CHAPTER 5

RULE 1.9: CONFLICTS OF INTEREST INVOLVING FORMER CLIENTS

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RULE 1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing after consultation and a full disclosure of the material facts; or

(b) Use confidences or secrets relating to the representation to the disadvantage of the former client, except as rule 1.6 would permit.

§5.1 INTRODUCTION

Washington Rule of Professional Conduct (WRPC) 1.9(a) generally prohibits a representation that is "materially adverse to the interests of the former client" regarding "the same or a substantially related matter." The WRPC confirms that duties of loyalty and confidentiality to a client do not end with termination of the attorney-client relationship. An attorney has no duty to accept a particular client, but once he or she does, the attorney loses a certain amount of freedom to accept new clients, even after the end of the relationship with the first client. In addition, WRPC 1.9 is included in the provisions to which WRPC 1.10 applies, imputing one attorney's disqualification to the whole firm of which he or she is a member.

WRPC 1.9(b) prohibits the use of a client's confidences or secrets to a former client's disadvantage, even if the client has consented to a representation that would otherwise be barred by WRPC 1.9(a).

WRPC 1.9 is often enforced by disqualification motions in litigation rather than by malpractice actions or disciplinary proceedings. Disqualification has serious consequences for the client and for the attorney. The client must retain new counsel who must learn about the matter, frequently without the benefit of the work product of the disqualified attorney. Allowing the new counsel to use the work product of the disqualified attorney would "infect" the new counsel with the taint of

the confidences or secrets that led to the disqualification. The disqualified attorney suffers destruction of the relationship with the client as well as financial losses resulting from the cost of transferring the representation to the new counsel and the inability to collect fees for the work done before disqualification. Of course, disciplinary actions are used to enforce these provisions as well.

§5.2 HAS THE REPRESENTATION ENDED?

The question whether the representation has ended assumes that the person concerned is or was a client at one time. That assumption bears scrutiny. See §2.3.

Once it is clear who the client was, it usually becomes apparent who the attorney was. Complications arise, however, from the increased movement of attorneys among firms. If one attorney is affected by WRPC 1.9, then so are all attorneys in the same firm. *See* WRPC 1.10(a). If an attorney was once a member of a firm that is disqualified under WRPC 1.10, changing firms does not necessarily cleanse the conflict. If the attorney had any knowledge of the client's confidences and secrets, the conflict follows that attorney even though he or she was not the primary attorney who actually represented the client. If that attorney has moved to another firm, WRPC 1.10 will operate to disqualify the entire new firm as well. Of course, if the attorney with primary responsibility for a client's matters leaves for another firm, the former firm will continue to be disqualified from work adverse to what is now its former client as long as any member of the firm has knowledge of that client's affairs. With regard to imputed disqualification issues, generally, see §6.1, especially the discussion of "screening."

Once it has been established that an attorney-client relationship existed, the question whether the representation of the former client has ended should also be examined and verified before applying WRPC 1.9. If there is any doubt that a person to whom legal services were once delivered may still reasonably regard himself or herself as a client of the lawyer (i.e., there is no tangible evidence of disengagement from either the lawyer or the client), then the facts should be evaluated under WRPC 1.7 and not WRPC 1.9. See chapter 3.

A gray area may exist if a client has entrusted several matters to an attorney over a period of years, but the attorney is not presently handling a matter for that client. This situation is frequently held to represent an inactive but ongoing attorney-client relationship. *See International Bus. Machs. Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978). When there is doubt about the nature of the relationship, the burden will fall on the attorney to do something to clearly terminate it if the attorney is seeking to rely on WRPC 1.9 (rather than WRPC 1.7). It is good practice to document the end of an attorney-client relationship, if it is in fact ending.

