

March 2026 WSBA *Bar News Ethics & the Law* Column

The “Hot Potato” Rule: The Coolest Name in Legal Ethics

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Litigators can find themselves in uncomfortable spots if conflict checks are missed or ignored. This discomfort is magnified if a law firm discovers it is on the other side of a current client without a waiver. Depending on the circumstances, the client involved may grant a waiver after-the-fact even though it is under no legal obligation to do so. In other situations, however, a client may be understandably displeased to find “its” lawyers on the other side and decline to grant a waiver. In this latter situation, the lawyers involved will ordinarily need to withdraw—or seek leave to withdraw if the local rule of the court concerned requires approval.

Occasionally, firms may instead be tempted to “fire” the client creating the conflict—which in this context is usually either the newer of the two clients now adverse or the one the law firm views as less “favorable” in economic terms. The reasoning usually goes something like this: if we “fire” the client creating the conflict, it will then be a former client and, because the matters we handled for it are unrelated to the current case, we will be free to continue to handle the matter opposing it because there is no conflict under the former client conflict rule. This reaction, however, runs headlong into the “hot potato” rule. Under that judicially created precept, a law firm cannot drop a client “like a hot potato” to avoid a

conflict. Invoked most often in the disqualification context, courts—including those in Washington and the Ninth Circuit—cite the rule to disqualify law firms from continuing in the case where they are opposing a current client. Courts invoking the rule typically look past the effort to “fire” the client creating the conflict and continue to hold the firm involved to the current client conflict rule—which requires a waiver to oppose a current client regardless of whether the matters involved are related or not.

In this column, we’ll first look at the contours of the “hot potato” rule. We’ll then survey the exceptions. Finally, we’ll conclude with a discussion of the risks involved if a law firm finds itself on the wrong end of the rule and practical steps available to avoid the situation in the first place.¹

Contours

The name “hot potato” rule is usually attributed to *Picker Intern., Inc. v. Varian Associates, Inc.*, 670 F. Supp. 1363 (N.D. Ohio 1987), *aff’d*, 869 F.2d 578 (Fed. Cir. 1989).² In *Picker*, a law firm withdrew from representing a less economically attractive client in favor of a more lucrative one when a conflict arose. The “fired” client moved to disqualify the law firm in the matter involving the conflict. The court agreed—using the memorable line: “A firm may not drop a client like a hot potato[.]”³

Although *Picker* provided the name, the concept was not new. The Ninth Circuit, for example, had spoken to the idea six years before *Picker* when it noted that a law firm could not avoid a current client conflict simply by withdrawing from what the Ninth Circuit described as a “disfavored client.”⁴ As noted earlier, current clients under ABA Model Rule 1.7 and state counterparts such as Washington RPC 1.7 have a broad ability to “veto” any adverse representation—by declining to grant a waiver—regardless of whether the matters creating the conflict are related or not.⁵ Further, clients are generally under no legal obligation to grant a waiver and can decline for a good reason, a bad reason, or no reason at all.⁶ This broad “veto” power goes hand-in-hand with the principle that lawyers generally owe their current clients a duty of “undivided loyalty.”⁷ That “veto” right, by contrast, is much narrower with former clients under ABA Model Rule 1.9 and state counterparts such as Washington RPC 1.9 and is generally limited to situations where the new matter is either the same or substantially related to the matter the lawyer or law firm handled for the former client.⁸ The “hot potato” rule essentially prevents a law firm from withdrawing from a current client to turn that client into a former client and then arguing that because the matters creating a conflict are unrelated, there is no former client conflict under Model Rule 1.9 and state counterparts. Rather, courts applying the

rule disregard this artifice and continue to analyze the situation as a current client conflict under Model Rule 1.7 and state counterparts.

Some have debated whether the hot potato rule is truly a principle of professional ethics or simply a judicial remedy drawing from the common law fiduciary duty of loyalty.⁹ Regardless of this theoretical debate,¹⁰ the rule has important practical risk management consequences for lawyers and their law firms. A decision from the federal court in Seattle illustrates the risk.

Atlantic Specialty Insurance Company v. Premera Blue Cross, 2016 WL 1615430 (W.D. Wash. Apr. 22, 2016) (unpublished), involved a law firm with offices in Seattle and Portland. A partner in the Portland office took on an insurance coverage case for a subsidiary of a large carrier. The Portland partner entered the name of the subsidiary into the firm's conflict system, but not the parent. The subsidiary sent the Portland partner a set of "corporate counsel guidelines" that said essentially "If you represent any part of our corporate family, you represent the entire family"—but the Portland partner still did not enter the names of either the parent or the other affiliates into the firm's conflict system. Later, the firm's Seattle office took on a coverage case for a long-time client against another subsidiary of the same carrier. The carrier moved to disqualify the law firm in Seattle. The law firm tried to avoid the conflict in Seattle by

withdrawing in Portland—and then argued in Seattle that because the two matters were unrelated under the former client conflict rule, the firm should be allowed to continue. The court in Seattle rejected that argument and disqualified the firm—citing the hot potato rule.

