2018 VWCC EDUCATIONAL CONFERENCE AND EXHIBITION

October 17-18
Greater Richmond Convention Center
403 North 3rd Street
Richmond, Virginia 23219

ETHICS: Client Representation, Past and Present:
Avoiding the Pitfalls of Rule 1.9

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HYPOTHETICAL NO. 1:

Attorney at Firm A represented Company in workers’ compensation. Employee and Company settle claim via Petition and Order (prepared by Attorney) and Employee continued to work with Company for several more years. Attorney leaves Firm A and at that point, Company stopped using Firm A. Several years later, employee was terminated by Company. Employee believes she was fired because of her age and asks Firm A to represent her in an unlawful termination action against Company.

Question: Can Firm A represent Employee in the unlawful termination action against Company?

Answer: Yes.

Rule 1.9(b)(1) states:

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) The matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

Determination of a potential conflict again hinges on the definition of “substantially related”. Firm A’s prior representation of Company in a workers’ compensation action does not appear to be “substantially related” to the wrongful termination action, even though both involve litigation related to labor. The actions involve separate areas of the law with unique rules and procedures. Additionally, the subject matter is distinctive: a work-related injury vs. termination allegedly related to Employee’s age and not a work-related injury.

Courts addressing the issue have stated that substantial relatedness exists where the matters or issues raised in the current and the former representation are essentially the same, arise from substantially the same facts, or are byproducts of the same transaction, Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724 (E.D. Va. 1990), or entail virtually a congruence of issues or a patently clear relationship in subject matter. In re Stokes, 156 B.R. 181 (Bkr. E.D.Va. 1993). See also Pasquale v. Colasanto, 14 Va. Cir. 54 (1988).
(VSB Legal Ethics Committee Opinion 1652, 9/12/95; reconsidered and revised, 7/8/96)

In this hypothetical, the issues raised in the current and former representation are not the same, do not arise from substantially the same facts, nor are byproducts of the same transaction.
HYPOTHETICAL NO. 2:

Over a period of several years, Firm was retained by Construction Company to work on a number of workers’ compensation cases on appeal involving the issue of statutory employer. After the appellate work ended, Firm filed an action against Construction Company for a separate claim involving the compensability of injuries sustained by an employee not involved in the prior litigation, and whose employment status is not in question.

Question: Was Firm’s previous work for Construction Company enough of a “substantially related matter” to create a conflict with the current litigation?

Answer: No.

VSB Rule 1.9(a) states: “A lawyer who has formerly represented a client in a matter shall not thereafter 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 both the present and former client consent after consultation.”

According to the ABA’s model rules guidelines, 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. . . (a) conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services”

(ABA Comment on Rule 1.9, No. 3, in pertinent part)

VSB Legal Ethics Opinion 1652 states in pertinent part:

Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination. LEO #1613 addressed "substantial relatedness," as follows:

“[T]he committee has not established a precise test for substantial relatedness under DR 5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts
(LEO #1473), the same parties (LEOs #1279, #1516), or the same subject matter (LEOs #1399, #1456).”

(VSB Legal Ethics Committee Opinion 1652, 9/12/95; reconsidered and revised, 7/8/96)

Additionally, and most importantly for this hypothetical, the VSB stated in its comments to Rule 1.9:

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

(VSB Professional Guidelines, Rule 1.9, Comment No. 2).

Applying the above rationale, it does not appear that Firm’s prior appellate work for Construction Company on the distinct issue of statutory employer is a substantially related matter, and thus does not create a conflict in the present litigation. However, it does seem clear that if Firm were to represent an injured employee whose employment status was in question and material to the claim, Firm’s prior work would preclude them from representing the employee.
HYPOTHETICAL NO. 3:

Attorney represented Company A. He now wishes to represent Company B in what the parties agree is a substantially related matter, with Company B’s interests being materially adverse to the interests of the former client, Company A.

Question: What must be done for Attorney to represent Company B in the “substantially related matter”?

Answer: Bilateral consent after consultation

In Virginia, the parties can agree to waive any conflicts between the current and former clients if certain requirements are met. Virginia Rule 1.9(b)(2) addresses the remedy:

A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client...about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless both the present and former client consent after consultation.

Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

(VSB Professional Guidelines, Rule 1.9, Comment No. 9)

**NOTE:** Virginia deviates from the ABA model rules in Rule 1.9(b)(2) in two important ways: the ABA Rule requires informed consent only from the former client, while Virginia requires consent from both the former and current client after consultation. Additionally, Virginia rules do not specifically require written consent from the parties, although it is advisable to do so:

*ABA Rule 1.9(b)(2) (in pertinent part):*

...about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

*VSB Rule 1.9(b)(2) (in pertinent part):*

...about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless both the present and former client consent after consultation.
HYPOTHETICAL NO. 4:

Firm A represents Plaintiff in a large loss liability matter. Firm B represents Defendant. Attorney working on the liability matter at Firm B decides to pursue a lateral position at Firm A. Firm A hires Attorney from Firm B.

Question: Can Firm A successfully screen the attorney from the relevant litigation?

Answer: No; Virginia has not adopted the “Lateral Screening Rule”

A common misconception regarding conflicts of interest is that a law firm can "cure" a conflict of interest stemming from one lawyer’s work by screening that attorney from the rest of the firm with regard to that matter. Actually, the ethics rules do not allow for a screen, or Chinese wall, to cure conflicts of interest in most contexts. Specifically, most conflicts involve an attorney’s work for a current or former client. Rule 1.7 addresses conflicts regarding current clients and Rule 1.9 addresses conflicts triggered by work done for former clients. Both of those types of conflicts are imputed to all members of the lawyer’s firm under Rule 1.10. Thus, if an attorney must decline or withdraw from a case because of work he’s done for a current or former client, all members of his firm face the same conflict. The "cure" for such conflicts, for the lawyer or any member of his firm, is not a screen, but rather consent from the former and/or the current client. Note that for conflicts under Rule 1.7, consent is not sufficient in certain instances.

There are three exceptions in the rules where a screen is acceptable: to avoid imputation of a conflict: "revolving door" situations involving government attorneys and situations involving former judges and arbitrators. Rule 1.11 addresses attorneys switching from government practice to private practice, and vice versa. Paragraph (b) of that rule outlines a screening procedure for an attorney in a private firm who had worked "personally and substantially" on a matter where another member of that firm now will represent a party "in connection with" that matter. Rule 1.12 addresses the private practice of former judges and arbitrators. Paragraph (c) outlines a screening procedure for an attorney in a private firm who had participated in a matter as judge or arbitrator where another member of the firm will now represent a party in that same matter. Rule 1.18 addresses duties to prospective clients, and paragraph (d) outlines a procedure for screening an individual lawyer who has received disqualifying information from a prospective client while permitting another lawyer in the firm to represent a party adverse to the potential client. Outside the scenarios addressed by Rules 1.11, 1.12 and 1.18, a screen is not a sufficient cure for conflicts of interest triggered by the ethics rules.
(Virginia State Bar, “Answering Your Questions About Ethics FAQs)

(See also “Is there a Conflict? Not Always”, Emily F. Hedrick, Virginia Lawyer, June 2016, Vol. 65 and “State Adoption of Lateral Screening Rule” chart, American Bar Association website).
HYPOTHETICAL NO. 5:

Associate A works for Firm A on complex coverage issues but only for one client, Insurance Company X. Firm A also does extensive work for Insurance Company Y but Associate has no knowledge of any of Y’s cases with Firm, nor did he have access to Y’s file. Associate A then takes job with Firm B, who assigns him to work on a complex coverage issue against Insurance Company Y, which is still represented by his former firm.