Note that a law firm may not terminate a representation in the middle of the matter in order to undertake an adverse representation in an unrelated matter. Under the "hot potato rule," termination of the relationship will not be effective to turn a current client into a former client. The firm will still be subject to the standards of WRPC 1.7. *See Picker Int'l v. Varian Assocs.*, 670 F. Supp. 1363 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989)(law firm for plaintiff disqualified after it merged with law firm that represented defendant in other, unrelated matters). *But cf. Ex parte AmSouth Bank,* 589 So. 2d 715 (Ala. 1991). In *AmSouth Bank*, a conflict arose due to a change in the configuration of adverse parties in the middle of a lawsuit; the court held that the firm could withdraw from its representation of one of them and continue the representation of the other, as

long as the firm was not responsible for creating the conflict and the withdrawal would not cause undue hardship to the client the firm wanted to drop.

ILLUSTRATIVE CONFLICT SITUATION:
Lawyer's new firm seeks to represent a client in a matter adverse to a client of lawyer's former firm

(a) *Defining characteristics*. A lawyer at one law firm moves to a different law firm, which then or in the future represents a client in a matter adverse to the interests of a client of the first law firm. The lawyer who made the move may or may not have been involved in the representation of the client his new firm seeks to proceed against.

(b) *Example*. Lawyer Able leaves his old law firm to practice with a new law firm. Some time after Able's switch, his new law firm wishes to represent Corporation B in a matter adverse to Corporation C, a client of the old law firm. If Able was never exposed to any information about Corporation C, WRPC 1.9 should not prohibit the representation. WRPC 1.9 would also not be a bar to the representation if the new matter is not related to any matter handled for Corporation C by the old law firm while Able was there. On the other hand, if Able did learn enough about Corporation C confidences and secrets to be of some help to Corporation B in the new matter, the matters would be related and WRPC 1.9 will prevent the representation. *See* WRPC 1.10(b) (re possibility of screening Able from the matter so that the new law firm may undertake the representation).

§5.3 ARE THE MATTERS THE SAME OR SUBSTANTIALLY RELATED?

The term "substantially related" is not defined in the Washington Rules of Professional Conduct. Courts have discussed the phrase, however, in the context of disqualification motions. Unfortunately, there is no uniformly accepted test for what should be compared in determining whether there is a close connection between two matters.

Although some opinions are couched in terms of protecting privileged information, going to the duty of confidentiality, others speak in terms of an ongoing duty of loyalty to the prior client regardless of whether any confidences or secrets have been or could have been disclosed. For example, if one attorney represents two people forming a new business entity, a later representation of one of those parties against the other will not usually risk a breach of confidentiality, because both parties were privy to all the confidences and secrets. The attorney will be barred from the subsequent representation (or subject to a malpractice claim), nonetheless, if the matters are the same or related. *See Damron v. Herzog*, 67 F.3d 211 (9th Cir. 1995); *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979).

As a general proposition, in determining whether matters are substantially related, courts look to the substance of the transactions themselves and to the nature of confidential information likely to have been shared during the prior representation. If the new transaction is significantly connected to the former transaction, or if confidences or secrets relevant in the new transaction were revealed or might have been revealed in the prior transaction, the two matters are substantially related. *See, e.g., International Corp. v. Intercapital Corp.,* 41 Wn. App. 9, 700 P.2d 1213 (1985), *rev'd on other grounds sub nom. First Small Bus. Inv. Co. v. Intercapital Corp.,* 108 Wn.2d 324, 738 P.2d 263 (1987); s*ee also Analytica, Inc. v. NPD Research, Inc.,* 708 F.2d 1263 (7th

Cir. 1983) (disqualification due to former representation so clear that law firm should be sanctioned for bad faith resistance to the disqualification motion). *Cf. Realco Servs., Inc. v. Holt,* 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979) ("The disruption and prejudice that befall a client whose counsel is disqualified are reasons to avoid a hasty conclusion in favor of disqualification, based merely on a 'doubt' about the propriety of the representation.").

The former client need not establish that the attorney actually had access to or received privileged information. It is sufficient that the lawyer *could have obtained* confidential information in the first representation that would be relevant in the second. *See U.S. Lord Elec. Co. v. Titan Pacific Constr.*, 637 F. Supp. 1556 (W.D. Wash. 1986); *Teja v. Saran*, 68 Wn. App. 793, 846 P.2d 1375 (1993).