Exceptions

Although exceptions to the hot potato rule go by varying names, the two most common are the “thrust upon” conflict and the “mere happenstance” conflict.¹¹

The easy example of a “thrust upon” conflict is a situation where a law firm’s corporate client acquires a company that the law firm is litigating against for another client.¹² Comment 5 to Washington RPC 1.7, which is based on its ABA Model Rule counterpart, speaks to this point and generally permits the law firm to choose which client it will continue to represent in the matter concerned:

Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.¹³

“Mere happenstance,” by contrast, is a more elastic notion. Most often, it is applied when a law firm files an appearance not realizing there is a conflict and

quickly withdraws when it discovers one.¹⁴ While not a model of analytical clarity, this genre of cases usually turns on the lack of “fault” by the law firm and the lack of “harm” to the client.¹⁵

Risk and Alternatives

By far and away, the most common application of the hot potato rule is in the disqualification context—with the “fired” client arguing that the law firm should be disqualified in the matter in which the law firm is representing a litigation opponent.¹⁶ In venues requiring court approval, a “fired” client may also oppose withdrawal in the matter in which the law firm is representing the client.¹⁷

Although regulatory discipline can result, it is for the unwaived conflict rather than the hot potato rule.¹⁸ Finally, because the hot potato rule is couched in terms of the fiduciary duty of loyalty, civil claims for breach of that duty can theoretically follow if client harm results.¹⁹

Lowering the risk of finding yourself in a “hot potato” situation begins with thorough conflict checks at the outset of all representations. That means training law firm personnel from senior partners to nonlawyer assistants to both use the firm’s conflict system and input complete information. Albeit not in a hot potato case, a local federal judge memorably observed in a disqualifying a law firm that had not run a 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.”²⁰ In *Atlantic Specialty*, the Court expressed surprise that the partner involved had not entered complete information into his large firm’s sophisticated conflict system.²¹

Thorough conflict checks should alert the firm to the issue before a new matter is taken on. In some instances, the firm may have anticipated the situation and obtained an advance waiver from the client concerned.²² In others, a conflict check will allow the law firm to approach the clients about the possibility of waivers rather than unceremoniously “dumping” one of the clients involved.²³ In still others, it may be possible to limit the scope of a potential representation to avoid a conflict with another client.²⁴ As the Court in *Atlantic Specialty* also reminded the disqualified law firm: “[T]he Rules of Professional Conduct impose duties on lawyers, and not their clients, to identify potential conflicts of interest and obtain informed consent, if necessary.”²⁵

Finally, routinely closing files for clients who are unlikely to use the law firm again can avoid conflicts in the first place.²⁶ Closing a client’s file and informing the client of that will generally turn them into a former client (assuming all work for that client has been completed).²⁷ If a new matter adverse to that former client is unrelated to the work that the law firm did for the former client, no

former client conflict should ordinarily exist under RPC 1.9 and the firm will be free to take on the new matter without needing waivers.²⁸

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¹ Although in theory a "hot potato" scenario could also arise in a non-litigation context, as a judicially created standard the rule typically plays out in a litigation setting.

² See generally Geoffrey C. Hazard, Jr., W. William Hodes, and Peter R. Jarvis, *The Law of Lawyering* 21-38 n. 45 (rev. 4th ed. 2021) (citing *Picker*) (Hazard); William T. Barker, *The "Hot Potato" Doctrine and the Model Rules of Professional Conduct: the Limits of a Lawyer's Duty of Loyalty*, 32 Geo. J. Legal Ethics 327, 329 n.4 (2019) (same) (Barker); John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 U. San Diego L. Rev. 251, 252 (2011) (same) (Leubsdorf); ABA Formal Op. 516 at 6 (2025) (same). For a national compilation of hot potato cases, see William M. Freivogel, *Freivogel on Conflicts* at: <https://www.freivogelonconflicts.com/hotpotato.html>.

³ *Picker Intern., Inc. v. Varian Associates, Inc.*, *supra*, 670 F. Supp. at 1365.

⁴ *Unified Sewerage Agency of Washington County, Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) (“The [current client] standard continues even though the representation ceases prior to the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client into a ‘former client’ by choosing when to cease to represent the disfavored client.”).

⁵ See generally *In re Egger*, 152 Wn.2d 393, 408-412, 98 P.3d 477 (2004) (discussing multiple client conflicts under RPC 1.7).

⁶ See generally *Bird v. Metropolitan Cas. Ins. Co.*, 2011 WL 149861 (W.D. Wash. Jan. 18, 2011) (unpublished) (law firm disqualified when it continued adverse representation after client declined to grant waiver); *Commercial Development Co. v. Abitibi-Consolidated, Inc.*, 2007 WL 4014992 (Wn. App. Nov. 15, 2007) (unpublished) (same).