Question: Can Associate A perform work on behalf of Company Y without creating a conflict?

Answer: Yes.

“Rule 1.9(b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm; and Rule 1.11(d) for restrictions regarding a lawyer moving from private employment to public employment.”

(VSB Professional Guideline, Rule 1.9, VSB Comment No. 5).

“Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.”

(VSB Professional Guidelines, Rule 1.9, Comment No. 6).
In this scenario, Associate A's lack of knowledge regarding Company Y--along with the fact that A had no access to Company Y's files--is adequate to avoid any conflict of interest.
HYPOTHETICAL NO. 6:

Attorney at Firm A is in protracted legal battle with Firm B in a workers’ compensation death case. While the litigation is still active, Firm A hires Paralegal from Firm B, who worked extensively on the matter.

Question: Does the hiring of Paralegal create a conflict between Firm A and Firm B regarding the active workers’ compensation litigation?

Answer: No; however, Firm A should take precautions regarding Paralegal’s knowledge of the pending litigation, and effectively screen Paralegal from the active litigation.

In 2004, the Virginia State Bar issued an advisory opinion regarding potential conflicts of interest involving non-lawyer staff. The Committee in LEO 1800 referenced both Rule 1.7 (current clients) and Rules 1.9 (former clients), by emphasizing that both Rules refer only to lawyers:

There are no paragraphs in these rules directed at non-lawyer staff, nor are there any paragraphs addressing a lawyer hiring non-lawyer staff. Nothing in Rules 1.7 and 1.9 creates a conflict of interest for an attorney hiring non-lawyer staff. This committee declines to adopt the conclusion drawn in a minority of states that Rules 1.7 and 1.9 can be read, despite their clear language to the contrary, to apply to support staff as well as attorneys.

This application of the current Rules of Professional Conduct is in line with a previous opinion finding that under the former Code of Professional Responsibility no conflict of interest arose for an attorney hiring non-lawyer staff of the opposing counsel’s firm during the course of the representation. See, LEO 745. Nonetheless, the Committee cautioned in that opinion, and reiterates here, that the hiring attorney must be mindful of the ethical supervisory duties regarding support staff.

(Virginia State Bar Legal Ethics Opinion 1800: “Are Non-Attorney Staff Subject to the Conflicts of Interest Prohibition?”, October 8, 2004).

The question then becomes how the new, non-lawyer hire should be handled by the new firm. The bulk of the guidelines regarding the hiring and handling of non-lawyer staff can be found in VSB’s Rule 5.3 (see attached Rule 5.3 resources). However, the VSB in LEO 1800 felt Rule 5.3 did not go far enough and instead adopted a more formal, rigid approach to ensure a conflict does not develop. In other words, a screen:
A minority of states have concluded that nothing more specific is required than a general nod to this Rule 5.3 supervisory duty. However, this committee prefers the position taken in a majority of states, which is outlined in ABA Informal Op. 88-1526. That position interprets Rule 5.3 such that the hiring firm must effectively screen the new employee with regard to the matter in question to ensure Rule 5.3 compliance.

*Id.*

In pertinent part, ABA Informal Opinion 88-1526 states:

A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm. In addition, the nonlawyer's former employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer.

The Model Rules require that a lawyer make reasonable efforts to ensure that each of the lawyer's nonlawyer employees maintains conduct compatible with the professional obligations of the lawyer, including the nondisclosure of information relating to the representation of clients. This requires maintaining procedures designed to protect client information from disclosure by the lawyer's employees and agents.

Finally, **LEO 1800** also provides a useful guideline on how to shield the newly-hired paralegal from the potential conflict:

Numerous factors will determine what is necessary for effective screening in any given instance; the size of the original firm, the size of the hiring firm, and the nature of the work performed by the employee at the first firm are only some examples of what a firm should consider in developing an appropriate screen. Thus, while there is no “one size fits all” screen, this committee presents the following list of possible elements that could support an effective screen:

1) Educate the new staff member both about the general concept of client confidentiality and should be specific that he not discuss his work at the former firm on the matter in question;

2) Confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;

3) Educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;

4) Preclude in some practical way access to and/or involvement with the pertinent file by the staff member;

5) Develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel’s firm; and

6) Note, on the cover of the file in question, the key information regarding confidentiality.

(Id.)
HYPOTHETICAL NO. 7:

Attorney A handled Mega Corporation’s workers’ compensation files for many years. During that time, Attorney A and Mega developed a controversial “make-work” program for light duty employees, despite concerns by the Claimants’ Bar. The details and validity of the program were regularly argued in front of Deputy Commissioners but were not known outside of the workers’ compensation community. Attorney A later joins Claimants’ Firm and plans to argue against the validity of the program when he begins representing workers employed at Mega. Mega claims the details of the program are confidential. Attorney A argues the program is “generally known” and therefore not confidential.

Question: Can Attorney A use the information obtained to the disadvantage of Client Company?

Answer: It depends on the definition of “generally known.”

Rule 1.9 (c) states:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; and

(2) Reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

“Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.”

(VSB Professional Guidelines, Rule 1.9, Comment No. 8)

On December 15, 2017, The American Bar Association’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 479, which defines when something is “generally known” for purposes of triggering an exception to the prohibition on using a former client’s confidential information.
In their news release regarding Formal Opinion 479, the ABA stated:

The ABA Model Rules of Professional Conduct prohibit lawyers from revealing confidential information about former clients without their permission. Model Rule 1.9(c)(1), however, says a lawyer may use such information ‘to the disadvantage of the former client’ when the information has become ‘generally known.’ The term is not defined in the model rules.

Formal Opinion 479 advises that information is “generally known” if it is “widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client’s industry, profession, or trade.” Information may become “generally known” as a result of publicity in newspapers, magazines, radio, television, websites or social media, according to the opinion. Information may become “generally known” within an industry if it is “announced, discussed or identified” in “a leading print or online publication or other resource in the particular field.”

Formal Opinion 479 cautions that information is not “generally known” just because it has been discussed in open court, or is available in court records, public libraries or other public repositories. “Information that is publicly available is not necessarily generally known,” according to the Opinion.
RESOURCES


Rule 1.9

Conflict of Interest: Former Client

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter 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 both the present and former client consent after consultation.

- (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
  - (1) whose interests are materially adverse to that person; and
  - (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

  unless both the present and former client consent after consultation.

- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  - (1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
  - (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.
[2] The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, 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. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved and other lawyers may be subject to imputed disqualification under Rule 1.10. If a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs 1.9 (b) and (c) concerning confidentiality have been met.

**Lawyers Moving Between Firms**

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[4a] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences
concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[4b] The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the Virginia Code. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety. A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm; and Rule 1.11(d) for restrictions regarding a lawyer moving from private employment to public employment.

Confidentiality

[6] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other

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clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[6a] Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

[8] Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using non-confidential information about that client when later representing another client.

[9] Disqualification from subsequent representation is primarily for the protection of former clients but may also affect current clients. This protection, however, can be waived by both. A waiver is effective only if there is full disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

[10] With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Virginia Code Comparison

Paragraph (a) is substantially the same as DR 5-105(D), although the Rule requires waiver by both a lawyer's current and former client, rather than just the former client.