Courts will look more closely at situations in which an attorney has represented a client on several matters that involve the same general factual setting and that give the attorney unique insight into the client's affairs or method of operating. *See Contant v. Kawasaki Motors Corp.*, 826 F. Supp. 427 (M.D. Fla. 1993), in which an attorney was disqualified from representing a plaintiff against Kawasaki in a products liability case because the attorney had previously (seven years earlier) defended Kawasaki in identical claims, although none of those claims related to the claim in the present case. *See also Stitz v. Bethlehem Steel Corp.*, 650 F. Supp. 914 (D. Md. 1987), in which former in-house labor counsel for the defendant for nine years was disqualified from representing the plaintiff in a labor dispute with the corporation.

On the other hand, *see Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 646 F.2d 1020 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981), in which the court refused to disqualify the plaintiff's attorney in a churning case even though the attorney defended the brokerage in similar prior cases. *See also* Comments to ABA Model Rule 1.9, which state, in part:

> [A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.

ILLUSTRATIVE CONFLICT SITUATIONS:

(1) Sequential representation of potentially adverse parties—representing the seller of a business, and later the buyer

(a) *Defining characteristics*

Here we deal with problems that arise in sequential representation, when a lawyer represents one client and later represents a second client whose interests are potentially adverse to the first client. In most but not all instances, these cases involve a nexus between the two clients—either property they own sequentially or a contractual relationship between the two clients, or both.

(b) *Examples*

In the classic example, lawyer Able represents Corporation S, the seller of a business, at the time of sale. The buyer, Corporation B, subsequently retains Able to continue acting as counsel for the business. The nexus is the property of the business and the contractual relationship between the buyer and seller.

A similar property connection may give rise to conflicts when a lawyer is retained first by the seller of land and then by the purchaser who seeks to develop it, or when an attorney initially works

on the development of property and then later represents a client who seeks to acquire that property. A contractual tie exists when an attorney represents a landlord first in negotiations with a commercial tenant, and is then asked by the tenant to represent the tenant's business. Another example of a contractual nexus occurs if a lawyer who represents the supplier of raw materials in its negotiations with a manufacturer is later hired by the manufacturer to act as general counsel.

Not all problems of sequential representation involve property or contractual ties between successive clients. For instance, a lawyer may be prevented from representing a new client by virtue of information previously obtained from an existing client who competes with the prospective client. Likewise, an attorney representing a property owner who seeks to forestall commercial development may later be precluded from representing another property owner in the same area who wishes to obtain a zoning change to enable commercial development.

(2) Representation of two clients followed by representation of one of them in a matter adverse to the other

(a) *Defining characteristics*

An attorney represents two parties in a context in which each party knows or presumes that his or her confidences and secrets will be shared with the other party and thus, as between them, such information is no longer confidential. These circumstances arise when an attorney undertakes a joint representation in which there is a free flow of information among the attorney and the two clients.

(b) *Examples*

Lawyer Barbara jointly represents Connie and Donald in the formation of a limited liability company. Connie later withdraws as a member of the company and brings an action against the company and Donald for a breach of the operating agreement. Even though Barbara has no confidences or secrets of Connie that relate to the matter, disqualification from representation of the company and Donald is likely.

A similar set of circumstances may arise from the joint representation of a husband and wife in their estate planning. Again, confidences and secrets will be shared in a setting in which it is assumed that they flow freely among the attorney and the two clients. If one spouse obtains other counsel and commences an action to dissolve the marriage, certainly the estate planning counsel (and his or her firm) may not handle the dissolution matter for the other spouse. It is possible that they would even be disqualified from continuing estate planning work for either spouse.

§5.4 ARE THE CLIENTS' INTERESTS MATERIALLY ADVERSE?

