

## Conflict Of Interest In Family Law Matters

By the NHBA Ethics Committee - April 2001

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The Rule 1.9 restriction on a lawyer who has represented a client from representing another with adverse interests in a substantially related matter has special relevance in family law, where questions arise about situations such as:

- drafting wills for a couple and later, one of them seeking representation in a divorce
- representing John (unmarried person) in a paternity case brought by Mary, and later, his wife Joan seeks representation in their divorce.

Before considering these and other similar scenarios, a review of the standards that apply to all practice areas is in order.

Absent full disclosure to and consent by the former client, Rule 1.9 prohibits an attorney who has represented a client in a matter from representing another person “in the same or a substantially related matter” where the clients’ interests in the matter are “materially adverse,” unless the former client consents “with knowledge of the consequences.” The subject matter is “substantially related” if the factual and legal matters are so similar that there is a genuine threat that confidential information revealed in the previous case could be used against the former client in the present case. *Annotated Model Rules of Professional Conduct (4<sup>th</sup> ed.)*.

Factors in making such a determination include the duration and intimacy of the lawyer-client relationship, the lapse of time between causes, the likelihood of an actual conflict, and likely prejudice to the client if conflict does arise. *State ex rel, Wal-Mart Stores, Inc. v. Kortum*, 559 N.W. 2 496, 501 (Neb. 1997). 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 re-zoning of the property, but would not be precluded, on the grounds of substantial relationship, from defending tenant of the completed shopping center in resisting eviction for nonpayment of rent.

This rule applies if the attorney’ s former firm represented the former client whose interests are “materially adverse” and the attorney has acquired material confidential information, unless the former client consents. The rule also prohibits the attorney from using any information gained in a former representation against the former client, unless the information has become “generally known,” and from revealing confidential information. Rule 1.9, N.H. Rules of Professional Conduct, as amended effective June 1, 1999. Also see Practical Ethics column (*NH Bar News*, September 1, 1999).

The New Hampshire Supreme Court has found that a Rule 1.9 (a) violation is established by proof of four elements:

1. The existence of a valid attorney-client relationship between the attorney and the former client.
2. The interests of the current and former client must be materially adverse.
3. The current and former matter are the same or substantially related.
4. The former client has not given an informed consent to the new representation.

*Sullivan County Regional Refuse Disposal District v. Town of Acworth*, 141 N.H. 479, 481-482 (1996). Upon a finding that all of these elements have been satisfied, “a court must irrebuttably presume that the attorney acquired confidential information in the former representation” and disqualification becomes mandatory. *Id. at 483*; cf. *Wood’s Case*, 137 N.H. 698 (1993).

It is useful to analyze each of these elements, considering the application to family law.

### Former Client

Being a family’s “family lawyer” can mean that under Rule 1.9, one may not represent either spouse in a divorce. The “former client” may be the other spouse, or the prior representation may have been of the parties jointly. In addition, having represented the grandparents, or one of the children, or having served as GAL, could be a conflict.

The definition of “former client” is broad and includes persons who had only a one-time consultation. A lawyer-client relationship is created when:

- A person seeks advice or assistance from a lawyer,

- The advice or assistance sought pertains to matters within the lawyer's professional competence; and
- The lawyer expressly or impliedly agrees to give or actually gives the desired advice or assistance.

*State v. Gordon*, 141 N.H. 703, 705 (1997).

Rule 1.9 has three subsections. Subsection (a) allows representation if the former client consents; subsection (b) deals with former clients of a firm the attorney is no longer associated with; and subsection (c) prohibits use of information relating to the former representation against that client, unless it has become generally known. Even if the prior representation was joint representation of the parties, for example, preparing "husband and wife" wills, each client has a right of confidentiality under Rule 1.6. Representation is presumed to involve receipt of confidential information under Rule 1.9. . In *Sullivan County*, supra, the Court noted that a former client "need never prove that the attorney actually misused ...confidences." 141 N.H. at 483.

It is essential to have a good conflicts-checking system to keep track of "former clients," including those that consisted only of consultations. Before taking on a new representation, run a conflicts check. Better still, check *before* you have any substantial discussion. This will prevent your consulting with wife, and six months later consulting with husband, resulting in being able to represent neither of them.

#### **B. Material Adversity of Interests**

The New Hampshire Supreme Court has not established any well-defined standard by which the interests of a present and former client are deemed to be materially adverse. However, in a divorce, the interests of the spouses are inherently adverse. This is why a lawyer may not represent both husband and wife in their divorce even if it is no-fault and uncontested. N.H. Ethics Opinion 78-5/2. Serving as a guardian *ad litem* for a child prohibits simultaneously representing the child's parent, even in an unrelated matter. *Boyle's Case* 136 N.H. 21 (1992).

#### **C. Substantial Relationship Test**

The New Hampshire Ethics Committee has said, "This test provides that the former client need only show that matters embraced in the pending suit in which his former attorney is representing his adversary are substantially related to the previous cause of action. The Court will then assume that confidences pertaining to the matter were revealed during the course of the former representation without inquiring into the nature and extent of such revelations." Advisory Opinion #1990-91/1.