There was no direct counterpart to paragraph (b) in the Virginia Code. Representation by a lawyer adverse to a client of a law firm with which a lawyer was previously associated was sometimes dealt with under the rubric of Canon 9 of the Virginia Code which provided: "A lawyer should avoid even the appearance of impropriety."

There was no counterpart to paragraph (c) in the Virginia Code. The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that also was not prohibited by the Virginia Code which protected only
"confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

Committee Commentary

The Committee believed that, in an era when lawyers frequently move between firms, this Rule provided more specific guidance than the implicit provisions of the Disciplinary Rules. However, the Committee added language to paragraph (a) requiring consent of both present and former clients. Additionally, the Committee adopted broader language in paragraph (c) precluding the use of any information "relating to or gained in the course of" the representation of a former client, rather than precluding the use only of information "relating to" the former representation.

The amendments effective January 4, 2010, in Comment [5], added the reference to Rule 1.11(d) in the last sentence.
ABA Comments on Rule 1.9

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether
two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the
affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.
I am writing in response to your letter dated June 14, 1995, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("committee"). As you know, the committee issued an advisory opinion on September 12, 1995, in response to your inquiry. On June 11, 1996, the committee reconsidered the opinion on the issue of whether a client may withdraw at any time consent previously given to a conflict. Because the statement made in the prior opinion may be overbroad, the committee concluded that this matter requires clarification, and overrules the prior opinion in that regard.

You have presented a hypothetical situation in which Attorney A, in 1986, began representing Client with regard to alleged arrearages by her ex-husband in the payment of sums due under a property settlement agreement which had previously been ratified as part of the divorce proceeding between Client and ex-husband. Attorney A instituted contempt proceedings which were still pending in April, 1987. At that time, ex-husband requested that Attorney A represent him, as co-counsel with Attorney B, on DUI and refusal charges. In the presence of Attorneys A and B, ex-husband was informed of the conflict and signed a waiver stating he had no objection to Attorney A's continued representation of Client. Ex-husband agreed orally to not object in the future to A's representation of Client. Client also executed a waiver, acknowledging that the retainer paid by ex-husband to Attorney A would not be available to apply toward arrearages owed by ex-husband to Client.

In March, 1992, Attorney A was still representing Client and attempting to collect arrearages from ex-husband. When criminal and traffic charges were placed against ex-husband, Client again permitted Attorney A to represent ex-husband. Client signed a waiver acknowledging the potential conflicts, including the fact that the retainer paid by ex-husband to Attorney A would not be available to satisfy, in part, the arrearages sought by Client. Client also acknowledged that Attorney A could take no actions on Client's behalf against ex-husband without ex-husband's consent until the charges were resolved. Ex-husband again signed a waiver of the "potential conflict of interest" and authorized Attorney A to "take whatever actions he deems necessary" against ex-husband regarding the arrearages while representing him in the criminal matters. Client is continuing to collect the alleged sums due from ex-husband, and ex-husband now objects to Attorney A's continued representation of Client.

You ask the committee to opine whether Attorney A may continue to represent Client (the former wife) in the contempt proceeding against her former husband to compel payment of arrearages owed
Committee Opinion
September 12, 1995
Reconsidered and Revised
July 8, 1996

Client under their property settlement agreement over ex-husband's objection to such representation.

On the facts you presented, Attorney A's representation of ex-husband was concluded in 1992. Ex-husband is, therefore, a former client of Attorney A. The controlling disciplinary rules pertinent to your inquiry are DR 5-105(D), which bars representation adverse to a former client in the same or a substantially related matter without consent from the former client, and DR 4-101(B), which prohibits the use of a client's confidences or secrets to the disadvantage of the client, or for the advantage of a third person, unless the client consents. The duty of confidentiality applies equally to existing clients and to former clients. EC 4-6.

Whether current representation adverse to a former client is "substantially related" to the former representation is a fact-specific inquiry requiring a case-by-case determination. LEO #1613 addressed "substantial relatedness," as follows:

[T]he committee has not established a precise test for substantial relatedness under DR 5-105(D). The committee, however, has previously declined to find substantial relatedness in instances that did not involve either the same facts (LEOs #1473), the same parties (LEOs #1279, #1516), or the same subject matter (LEOs #1399, #1456).

Courts addressing the issue have stated that substantial relatedness exists where the matters or issues raised in the current and the former representation are essentially the same, arise from substantially the same facts, or are byproducts of the same transaction, Tessier v. Plastic Surgery Specialists, Inc., 731 F. Supp. 724 (E.D. Va. 1990), or entail virtually a congruence of issues or a patently clear relationship in subject matter. In re Stokes, 156 B.R. 181 (Bkrs. E.D.Va. 1993). See also Pasquale v. Colesanto, 14 Va. Cir. 54 (1988). On the facts presented, the committee is of the opinion that Attorney A's current representation of Client against ex-husband in a contempt proceeding to compel payment of arrearages is not substantially related to his former representation of ex-husband in defending traffic charges.

The committee observes that DR 5-105(D)'s proscription is rooted in DR 4-101(B)'s mandate to safeguard the confidences and secrets of clients, both existing and former. Tessier expresses the relationship between DR 5-105(D) and DR 4-101(B), at 728:

The problem implicated by successive representation is the potential for the use of confidences gained from a former client to the detriment of that client or the failure to use information favorable to the present client in order to protect the confidentiality of the former client.

If substantial relatedness exists between the matter in former representation and the matter in current representation adverse to the former client, there is a presumption that the attorney gained confidences and secrets in the former representation which could be used to the former client's disadvantage in the current representation. Rogers v. Pittston Co., 800 F.2d 350, 353-54 (W.D. Va. 1992), aff'd without op., 996 F.2d 1212 (4th Cir. 1993). There is no presumption, however, if the matters are not substantially related. See Pasquale v. Colesanto, supra.

In LEO #622 the committee opined that it was permissible for an attorney to represent a creditor seeking to collect a debt from the attorney's former client when the matters were not substantially
related and the collection matter did not implicate confidences and secrets gained from the former client. On the facts represented the committee cannot determine whether Attorney A would have gained confidences or secrets from ex-husband that could be used to his disadvantage in Attorney A’s representation of Client in the contempt proceeding.

The Committee notes, however, that since ex-husband is the subject of a contempt proceeding, ex-husband’s earnings, employment, ability to earn, assets, use of earnings, lifestyle and the like could be material to Attorney A’s representation of Client against ex-husband. To the extent Attorney A acquired information about those factors in his former representation of ex-husband, they would be confidences and secrets which Attorney A could not use to the disadvantage of ex-husband without ex-husband’s consent. Moreover, ex-husband’s refusal to consent would adversely affect the character of Attorney A’s representation of Client. See DR 7-101(A)(1) and (3).

On the facts presented, ex-husband consented to Attorney A’s simultaneous representation of Client and thereafter objected to Attorney A’s representation of Client following Attorney A’s representation of ex-husband. It is doubtful that Attorney A’s consent from ex-husband, as well as Client, cured Attorney A’s conflict of interest in his simultaneous representation of both. DR 5-105(C); see LEO #1408. In any event, consent is not a contractual obligation and a client under certain circumstances may withdraw the consent. See, e.g., LEO #1354; Commercial & Sav. Bank v. Brundige, 5 Va. Cir 33, 34 (1981).