Whether the interests of the new and former client are "materially adverse" with regard to the substantially related matter is a question of fact, again calling for careful judgment on the part of an attorney. Representation will be adverse to the former client if advocating or advancing the new client's interests will in some way be harmful to the interests of the former client. It is not necessary that the later representation strikes a totally adversarial posture. It is enough if the two positions are not exactly aligned. In the ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, the authors suggest the following approach:

> The lawyer should take a clear-eyed view of the two representations. Would a reasonable observer conclude that the current client's success is likely to involve some detriment to the former client? Resolve doubts in favor of finding that the two representations may be adverse, because as a practical matter the judge probably will do the same.

Id. at 51:214.

Although the term "materially" seems to suggest that a matter of degree is involved in this judgment, the underlying values of loyalty and confidentiality generally do not lend themselves to such relativity under the rules. We read the qualifier "materially" to add little to WRPC 1.9, and conclude that if the proposed and former representations are found to be "substantially related" and "adverse" to the former client, a disqualifying conflict likely exists.

Although WRPC 1.9 suggests only a present-tense analysis ("*are* materially adverse"), we believe it is likely a court, in retrospect, will require an attorney to have foreseen what was reasonably foreseeable. Because assessment under WRPC 1.9 in part involves a representation or transaction that has concluded, predicting future conflicts should be somewhat easier than under WRPC 1.7.

§5.5 HAS THE FORMER CLIENT CONSENTED TO OR WAIVED THE CONFLICT OF INTEREST?

The limitations on representation imposed by WRPC 1.9 will not apply if "the former client consents in writing after consultation and a full disclosure of the material facts." Thus, if a new representation relates to one for a former client, and the new matter will be adverse to the interests of the former client, the attorney must elect whether to decline the representation or to seek a consent. Such an election should be made even if there is doubt about whether the matters are related or adverse to the former client. Forging ahead without a consent is risky. The attorney puts his or her new client at risk of changing counsel midstream and the attorney risks disciplinary proceedings or a civil action by the former client.

The majority of decisions concerning what constitutes "full disclosure" have been decided under WRPC 1.7 or its predecessor. The nature of the required disclosure, however, would be similar under WRPC 1.9. See §3.2(1)(b) of this book. The attorney must explain the implications of the representation, including the advantages and risks involved, and suggest that the client obtain the advice of independent counsel. *See Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 588–89, 675 P.2d 192 (1983). One court has stated that "full disclosure" implies communicating "all of the facts and implications" of an attorney's representation and any circumstances that might cause a client to question the undivided loyalty of the lawyer. *City Council v. Sakai,* 58 Haw. 390, 570 P.2d 565, 574 (1977). It has also been held that such disclosure includes a clear explanation of the risks and disadvantages to the client and an explanation of the advantages of seeking independent legal advice. *Matter of James,* 452 A.2d 163 (D.C. App. 1982); *In Re Boivin,* 271 Or. 419, 533 P.2d 171 (1975). It has generally been accepted that the requirement of full disclosure is not satisfied by merely informing the client of the fact of multiple representation. *See, e.g., Unified Sewerage Agency v. Jelco, Inc.,* 646 F.2d 1339 (9th Cir. 1981).

Before proceeding to seek a consent, counsel should consult with the new client about the need to disclose information which may be (or which the client considers to be) confidential or secret. Counsel should also explore with the new client the possibility that seeking the consent will itself

put others on notice of the client's intentions or legal position at a time that would work to the client's disadvantage.

Realistically, it is not likely that a former client will be motivated to give such a consent. When seeking such a consent, it would be prudent to advise the former client to obtain independent counsel with respect to the request, preferably in writing. One's chances of obtaining a consent may be enhanced by reciting, if true, that the firm's attorneys who worked on the former client's matter will not work on the new client's matter. It may also be helpful to limit the scope of the consent to the negotiation and documentation of a matter, but not to representation of the new client in litigation, arbitration, etc., should a dispute arise between the new client and the prior client (i.e., "You won't be sued by your former counsel."). See sample Former Client's Consent Letter, Appendix I.

A client might consent to conflicts of interest that might arise in the future, as part of the arrangement under which new counsel begins work for the client.

> ***Example:*** Law Firm A is under consideration to provide legal services for City B on a specific project. City B realizes that Law Firm A will need to represent clients against the City in connection with other, unrelated matters. City B may be likely to consent to such conflicts of interest in advance, particularly conflicts of a type that are common and familiar to the City.

