 1995 and Best

Lawyers Publishing named him Seattle's Plaintiffs' Legal Malpractice Lawyer of the year three times. Johnson is a partner at Johnson Flora Sprangers PLLC in Seattle.

*1 Under RPC 1.10(a), a law firm lawyer's conflicts are generally imputed to the lawyer's law firm as a whole. See, e.g., Ali v. American Seafoods Co., LLC, 2006 WL 1319449 at *5 (W.D. Wash. May 15, 2006) (unpublished) (applying principle in disqualifying entire law firm).*

2 RPC 1.9(b) addresses a related area: an individual lawyer's former client conflicts when the lawyer has moved to a new firm.

3 Comment 2 to RPC 1.9 notes: "The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction."

4 See Sanders v. Woods, 121 Wn. App. 593, 598, 89 P.3d 312 (2004) ("The decision turns on whether the lawyer was so involved in the former representation that he can be said to have switched sides.").

5 420 F. Supp. 2d 1153 (W.D. Wash. 2006).

6 160 Wn.2d 16, 155 P.3d 937 (2007).

7 2008 WL 149137 (E.D. Wash., Jan. 10, 2008) (unpublished).

8 445 P.3d 574, 2019 WL 3407107 (July 29, 2019).

9 RPC 1.9(c)(1) permits the use of information gained through an earlier representation when the RPCs otherwise allow or when it has become "generally known." ABA Formal Opinion 479 (2017) includes an extensive discussion of when information becomes "generally known."

10 74 Wn. App. 38, 47, 873 P.2d 540 (1994) (emphasis added by court) (quoting Teja v. Saran, 68 Wn. App. 793, 799, 846 P.2d 1375 (1993)). Hunsaker was decided under a similar predecessor version of RPC 1.9. See also Plein, supra, n. 7 (discussing and moving beyond other aspects of Hunsaker).

*11 2012 WL 432865 at *2 (W.D. Wash., Feb. 7, 2012) (unpublished).*

12 161 Wn. App. 550, 255 P.3d 730 (2011).

13 119 Wn.2d 357, 832 P.2d 71 (1992).

14 Hipple, 161 Wn. App. at 559.

15 45 F. Supp. 2d 1055 (W.D. Wash. 1999).

16 See, e.g., Damron v. Herzog, 67 F.3d 211 (9th Cir. 1995) (decided under Idaho law).

17 Id. at 213 (stating principle).

*18 See, e.g., In re Egger, 152 Wn.2d 393, 410, 98 P.3d 477 (2004) (regulatory); Jones v. Rabanco, Ltd., 2006 WL 2237708 at *3 (W.D. Wash., Aug. 3, 2006) (unpublished) (disqualification).*

19 See, e.g., Avocent Redmond Corp. v. Rose Electronics, 491 F. Supp. 2d 1000, 1004–06 (W.D. Wash. 2007) (examining engagement agreement in ruling on disqualification).

ARCHIVES

2018
2017

CATEGORIES

Bar Talk (34)

Business of the Board (30)

Dining Out (33)

From The Desk of the Executive Director (34)

From the Presiding Judge (32)

General (833)

KCBA Classifieds (28)

King County Law Library (32)

Letters (1)

President's Page (34)

Profile (34)

Volunteer of the Month (7)

KING COUNTY BAR ASSOCIATION

1200 5th Ave, Suite 700
Seattle, WA 98101

Main (206) 267-7100

✉ Contact Us

RESOURCES

Free Legal Services

Lawyer Referral Service

Member Benefits

Publications

Judicial Resources

Legal Assistant Registration

LINKS

King County Bar Foundation

Young Lawyers Division

CONNECT WITH KCBA

Twitter

Facebook

LinkedIn