Based on the foregoing, it is the opinion of the committee that Attorney A has an incurable conflict and must withdraw from the representation of Client.
Answering Your Questions about Legal Ethics

The Virginia State Bar’s legal staff includes the ethics unit. The ethics hotline, (804) 775-0564 or ethicshotline@vsb.org, serves members of the bar and the public by answering questions regarding ethics and the unauthorized practice of law. Below, are some of the most frequently asked questions, along with summary answers. References in these answers are made to the Rules of Professional Conduct (RPCs)\(^1\) the Unauthorized Practice Rules (UPRs)\(^2\), Legal Ethics Opinions (LEOs) and Unauthorized Practice of Law Opinions (UPLs). The rules and many of the opinions can be found at the Virginia State Bar’s Web site: www.vsb.org.

13. Chinese Walls/ Screens When can a law firm use a “Chinese wall” to screen an attorney to avoid a conflict of interest?

A common misconception regarding conflicts of interest is that a law firm can “cure” a conflict of interest stemming from one lawyer’s work by screening that attorney from the rest of the firm with regard to that matter. Actually, the ethics rules do not allow for a screen, or Chinese wall, to cure conflicts of interest in most contexts. Specifically, most conflicts involve an attorney’s work for a current or former client. Rule 1.7 addresses conflicts regarding current clients and Rule 1.9 addresses conflicts triggered by work done for former clients. Both of those types of conflicts are imputed to all members of the lawyer’s firm under Rule 1.10. Thus, if an attorney must decline or withdraw from a case because of work he’s done for a current or former client, all members of his firm face the same conflict. The “cure” for such conflicts, for the lawyer or any member of his firm, is not a screen, but rather consent from the former and/or the current client. Note that for conflicts under Rule 1.7, consent is not sufficient in certain instances.

There are two exceptional contexts in the rules where a screen is an acceptable conflicts cure: situations involving government attorneys and situations involving former judges and arbitrators. Rule 1.11 addresses attorneys switching from government practice to private practice, and vice versa. Paragraph (b) of that rule outlines a screening procedure for an attorney in a private firm who had worked “personally and substantially” on a matter where another member of that firm now will represent a party “in connection with” that matter. Rule 1.12 addresses the private practice of former judges and arbitrators. Paragraph (c) outlines a screening procedure for an attorney in a private firm who had participated in a matter as judge or arbitrator where another member of the firm will now represent a party in that same matter. Outside the scenarios addressed by Rules 1.11 and 1.12, a screen is not a sufficient cure for conflicts of interest triggered by the ethics rules.

http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html
Is there a Conflict? Not Always

by Emily F. Hedrick, assistant ethics counsel

Detecting and managing conflicts of interest is a significant concern for lawyers and law firms of all sizes in all practice areas. As challenging as it can be to identify a conflict and be required to decline or limit representation, it can also be difficult to identify all the situations where there is no conflict. Although a lawyer can still decline to represent a client even if there is no conflict, both clients and lawyers can be unnecessarily frustrated by misconceptions about the lawyer’s duties. This article addresses some common situations that are often mistakenly identified as conflicts when the lawyer is actually free to take on the proposed representation.

Lawyers Leaving Law Firms

Lawyers changing firms can lead to confusion. The conflicts analysis shifts from imputation to actual knowledge of confidential information when a lawyer leaves a firm or joins a new one. Consider a situation where a lawyer in a firm has a longtime client whom she represents on divorce and custody matters. While the lawyer is part of the firm, her conflict is imputed to everyone else in the firm, regardless of whether other lawyers in the firm have any information about the client’s matters—the conflict is imputed even to other offices of the firm and to lawyers who have never met the lawyer or the client. However, once that lawyer leaves the firm, taking the client with her, the conflict is no longer imputed under Rule 1.10(b), and there is no conflict since no one remaining in the firm has any confidential information about the departed lawyer’s client.

Likewise, a lawyer who leaves a firm does not carry all of the firm’s con-

flicts with her. Rule 1.9(b) again limits conflicts for a lawyer who has departed a firm to matters in which the lawyer actually has confidential information about the clients of her former firm. As Comment [4b] to Rule 1.9 explains, the rule uses a “functional analysis” with the aims of preserving confidentiality and avoiding positions adverse to a client, rather than a per se disqualification that does not acknowledge the realities of law firm associations.

Adversity to a Former or Prospective Client

Lawyers often “know” that they cannot be adverse to former clients in any way. While a particular lawyer or firm might choose to adopt this as a policy, the Rules of Professional Conduct do not require it. Rule 1.9 forbids representing a client adverse to a former client in “the same or a substantially related matter” and forbids using or disclosing confidential information about a former client. This means that if the lawyer does not have relevant confidential information about the former client, she can represent someone who is adverse to the former client in an unrelated matter.

Rule 1.18 sets a more relaxed standard for conflicts arising from a consultation with a prospective client whom the lawyer never actually represents; it permits a lawyer to represent a client who is adverse to a prospective client even in the same matter, as long as the lawyer did not learn “significantly harmful” information from the prospective client.

Screening

First, one misconception about something that actually is a conflict: Virginia has not adopted the ABA Model Rule provision that allows for nonconsensual screening to avoid conflicts for lateral hires. If a lawyer who has a conflict joins a firm, that conflict is imputed to the entire firm and cannot be avoided by screening the new lawyer. On the other hand, lawyers may not appreciate situations where screening is permitted to prevent imputation of a conflict, and that can lead to unnecessary conflicts when a lawyer shares information throughout the firm rather than screening the affected lawyer or lawyers from the beginning. Rule 1.18(d) permits a firm to represent a client adverse to a prospective client of the firm even when the lawyer who consulted with the prospective client received significantly harmful information as long as that lawyer is screened from the matter as provided by the rule.

Rule 1.11 also allows screening to avoid imputation of conflicts arising from government service, both for lawyers who have moved from private practice to government service as well as the reverse.

For practical advice on how to implement a screen in these situations, see LEO 1800. The key points in establishing an effective screen are to explain to all members of the firm that the screened lawyer is not to have any contact with the case, physically/technologically restrict access to the file, and ensure that the screened lawyer understands the nature and purpose of the screen and the importance of ensuring the effectiveness of the screen.

Corporate Representation

Lawyers who represent corporations or other entities, particularly small, close-
ly-held entities, sometimes have some confusion about the identity of their client or clients. When a lawyer represents a corporation, she represents the corporation itself, although of course she deals with and takes direction from specific constituents of the corporation as provided by Rule 1.13(a). The lawyer must be vigilant to avoid creating unintended attorney-client relationships with constituents of the corporation, and otherwise should remember that her duty is to the corporation, not to its constituents. Lawyers often believe that they cannot be adverse to the "control group" or other key constituents of the entity, but that is not necessarily true. If it is consistent with the entity's interests, the lawyer may (and in some circumstances, should) take action adverse to key constituents of the entity.

Got an Ethics Question?
The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Non-lawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the blue "E-mail Your Ethics Question" box on the Ethics Questions and Opinions web page at www.vsb.org/site/regulation/ethics/.

"Not in Good Standing" Search Available at VSB.org
The Virginia State Bar offers the ability to search active Virginia lawyers' names to see if they are not eligible to practice because their licenses are suspended or revoked using the online Attorney Records Search at www.vsb.org/attorney/attSearch.aspx.

The "Attorneys Not in Good Standing" search function was designed in conjunction with the VSB's permanent bar cards. Lawyers are put on not-in-good-standing (NGS) status for administrative reasons — such as not paying dues or fulfilling continuing legal education requirements — and when their licenses are suspended or revoked for violating professional rules.