This is most likely with sophisticated clients that are accustomed to using more than one firm or who have in-house counsel. Such advance consent may prove particularly helpful in those situations in which a law firm undertakes a new, limited representation for a client that has many affiliates who may later be involved in matters with other clients of the law firm. It is still necessary to fully inform the client of the risks and to ensure that the client is properly represented by independent counsel in connection with granting the consent which, of course, should all be done in writing. See the discussion of advance consents in §3.2(1)(c).

Even if a consent would be required to engage in a representation, but representation is undertaken without the consent, if the former client acquiesces under circumstances that render it unfair to force a change of counsel on the new client, a court may find that the conflict has been waived. However, a court will not interpret the former client's delay in objecting to the new representation, alone, as a waiver. If the former client unfairly waits too long to object, however, and springs the objection at some point in the proceedings that would give it a tactical advantage, a court is likely to permit the representation to continue. Rather than waiver, the relief is really more in the form of a laches defense. The courts look for situations in which the former client had full information about the representation and its adverse nature, failed to object until it would gain an advantage by doing so despite an earlier opportunity to object, and the new client would suffer extreme hardship if counsel is disqualified. *See Chemical Waste Management, Inc. v. Sims*, 870 F. Supp. 870 (N.D. Ill. 1995). Note, however, that these cases provide no protection against disciplinary action.

§5.6 EVEN IF THE CONFLICT IS RESOLVED, WILL CONFIDENCES OR SECRETS BE USED?

Generally, an attorney must protect the confidences and secrets of a client. *See* WRPC 1.6. Even if a former client has consented to the representation of a new client in a related matter that is adverse to the former client, the attorney is still subject to the duty of confidentiality imposed by WRPC 1.9(b).

Can a former client give a prior consent to the disclosure of privileged information? WRPC 1.9(b) does not provide for such a consent, but WRPC 1.6 does. If a client may consent to the use or disclosure of its confidences and secrets to its own disadvantage, it would be a very dangerous practice to rely on such a consent unless it is in writing, the information to be disclosed is quite specifically listed, and the former client is actually represented by independent counsel (as versus merely having been advised to obtain counsel).

§5.7 CONSENT OF THE NEW CLIENT

Even if the prior client does provide the requisite consents, don't overlook the probable need for a consent from the new client. Such a consent probably will be required under WRPC 1.7(b) (see §3.2(2)), or possibly under WRPC 1.7(a) (see §3.2(1)).

§5.8 HYPOTHETICAL CASE

(a) The case

A good illustration of sequential representation involves a lawyer who has incorporated a closely-held business and represented it for a number of years. The owners elect to retire and the lawyer assists them in negotiating a sale of all the business assets. In the course of negotiations, the buyers become familiar with the attorney, and afterwards ask the attorney to continue representing the business.

(b) Analysis

There are substantial business reasons why new owners ask the former owner's attorney to continue to represent the business. The lawyer may have knowledge and expertise that remains pertinent to that particular business notwithstanding a change of ownership. Because most sellers have a continuing financial stake in the integrity of the business, they are often as pleased as the buyer to secure continuity of legal representation. A lawyer experienced with a business can help new owners avoid pitfalls that might complicate their ability to meet continuing obligations to the seller. Given this harmony of interests, it is easy to neglect potential future problems reflected in the concerns of WRPCs 1.7, 1.9, and 2.2. See §§3.2 and 3.3.

Assuming the attorney is not asked to continue representing the business until after the sale has closed, there will not be direct adversity between the two clients. Yet, as any lawyer who has taken this route with frequency will attest, the potential for post-sale adversity between buyer and seller is substantial, regardless of good feelings at closing. Even in the event of a cash sale, future disputes may arise around such issues as terms of the sale or alleged breaches of representations

and warranties. Given the frequency of after-the-sale disputes between buyers and sellers, any lawyer who would continue to represent the business must make difficult assessments about the past and predictions about the future.