⁷ See, e.g., *Angelo v. Kindinger*, 2022 WL 1008314 at *10 (Wn. App. Apr. 4, 2022) (unpublished) (“Attorneys owe clients a duty of ‘undivided loyalty[.]’”).

⁸ See generally *Plein v. USAA Casualty Insurance Company*, 195 Wn.2d 677, 463 P.3d 728 (2020) (discussing former client conflicts under RPC 1.9). For a former client conflict to exist, the interests of the current and former clients must also be “materially adverse.” ABA Formal Opinion 497 (2021) includes a detailed discussion of the phrase “materially adverse.”

⁹ In ABA Formal Opinion 516 (2025), for example, the majority took the position that the “hot potato” rule is judicial remedy derived primarily from the common law fiduciary duty of loyalty (at 7) while the dissenters argued that it is consistent with rule-based standards (at 9-10).

¹⁰ Barker, who undertook an extended comparison, concluded that they are congruent: “[This article] concludes that in most circumstances, the Model Rules support the same result as the flat ‘hot potato’ rule.” Barker, *supra*, at 330. Barker focuses on the general proposition under Comment 4 to ABA Model Rule 1.3 that a lawyer should generally complete agreed work for a client and the notion under ABA Model Rule 1.16(b)(1) that a lawyer should generally not withdraw when doing so will cause material harm to a client. *Id.* at 330-33. See also Leubsdorf, *supra*, 48 U. San Diego L. Rev. 251 (analyzing the hot potato rule against the backdrop of the ABA Model Rules).

¹¹ These are not intended to be an exclusive list. Leubsdorf, for example, discusses varying outcomes involving situations where the client fired the lawyer first and scenarios involving so-called “accommodation” clients (such as a co-defendant employee of a corporate client). 48 U. San Diego L. Rev. at 264-67, 281-82.

¹² See generally New York City Bar Op. 2005-05 (2005) (surveying “thrust upon” conflicts); Orange County Bar Formal Op. 2012-01 (2012) (same); ABA, *Annotated Model Rules of Professional Conduct* 214 (10th ed 2023) (same).

¹³ It is important to keep in mind that the “thrust upon” exception applies to conflicts arising from, for example, client mergers rather than law firm mergers. The later are generally not included within the “thrust upon” exception and, in fact, the paradigm hot potato case—*Picker*—was painted against the backdrop of a law firm merger.

¹⁴ See *Sabrix, Inc. v. Carolina Cas. Ins. Co.*, 2003 WL 23538035 at *3-*4 (D. Or. July 23, 2003) (unpublished) (surveying the “mere happenstance” exception).

¹⁵ *Id.*

¹⁶ See generally Hazard, *supra*, at 21-39 (noting most common application).

¹⁷ See, e.g., *Truckstop.net, L.L.C. v. Sprint Communications Company, L.P.*, 2006 WL 8447685 at *2-*4 (D. Idaho Jan. 3, 2006) (unpublished).

¹⁸ See, e.g., *In re Johnson*, 84 P.3d 637 (Mont. 2004) (lawyer disciplined under Montana RPC 1.7); see also *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002 (Mont. 2000) (appeal after denial of disqualification on procedural grounds but referring the lawyer to state regulatory agency to investigate the conflict and resulting in the later *Johnson* disciplinary decision).

¹⁹ See generally Ronald E. Mallen, *Legal Malpractice* § 17.24 (rev. ed. 2021) (surveying the hot potato rule in the context of lawyer liability and overall risk management); see also *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (analyzing lawyer conflicts under the fiduciary duty of loyalty); see also Restatement (Third) of the Law Governing Lawyers § 132, cmt. c (2000) (“A premature withdrawal violates the lawyer’s obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment[.]”).

²⁰ *Jones v. Rabanco, Ltd.*, 2006 WL 2237708 at *1 n.1 (W.D. Wash. Aug. 3, 2006) (unpublished).

²¹ 2016 WL 1615430 at *12-*13.

²² See RPC 1.7, cmt. 22 (advance waivers); ABA Formal Op. 05-436 (2005) (same).

²³ See generally Philadelphia Bar Op. 2009-7 (2009) (surveying the hot potato rule and alternatives).

²⁴ *Id.* See also RPC 1.2(c) (scope of representation).

²⁵ 2016 WL 1615430 at *12.

²⁶ See Hazard, *supra*, at 21-40 (hot potato rule does not apply to situations involving former clients); Barker, *supra*, at 335 (same).

²⁷ See generally *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (discussing current and former client conflicts in disqualification context).

²⁸ In rare circumstances, a former client’s confidential information alone may prevent taking on a new matter without a waiver from the former client. See generally RPC 1.9(c); *In re Cross*, 198 Wn.2d 806, 500 P.3d 958 (2021) (surveying the duty of confidentiality to former clients).