The NGS search can be used by the public with other attorney records searches — "Disciplined Attorneys" and "Attorneys without Malpractice Insurance" — to check on the status and disciplinary history of a lawyer.

Senior Citizens Handboook
Laws & Programs Affecting Senior Citizens in Virginia

A project of the Senior Lawyers Conference of the Virginia State Bar

What Seniors Need to Know.
The Senior Citizens Handbook is an invaluable resource with just about everything a senior would want to know about the law and a compendium of community-service organizations that provide senior services.

For more information, or to order copies of the Senior Citizens Handbook, please e-mail Stephanie Blanton at blanton@vsb.org or call (804) 775-0576.
## State Adoption of Lateral Screening Rule

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<th>State</th>
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33 states have adopted rules permitting lateral screening with various conditions (AZ, CO, CT, DE, DC, HI, ID, IL, IN, IA, KY, MD, MA, MI, MN, MT, NV, NH, NM, NC, ND, NJ, OH, OR, PA, RI, SC, TN, UT, WA, WV, WI, and WY); **out of those, 30 states have rules substantially similar to the revised ABA Model Rule 1.10 (CO, CT, DE, DC, HI, ID, IL, IN, IA, KY, MD, MA, MI, MT, NM, NV, NH, NJ, NC, OH, OR, PA, RI, SC, UT, WA, WV, WI, and WY)**

Copyright © 2015 American Bar Association. All rights reserved. Nothing contained in this chart is to be considered the rendering of legal advice. The chart is intended for educational and informational purposes only. We make every attempt to keep the chart as accurate as possible. If you are aware of any inaccuracies in the chart, please send your corrections or additions and the source of that information to John Holtaway, (312) 988-5298, john.holtaway@americanbar.org
LEGAL ETHICS OPINION 1800 ARE NON-ATTORNEY STAFF SUPPORT SUBJECT TO THE CONFLICTS OF INTEREST PROHIBITION?

You have presented a hypothetical situation in which Attorneys A and B represent opposing parties in pending litigation. A’s two-member firm used secretary X for all secretarial work for the office, including the present litigation. A’s firm fired X. The following week, Attorney B’s firm, also a two-lawyer office, hires X as a secretary.

With regard to the facts of your inquiry, you have asked the following questions:

1) Is there a conflict of interest requiring B’s withdrawal from the litigation?
2) Would the answer to question one differ if X were a paralegal rather than a secretary?
3) Would the answer to question one differ if X met alone with A’s client when the client reviewed and signed discovery responses?
4) Would the answer to question one differ if X’s only duty for B on the litigation at issue was to answer the telephone?

The fundamental issue for this series of questions is whether an attorney’s hiring of opposing counsel’s secretary creates an impermissible conflict for the hiring attorney. The general conflict of interest provisions in the Rules of Professional Conduct are Rules 1.7 and 1.9, dealing with current and former clients, respectively. Those rules state as follows:

RULE 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

RULE 1.9 Conflict of Interest: Former Client
(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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 both the present and former client consent after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless both the present and former client consent after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Each paragraph of these rules begins with the clear phrasing, “a lawyer.” There are no paragraphs in these rules directed at non-lawyer staff, nor are there any paragraphs addressing a lawyer hiring non-lawyer staff. Nothing in Rules 1.7 and 1.9 creates a conflict of interest for an attorney hiring non-lawyer staff. This committee declines to adopt the conclusion drawn in a minority of states that Rules 1.7 and 1.9 can be read, despite their clear language to the contrary, to apply to support staff as well as attorneys.

This application of the current Rules of Professional Conduct is in line with a previous opinion finding that under the former Code of Professional Responsibility no conflict of interest arose for an attorney hiring non-lawyer staff of the opposing counsel’s firm during the course of the representation. See, LEO 745. Nonetheless, the Committee cautioned in that opinion, and reiterates here, that the hiring attorney must be mindful of the ethical supervisory duties regarding support staff.

Rule 5.3 governs an attorney’s ethical responsibilities regarding non-lawyer assistants. As explained in the Comment to the rule:

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client...”
Thus, Attorney A and his partner should have made sure secretary X understood during his employment with the firm the critical importance of maintaining client confidentiality. Similarly, when X joined attorney B’s firm, those attorneys should have made sure X understood that principle; any attempt by attorney B or his firm members to learn or use the confidential information acquired by X regarding a client of his former employer would be in violation of the requirements of Rule 5.3. [2]

A minority of states have concluded that nothing more specific is required than a general nod to this Rule 5.3 supervisory duty. [3] However, this committee prefers the position taken in a majority of states, which is outlined in ABA Informal Op. 88-1526. [4] That position interprets Rule 5.3 such that the hiring firm must effectively screen the new employee with regard to the matter in question to ensure Rule 5.3 compliance.

Numerous factors will determine what is necessary for effective screening in any given instance; the size of the original firm, the size of the hiring firm, and the nature of the work performed by the employee at the first firm are only some examples of what a firm should consider in developing an appropriate screen. Thus, while there is no “one size fits all” screen, this committee presents the following list of possible elements that could support an effective screen:

1) educate the new staff member both about the general concept of client confidentiality and should be specific that he not discuss his work at the former firm on the matter in question;

2) confirm that the newly hired staff member brought no files or documents with him regarding the matter in question;

3) educate all of the attorneys and other staff members not to discuss the matter in question with that new staff member;

4) preclude in some practical way access to and/or involvement with the pertinent file by the staff member;

5) develop a written policy statement regarding confidentiality, which would include that the above steps are to be followed whenever staff members are hired from an opposing counsel’s firm; and

6) note, on the cover of the file in question, the key information regarding confidentiality.

To reiterate, the committee presents this list as a suggestion; the list is not meant to be mandatory or exhaustive.

In conclusion, in answer to your first question, Attorney B is not automatically required to withdraw from the representation merely for having hired his opponent’s secretary. Absent consent from the opposing party, Attorney B could remain in the case only if his firm effectively screened the secretary with regard to the matter in question. As to questions two through four, the answer to question one applies regardless of the specific title or duties of the non-lawyer staff. Those duties could however determine what screening elements were needed.
This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
October 8, 2004


[2] Note that Rule 8.4(a) prohibits an attorney from violating an ethics rule indirectly through the act of another.


LEO: Employment of Adverse Attorney's, LE Op. 745

Employment of Adverse Attorney's Secretary During Ongoing Litigation.

December 4, 1985

An attorney who has employed the former legal secretary of adverse counsel in ongoing litigation must exercise a high standard of care to assure compliance by the legal secretary with the Virginia Code of Professional Responsibility (the Code). The attorney may not accomplish by the conduct of a nonlawyer that which, if undertaken by the attorney, would violate the Code. [DR:3-104(C)]

Committee Opinion December 4, 1985

Rule 5.3

Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one’s role in a law enforcement investigation or a housing discrimination "test".

Virginia Code Comparison

Rule 5.3(a) and (b) are similar to DR 3-104(C). The Virginia Code also addressed a supervising lawyer’s responsibilities in DR 4-101(E) and DR 7-106(B). The Virginia Code did not contain any
explanation of a lawyer's responsibility for a nonlawyer assistant's wrongdoing, which is addressed in Rule 5.3(c).

Committee Commentary

The Committee adopted this Rule as a parallel companion to Rule 5.1 which applies similar provisions to lawyers with supervisory authority over other lawyers. The Committee inserted the phrase "or should have known" in Rule 5.3(c)(2) to reflect a negligence standard. The Committee also deemed it appropriate to add the language in the last sentence of the Comment to cover such recognized and accepted activities as those described.