The subject matter is substantially related if the lawyer could have obtained confidential information in the first representation that would be relevant in the second. *Kevlik v. Goldstein*, 724 F.2d 844, 851 (1<sup>st</sup> Cir.1984). 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. The N.H. Ethics Committee has noted that the purpose of the substantial relationship test is to protect the former client's confidential information. Formal Opinion #1992-93/13.

The rules are broad enough to protect the voluntary disclosure of both privileged and unprivileged communications gained during the course of representation. Thus, every piece of information which the inquiring attorney hopes to use in his representation of the new client must be evaluated to determine whether he learned of it in the course of his previous employment. Formal Opinion #1996-97/3.

What does "same or similar matter" mean in the context of a divorce? In considering this issue, the North Dakota Bar Association's Ethics Committee noted:

In divorce matters, virtually all aspects of a person's life are relevant to one or more issues. In dividing property, allocating debt, and awarding spousal support, the court considers the ages of the parties; the parties' earning abilities; the conduct of the parties during the marriage; the parties' station in life; the parties' health and physical condition; the necessities of the parties and their circumstances, financial and otherwise; the efforts and attitudes of the parties towards accumulation of property; and such other matters as the Court may determine are material. [Cite omitted.]

In matters of child custody and visitation, the Court considers the disposition of a parent to provide love and guidance; the disposition of a parent to provide for the material needs of a child; the moral fitness of the parents; the mental and physical health of the parents; a parent's relationships with third parties; whether a parent has been abusive; and any other factors that the court deems relevant. In summary, there is very little that goes on in one's life that could not become relevant in a divorce proceeding. [Cite omitted.]

North Dakota Ethics Opinion 00-01 (January 26, 2000).

Communications between a lawyer and client in domestic matters are frequently wide-ranging and address sensitive matters. Even if the prior representation involved a different adversary such as a former spouse, it is likely that confidential communications occurred between attorney and client that could be relevant in the divorce case.

A conclusion about the possession of such information may be based on the general 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. For example, is it reasonable to believe that information disclosed by a client in a protection order, child support, or custody proceeding would have relevance in the client's subsequent divorce case. Every divorce deals with all assets of both spouses, so that any prior representation concerning assets could bring up Rule 1.9. Such prior representation could include estate planning or bankruptcy. If there are minor children, both income and parenting are issues.

#### **D. Informed Consent or Waiver**

The language of Rule 1.9 requiring consent of the former client "after consultation and with knowledge of the consequences" is the same as that contained in Rule 1.7 for concurrent clients. (Note: Rule 1.7 requires the consent of both clients; while under Rule 1.9, only the former client need consent.) Under Rule 1.7, what is required for consultation or disclosure turns on the sophistication of the client, the client's familiarity with the potential conflict, the longevity of the relationship between client and lawyer, the legal issues and the ability of the lawyer to anticipate what will happen if the conflict is waived. *IBM v. Levin*, 579 F.2d 271 (3<sup>rd</sup> Cir. 1978).

Consultation or disclosure requires the affirmative revelation by the lawyer of all the facts, legal implications, possible effects, and other circumstances relating to the proposed representation. *Financial General Bankshares v. Metzger*, 523 F.Supp. 744, 771 (D.D.C. 1981).

The lawyer must take into account the ... former client's individual circumstances in deciding whether his/her disclosure and explanation of consequences is adequate under the Rules. For example, more care needs to be taken with the unsophisticated than with the more sophisticated and knowledgeable client. [Cites omitted.]

N.H. Op. 1990-91/1. The emotion-charged atmosphere that is typical of divorce, custody, and other disputes between family members is a "circumstance" that must be considered.

The ABA Ethics 2000 Report recommends that the phrase "consents after consultation" be replaced by "gives informed consent, confirmed in writing."

#### **Practical Considerations**

Even though consent is permissible and the prior client may be willing, a prudent family law lawyer would hesitate to ask. Many people seeking such representation would be unable to appreciate the significance of waiving the conflict.

There may also be a problem in even requesting the consent. For example, husband consults a lawyer in year 1 concerning marital problems, but takes no legal action. In year 3, wife seeks an appointment with the lawyer about a divorce. Asking husband to consent would require telling him that wife is seeking legal services, thus revealing confidential information.

A prudent lawyer would also consider the fact that family law is the practice area with the largest number of complaints docketed with the Professional Conduct Committee (27% of total in 1999). It would be better to err on the side of caution, rather than to parse Rule 1.9 looking for grounds to accept the new representation.

#### **Conclusion**

Rule 1.9 prohibits representing one spouse in a divorce if the lawyer had previously represented the other spouse or the parties jointly in a "substantially-related matter," absent consent. Careful scrutiny is needed if the prior representation involved a family law matter, whether or not it involved the current spouse. It is likely that the potential to utilize information obtained during the prior matter will arise and place the lawyer in a position in which his or her obligation to protect a former client's confidences conflicts with the obligation to represent the current client. In family law matters, the option of obtaining consent from the prior client raises both ethical and practical questions.