

WSBA NWSidebar

Posted: January 4, 2023

Federal Court Disqualifies Law Firm For Conflict with Key Witness

**By Mark J. Fucile
Fucile & Reising LLP**

The federal district court in Spokane recently disqualified a law firm for a conflict with a key adverse witness. *Caldwell v. United States*, 2022 WL 17408818 (E.D. Wash. Nov. 9, 2022) (unpublished), was a malpractice case stemming from the plaintiff's treatment at a government medical facility. Although the U.S. Government was the sole defendant, the focus of the case was on the doctor who allegedly failed to diagnose the plaintiff's cancer. The plaintiff's law firm had also represented the doctor in an unrelated employment matter.

The Government moved to disqualify the law firm—arguing that it had a conflict because it would necessarily be adverse to the doctor. The law firm made two primary arguments in response. First, the law firm contended that it had ended its employment work for the doctor and, therefore, no former client conflict arose under RPC 1.9 because the two matters were unrelated. Second, the law firm argued that even if the current client conflict rule—RPC 1.7—applied, there was no conflict because the doctor was not a defendant. The Court rejected both arguments and disqualified the law firm.

On the law firm's first argument, the court found that even if the law firm had ended its relationship with the doctor, the law firm had been adverse to the

doctor in pre-litigation matters leading up to the current case—including an earlier administrative tort claim—while also representing the doctor in the employment matter. The court, therefore, concluded that the conflict should be analyzed under the current client conflict rule, RPC 1.7, rather than the former client conflict rule, RPC 1.9. Unlike RPC 1.9, RPC 1.7 is not tied to particular matters and broadly precludes a law firm from representing parties adverse to current clients (absent conflict waivers, if available).

On the law firm’s second argument, the court looked to the definition of “directly adverse” as used in RPC 1.7(a)(1). Although the doctor was not a party, the plaintiff was seeking to hold the doctor’s employer—the Government—vicariously liable for the doctor’s asserted negligence. The court found that because the doctor’s conduct was in dispute, the predicate adversity for a conflict was present even though the doctor was not a defendant.

Caldwell underscores the potential sweep of RPC 1.7. The court noted that the law firm did not have an engagement agreement with the plaintiff. The opinion is not clear on whether the law firm had run a conflict check when it took on the malpractice case and, if it did, the names that were run for the conflict check. Given the breadth of RPC 1.7, however, prudent practice suggests

including the names of employees that a lawyer's client will use to argue that an employer should be held vicariously liable.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author and the editor-in-chief for the WSBA *Legal Ethics Deskbook* and is a contributing author and principal editor for the OSB *Ethical Oregon Lawyer* 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.