The amendments effective January 1, 2004, in paragraph (a), inserted "or a lawyer who individually or together with other lawyers possesses managerial authority" following the current word "partner"; and in paragraph (c)(2), inserted "or has managerial authority" following "partner."
IMPUTED DISQUALIFICATION ARISING FROM CHANGE IN EMPLOYMENT BY NONLAWYER EMPLOYEE

June 22, 1988

American Bar Association

A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm. In addition, the nonlawyer’s former employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer.

The Committee is asked whether, under the ABA Model Rules of Professional Conduct (1983, amended 1987), a law firm that hires a paralegal formerly employed by another lawyer must withdraw from representation of a client under the following circumstances. The paralegal has worked for more than a year with a sole practitioner on litigation matters. One of those matters is a lawsuit which the sole practitioner instituted against a client of the law firm that is about to hire the paralegal and wishes to continue to defend the client. The paralegal has gained substantial information relating to the representation of the sole practitioner’s client, the plaintiff in the lawsuit. The employing firm will screen the paralegal from receiving information about or working on the lawsuit and will direct the paralegal not to reveal any information relating to the representation of the sole practitioner’s client gained by the paralegal during the former employment. The Committee also is asked whether the paralegal’s former employer must take any actions in order to comply with the Model Rules.

RESPONSIBILITIES OF EMPLOYING FIRM

The Committee concludes that the law firm employing the paralegal should not be disqualified from continuing to defend its client in the lawsuit, as long as the law firm and the paralegal strictly adhere to the screening process described in this Opinion, and as long as no information relating to the representation of the sole practitioner’s client is revealed by the paralegal to any person in the employing firm. [FN1]

The Model Rules require that a lawyer make reasonable efforts to ensure that each of the lawyer’s nonlawyer employees maintains conduct compatible with the professional obligations of the lawyer, including the nondisclosure of information relating to the representation of clients. This requires maintaining procedures designed to protect client information from disclosure by the lawyer’s employees and agents. See infra note 4.

Although the Committee has not previously addressed the issues present when nonlawyers change employment from one law firm to another while both firms are representing clients with conflicting interests, courts and other ethics committees have considered these issues. In Kapco Manufacturing Co., Inc. v. C & O Enterprises, Inc., 637 F. Supp. 1231 (N.D. Ill. 1985), the court was presented with the question whether a law firm should be disqualified from continuing to represent a defendant in litigation following the employment of the office manager-secretary of the plaintiff’s law firm. The disqualification motion was based on the fact that the employee had gained substantial confidential information about the plaintiff while with the former employer.
The court found that plaintiff had met its initial burden of presenting a prima facie case for disqualification of the defendant's law firm by proving that the office manager was privy to confidential information. Noting that the burden of going forward with evidence to rebut the presumption that this information had been shared with the new firm shifted to defendant, the court found that the defendant had met this burden. Although no formal 'Chinese wall' had been instituted, the law firm had taken appropriate steps to ensure that the office manager took no part in working on the defendant's case and that no one discussed the case with the employee. Accordingly, the motion to disqualify defendant's law firm was denied. The court distinguished Williams v. Trans World Airlines Inc., 588 F. Supp. 1037 (W.D. Mo. 1984), on the basis that in Williams there was no question but that confidential information had been obtained by the law firm from the newly hired employee, and this factor required disqualification of the law firm in that case. [FN2]

When a lawyer moves from one firm to another which is on the opposite side of a matter, the Model Rules permit continued representation by the new law firm only where the newly employed lawyer acquired no protected information and did not work directly on the matter while with the former employer. Rule 1.10. The Rules do not recognize screening the lawyer from sharing the information in the employing firm as a mechanism to avoid disqualification of the entire firm. [FN3] In the case of nonlawyers changing firms, however, additional considerations are present which persuade the Committee that the functional analysis in Kapco is more appropriate than would be a rule requiring automatic disqualification once the nonlawyer is shown to have acquired information in the former employment relating to the representation of the opponent.

It is important that nonlawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. To so limit employment opportunities that some nonlawyers trained to work with law firms might be required to leave the careers for which they are trained would disserve clients as well as the legal profession. Accordingly, any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information.

Model Rule 5.3 imposes general supervisory obligations on lawyers with respect to nonlawyer employees and agents. The obligations include the obligation to make reasonable efforts to ensure there are measures in effect to assure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer. [FN4] With respect to new employees who formerly worked for other lawyers, these measures should involve admonitions to be alert to all legal matters, including lawsuits, in which any client of the former employer has an interests. The nonlawyer should be cautioned: (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter on which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does not work in relation to matters on which the nonlawyer worked in the prior employment, absent client consent after consultation. [FN5]

Circumstances sometimes require that a firm be disqualified or withdraw from representing a client when the firm employs a nonlawyer who formerly was employed by another firm. These circumstances are present either: (1) where information relating to the representation of an adverse party gained by the nonlawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm, as was the case in Williams; or (2) where screening would be ineffective or the nonlawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the nonlawyer worked or respecting which the nonlawyer has gained information relating to the representation of the opponent while in the former employment. If the employing firm employs the nonlawyer under those circumstances, the firm must withdraw from representing the client, unless the client of the former employer consents to the continued representation of the person with conflicting interests after being apprised of all the relevant factors.

RESPONSIBILITIES OF FORMER EMPLOYER
Under Model Rule 5.3, lawyers have a duty to make reasonable efforts to ensure that nonlawyers do not disclose information relating to the representation of the lawyers’ clients while in the lawyer’s employ and afterwards. On the facts presented to the Committee here, once the lawyer learns that the paralegal has joined the opposing law firm, the lawyer should consider advising the employing firm that the paralegal must be isolated from participating in the matter and from revealing any information relating to the representation of the lawyer’s client. If not satisfied that the employing firm has taken adequate measures to prevent participation and disclosures, the lawyer should consider filing a motion in the lawsuit to disqualify the employing law firm from continuing to represent the opponent. See Philadelphia Bar Ass’n Opinion 80-119 (applying these principles to the case of a secretary under similar circumstances).

RESPONSIBILITIES UNDER CODE OF PROFESSIONAL RESPONSIBILITY

The standards expressed in this Opinion also are applicable under the predecessor ABA Model Code of Professional Responsibility (1969, amended 1980). Although the Disciplinary Rules under Canon 4 (Preservation of Confidences and Secrets) and under Canon 5 (Exercise of Independent Professional Judgment) regulate the conduct of lawyers and not the conduct of nonlawyers, DR 4-101(C) specifically requires a lawyer to ‘exercise reasonable care to prevent [the lawyer’s] employees, associates and others whose services . . . [the lawyer utilizes] from disclosing or using confidences or secrets of a client, except to the extent the lawyer . . . may do so.’ See also EC 4-2 (the exposure to nonlawyer employees of confidential professional information as a result of normal law office operations ‘obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved’); EC 4-5 (‘. . . a lawyer should be diligent in his efforts to prevent the misuse of [information acquired in representation of a client] by his employees and associates’).

The Committee accordingly is of the opinion that the same policy considerations are applicable under the Model Code as are applicable under the Model Rules. Therefore, the lawyer who hires the paralegal, under the circumstances before the Committee, must screen the paralegal from participating in the lawsuit with the employing law firm. Both the employing firm and the sole practitioner should admonish the paralegal not to disclose information relating to the representation of the plaintiff in the lawsuit and also of any other client of the sole practitioner for whom the paralegal formerly worked while with the former employer.