At the outset, an attorney must define the scope of past and contemplated future representation. Suppose, for instance, the attorney had little contact with the seller other than representing the business at hearings before a licensing agency that regulates its operations. That type of specialized representation presents negligible risk of withdrawal necessitated by future disputes between buyer and seller. On the other hand, a buyer's lawyer who had been deeply immersed in representing a business and in structuring its sale on behalf of the seller would in all likelihood be disqualified from representing either party in a later dispute, especially if it involved any aspect of the sale.

Once the scope of proposed representation is determined, the lawyer must attempt to measure the probability of a future dispute between buyer and seller, as well as the likely extent and nature of the dispute. Questions the attorney should ask include the following:

- How complex was the sale and how well informed were both parties?
- How sophisticated are both buyer and seller?
- How contentious by nature are both buyer and seller?
- Based on the lawyer's assessment of each party, how likely is it that future disputes may be resolved by intermediation?
- After the sale, how much interest does the seller continue to have in the business?
- How tightly structured was the sale to take care of unforeseen contingencies?
- Given the nature of the business and the structure of the sale, how long will it be before potential sources of dispute are laid to rest?
- How much will both buyer and seller be injured if the lawyer is later forced to withdraw?

In some situations it may be easy for a lawyer to continue post-sale representation. For example, a mother and father make a cash sale of a small business to a daughter who has worked in the business for many years. The parents have had and will probably continue to have access to confidential information about the business; the daughter has first-hand knowledge of the business; relationships are in harmony; and the likelihood of future disputes minimal. Under these circumstances, the risk of continuing representation is slight, both for clients and the lawyer.

In contrast, consider the sale of a complex, financially troubled business that occurs after heated, acrimonious negotiations between a buyer and seller, with a substantial part of the purchase price deferred. The prospect of future dispute is significant, the likelihood of the lawyer's disqualification high, and the costs of such disqualification substantial. It is difficult to judge at what point the aggregation of these prospects amounts to a material limitation of the lawyer's representation of the business after the sale. This case is probably not the time for an attorney to try to use the vagaries of WRPC 1.7(b) with surgical precision to justify continued representation.

Even if convinced that WRPCs 1.7 and 1.9 are not prohibitive at the outset, a lawyer still has many reasons to discuss the risk of sequential representation with both clients and to obtain their consents. As a threshold matter, an attorney may not be able to make an informed judgment about the likelihood of adversity in the absence of information that would be revealed through discussions with the parties. Also, in preliminary talks, the lawyer may discover that the seller

objects to the attorney working for the buyer. Such an objection by the seller might foreclose the attorney from later reaching a reasonable belief that direct adversity did not affect the relationship with the seller. *See* WRPC 1.7(a) and §3.2(1)(a) of this book.

As in the case of business competitors, the seller, if given the opportunity, may wish to impose conditions on the lawyer's representation of the buyer in which the buyer agrees that, in the event of future direct adversity between buyer an seller, the lawyer may represent the seller. Enforceability may be a problem. See Appendix J for a sample letter.

If any attorney decides to continue representing the business after a sale, it is essential that a system be established to detect buyer-seller conflicts as early as possible. These conflicts can be detected most efficiently through an agreement by both parties that they will notify the lawyer immediately should a concern surface regarding the sale transaction. At the same time, the lawyer must regularly question whether developments in the business portend a dispute between the parties. If conflicts materialize, the lawyer must proceed with an analysis under WRPCs 1.7, 1.9, or 2.2, whichever is appropriate under the circumstances. Even if there has been previous consent to sequential representation, emergence of new or actual conflicts might require fresh disclosure and renewal of consent.

§5.9 CARDINAL POINTS

1. Under WRPC 1.9, a lawyer cannot become involved in a matter of interest to a former client if the lawyer's involvement is materially adverse to the former client and the matter is substantially related to the prior representation.
2. Conflicts of interest involving one member of a firm are imputed to all members of the firm.
3. Even if no conflict exists, or is waived, the attorney may not undertake or continue the representation if a former client's confidences or secrets will be used to that client's disadvantage, unless a consent covers that as well.