The standards expressed in this Opinion apply to all matters where the interests of the clients are in conflict and not solely to matters in litigation. The Committee also notes that these standards apply equally to all nonlawyer personnel in a law firm who have access to material information relating to the representation of clients and extends also to agents who technically may be independent contractors, such as investigators. See supra note 4, Comment to Rule 5.3.

FN1 The Committee notes that Model Rule 1.6 protects from disclosure a greater amount of information than does the predecessor ABA Model Code of Professional Conduct (1969, amended 1980). DR 4-101(A) of the Code protects ‘confidences’ and ‘secrets’ from disclosure. The term ‘confidences’ is defined as ‘information protected by the attorney-client privilege under applicable law.’ The term ‘secrets’ is defined as ‘other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.’ The term used in Model Rule 1.6, ‘information relating to the representation of a client,’ though not specifically defined, plainly encompasses in addition to confidences and secrets all information which pertains to the attorney-client relationship, even though it was not learned during the relationship and even though disclosure would not embarrass or be detrimental to the interests of the client.

FN2 Other courts and some ethics committees have employed the rationale applied in Kapco to allow firms to continue in matters where screening is effective to prevent the disclosure by the new employees of confidences of clients of their former employers. See, e.g., Herron v. Jones, 276 Ark. 493 (1982) (disqualification denied where no disclosure of confidential information by secretary occurred); Virginia State Bar Opinion No. 745 (1985) (lawyer may continue in case so long as adverse lawyer’s former secretary
is required to maintain confidences gained in former employment); Philadelphia Bar Ass'n Opinions 80-77, 80-119 (screening process adequate to prevent disclosure of confidences of former employer's client may suffice to avoid disqualification). Contra State Bar of Michigan Opinion C1-1096 (1985) (informed consent of all opposing clients required); New Jersey Opinion 546 (1984) (presumption that confidences have been exchanged is irrebuttable, and disqualification is automatic).

FN3 Screening is permitted only in the case where the lawyer formerly worked for the government. See Rule 1.11. Although most cases which have considered the issue reject the application of screening mechanisms as a means to avoid disqualification of the entire firm where the conflict arises from the newly employed lawyer's earlier nongovernmental association, this is not the universal view. See, e.g., Nemours Foundation v. Gilbane, 632 F. Supp. 418 (D. Del. 1986), applying Delaware Rules which are substantially the same as Model Rules 1.9, 1.10 and 1.11; Schissel v. Stephens, 717 F.2d 417 (C.A. 7 1983).

FN4 Rule 5.3(b) provides that 'a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.' The Comment to Rule 5.3 states that a lawyer should give to the lawyer's assistants, such as secretaries, investigators, law student interns and paraprofessionals, '... appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client...'


FN6 DR 4-101(C) states:
(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

ABA Informal Op. 88-1526

END OF DOCUMENT
ABA issues ethical guidance on "generally known" exception to former-client confidentiality

CHICAGO, Dec. 15, 2017 — The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 479, which defines when something is "generally known" for purposes of triggering an exception to the prohibition on using a former client's confidential information.

The ABA Model Rules of Professional Conduct prohibit lawyers from revealing confidential information about former clients without their permission. Model Rule 1.9(c)(1), however, says a lawyer may use such information "to the disadvantage of the former client" when the information has become "generally known." The term is not defined in the model rules.

Formal Opinion 479 advises that information is "generally known" if it is "widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client's industry, profession, or trade." Information may become "generally known" as a result of publicity in newspapers, magazines, radio, television, websites or social media, according to the opinion. Information may become "generally known" within an industry if it is "announced, discussed or identified" in "a leading print or online publication or other resource in the particular field."

Formal Opinion 479 cautions that information is not "generally known" just because it has been discussed in open court, or is available in court records, public libraries or other public repositories. "Information that is publicly available is not necessarily generally known," the opinion states.

The ABA Standing Committee on Ethics and Professional Responsibility periodically issues ethics opinions to advise lawyers, courts and the public in interpreting and applying ABA model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior.

Formal Opinion 479 and previous ABA ethics opinions are available on the ABA Center for Professional Responsibility website under "Latest Ethics Opinions."

Go to www.abalawfactcheck.com for the ABA's new feature that cites case and statutory law and other legal precedents to distinguish legal fact from fiction.

With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. View our privacy statement on line. Follow the latest ABA news at www.americanbar.org/news and on Twitter @ABANews.

This entry was posted on Fri Dec 15 08:36:55 CST 2017 and filed under News Releases and The Center for Professional Responsibility.
The "Generally Known" Exception to Former-Client Confidentiality

A lawyer's duty of confidentiality extends to former clients. Under Model Rule of Professional Conduct 1.9(c), a lawyer may not use information relating to the representation of a former client to the former client's disadvantage without informed consent, or except as otherwise permitted or required by the Rules of Professional Conduct, unless the information has become "generally known."

The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

Introduction

Confidentiality is essential to the attorney-client relationship. The duty to protect the confidentiality of client information has been enforced in rules governing lawyers since the Canons of Ethics were adopted in 1908.

The focus of this opinion is a lawyer's duty of confidentiality to former clients under Model Rule of Professional Conduct 1.9(c). More particularly, this opinion explains when information relating to the representation of a former client has become generally known, such that the lawyer may use it to the disadvantage of the former client without violating Model Rule 1.9(c)(1).

The Relevant Model Rules of Professional Conduct

Model Rule 1.6(a) prohibits a lawyer from revealing information related to a client's representation unless the client gives informed consent, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Model Rule 1.6(b). Model Rule 1.9 extends lawyers' duty of confidentiality to former clients. Model Rules 1.9(a) and (b) govern situations in which a lawyer's knowledge of a former client's confidential information would create a conflict of interest in a subsequent representation. Model Rule 1.9(c) "separately regulates the use and disclosure of confidential information" regardless of "whether or not a subsequent

1 MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2017) [hereinafter MODEL RULES].
representation is involved.”

Model Rule 1.9(c)(2) governs the revelation of former client confidential information. Under Model Rule 1.9(c)(2), a lawyer who formerly represented a client in a matter, or whose present or former firm formerly represented a client in a matter, may not reveal information relating to the representation except as the Model Rules “would permit or require with respect to a [current] client.” Lawyers thus have the same duties not to reveal former client confidences under Model Rule 1.9(c)(2) as they have with regard to current clients under Model Rule 1.6.

In contrast, Model Rule 1.9(c)(1) addresses the use of former client confidential information. Model Rule 1.9(c)(1) provides that a lawyer shall not use information relating to a former client’s representation “to the disadvantage of the former client except as [the Model] Rules would permit or require with respect to a [current] client, or when the information has become generally known.” The terms “reveal” or “disclose” on the one hand and “use” on the other describe different activities or types of conduct even though they may—but need not—occur at the same time. The generally known exception applies only to the “use” of former client confidential information. This opinion provides guidance on when information is generally known within the meaning of Model Rule 1.9(c)(1).

The Generally Known Exception

The generally known exception to the use of former-client information was introduced in the 1983 Model Rules. The term is not defined in Model Rule 1.0 or in official Comments to Model Rule 1.9. A number of courts and other authorities conclude that information is not generally known merely because it is publicly available or might qualify as a public record or as a matter of public record. Agreement on when information is generally known has been harder to achieve.

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2 ELLEN J. BENNETT ET AL., ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 190 (8th ed. 2015).
3 MODEL RULES R. 1.9(c)(1) (2017) (emphasis added).
4 See id. at cmt. 9 (explaining that “[t]he provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent”).
5 See RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.9, at 534 (2017–2018) (explaining that the language was originally part of Model Rule 1.9(b), and was moved to Model Rule 1.9(c) in 1989).
6 See, e.g., Pallon v. Roggio, Civ. A. Nos. 04-3625(JAP), 06-1068(FLW), 2006 WL 2466854, at *7 (D. N.J. Aug. 24, 2006) (“‘Generally known’ does not only mean that the information is of public record. . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information ‘generally known’ within the meaning of Rule 1.9(c).” (citations omitted)); Steel v. Gen. Motors Corp., 912 F. Supp. 724, 739 (D. N.J. 1995) (in a discussion of Rule 1.9(c)(2), stating that the fact that information is publicly available does not make it ‘generally known’); In re Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) (“‘Generally known’ does not mean information that someone can find.”); In re Anonymous, 932 N.E.2d 671, 674 (Ind. 2010) (stating in connection with a discussion of Rule 1.9(c)(2) that “the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources” (footnote omitted)); In re Tennant, 392 P.3d 143, 148 (Mont. 2017) (explaining that with respect to the Rule 1.9(c) analysis of
A leading dictionary suggests that information is generally known when it is "popularly" or "widely" known. Commentators have essentially endorsed this understanding of generally known by analogizing to an original comment in New York's version of Rule 1.6(a) governing the protection of a client's confidential information. The original comment distinguished "generally known" from "publicly available." Commentators find this construct "a good and valid guide" to when information is generally known for Rule 1.9(c)(1) purposes:

[T]he phrase "generally known" means much more than publicly available or accessible. It means that the information has already received widespread publicity. For example, a lawyer working on a merger with a Fortune 500 company could not whisper a word about it during the pre-offer stages, but once the offer is made—for example, once AOL and Time Warner have announced their merger, and the Wall Street Journal has reported it on the

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9 Id.
front page, and the client has become a former client—then the lawyer may tell the world. After all, most of the world already knows. . .

[O]nly if an event gained considerable public notoriety should information about it ordinarily be considered “generally known.”

Similarly, in discussing confidentiality issues under Rules 1.6 and 1.9, the New York State Bar Association’s Committee on Professional Ethics (“NYSBA Committee”) opined that “information is generally known only if it is known to a sizeable percentage of people in ‘the local community or in the trade, field or profession to which the information relates.” By contrast, “[I]nformation is not ‘generally known’ simply because it is in the public domain or available in a public file.” The Illinois State Bar Association likewise reasoned that information is generally known within the meaning of Rule 1.9 if it constitutes “‘common knowledge in the community.’”

As the NYSBA Committee concluded, information should be treated differently if it is widely recognized in a client’s industry, trade, or profession even if it is not known to the public at large. For example, under Massachusetts Rule of Professional Conduct 1.6(a), a lawyer generally is obligated to protect “confidential information relating to the representation of a client.” Confidential information, however, does not ordinarily include “information that is generally known in the local community or in the trade, field or profession to which the information relates.” Similarly, under New York Rule of Professional Conduct 1.6(a), a lawyer generally cannot “knowingly reveal confidential information . . . or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person,” but “confidential information” does not include “information that is generally known in the local community or in the trade, field or profession to which the information relates.” Returning to Model Rule 1.9(c)(1), allowing information that is generally known in the former client’s industry, profession, or trade to be used pursuant to Model Rule 1.9(c)(1) makes sense if, as some scholars have urged, the drafters of the rule contemplated that situation.

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10 Id.
12 Id. at ¶ 17.
13 Ill. State Bar Ass’n, Advisory Op. 05-01, 2006 WL 4584283, at *3 (2006) (quoting RESTATEMENT (SECOND) OF AGENCY § 395 cmt. b (1958)). The Illinois State Bar borrowed this definition from section 395 of the Restatement (Second) of Agency, which excludes such information from confidential information belonging to a principal that an agent may not use “in violation of his duties as agent, in competition with or to the injury of the principal,” whether “on his own account or on behalf of another.” RESTATEMENT (SECOND) OF AGENCY § 395 & cmt. b (1958).
14 MASS. RULES OF PROF’L CONDUCT R. 1.6(a) (2017).
15 Id. at cmt. 3A.
16 N.Y. RULES OF PROF’L CONDUCT R. 1.6(a) (2017).
17 Id. at cmt. [4A] (“‘Information is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information is not ‘generally known’ simply because it is in the public domain or available in a public file”).
A Workable Definition of Generally Known under Model Rule 1.9(c)(1)

Consistent with the foregoing, the Committee's view is that information is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media. With respect to category (b), information should be treated as generally known if it is announced, discussed, or identified in what reasonable members of the industry, profession, or trade would consider a leading print or online publication or other resource in the particular field. Information may be widely recognized within a former client's industry, profession, or trade without being widely recognized by the public. For example, if a former client is in the insurance industry, information about the former client that is widely recognized by others in the insurance industry should be considered generally known within the meaning of Model Rule 1.9(c)(1) even if the public at large is unaware of the information.

Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.\(^9\) Information that is publicly available is not necessarily generally known. Certainly, if information is publicly available but requires specialized knowledge or expertise to locate, it is not generally known within the meaning of Model Rule 1.9(c)(1).\(^{20}\)

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\(^{19}\) See In re Gordon Props., LLC, 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) ("'Generally known' does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may [be] in a case file in the courthouse where anyone could go, find it and read it. It is not 'generally known.' In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. 'Generally known' does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse.'"); In re Tennant, 392 P.3d 143, 148 (Mont. 2017) (holding that a lawyer who learned the information in question during his former clients' representation could not take advantage of his former clients "by retroactively relying on public records of their information for self-dealing"); Rotunda & Dziekanowski, supra note 5, § 1.9-3, at 554 (explaining that Model Rule 1.9(c)(1) "deals with what has become generally known, not what is publicly available if you know exactly where to look"); see also supra note 6 (citing additional cases and materials).

\(^{20}\) See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (2000) (stating, inter alia, that information is not generally known "when a person interested in knowing the information could obtain it only by means of special knowledge").
Conclusion

A lawyer may use information that is generally known to a former client’s disadvantage without the former client’s informed consent. Information is generally known within the meaning of Model Rule 1.9(c)(1) if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client’s industry, profession, or trade. For information to be generally known it must previously have been revealed by some source other than the lawyer or the lawyer’s agents. Information that is publicly available is not necessarily generally known.
Q & A

1. Party has girlfriend who is witness in a case, you prep her for deposition and discuss her testimony, she then has her deposition taken and she lies. What is your obligation?

2. Discovery asks for recorded statement, or in the alternative, any writing by claimant related to work accident. Counsel not provided with statement or journal and indicates in discovery they will supplement. If not provided by the party, what action is counsel required to take to get such statement or journals.

3. You have a client who you have a bad feeling about, she calls you and you secretly record your conversations. Is this ethical?

4. You are negotiating a lump sum settlement. Your client learns he has 12 weeks to live. Because he has been diagnosed with cancer unrelated to the work injury, what is your obligation to tell opposite counsel?

5. You represent a party in a very public case where you are asked to comment on the case by press, what is your obligation to the press to tell the truth?