

**BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS**

Opinion No. 13-01

Topic:	Conflicts of Interest
Digest:	It is not ethical for a lawyer to represent another person in a matter where the lawyer has formerly represented a client in a substantially related matter unless informed consent is secured from the former client
Code:	Rule 1.0 (e), Rule 1.0 (j), Rule 1.6, Rule 1.7(a)(1), "Rule 1.7(a)(2), Rule .7(b)(4), Rule 1.9 (a)

QUESTION

May a lawyer who has formerly represented a client in a matter represent another person in a substantially related matter in which the person's interests are materially adverse to the interests of the former client?

OPINION

Under Rule 1.9 (a), a lawyer may not represent a client whose interests are materially adverse to a former client, unless the former client gives informed consent, confirmed in writing, if the matter on behalf of the present client is “substantially related” to the matter in which the attorney represented the former client.

Rule 1.0 (j) provides:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Rule 1.0 (e) provides:

“Confirmed in writing” denotes (i) a writing from the person to the lawyer confirming that the person has given consent, (ii) a writing that the lawyer promptly transmits to the person confirming the person's oral consent, or (iii) a statement by the person made on the record of any proceeding before a tribunal. If it is not feasible to obtain or transmit the writing at the time the person gives oral consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Matters are “substantially related” for purposes of Rule 1.9 if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior

representation would materially advance the client's position in the Subsequent matter. (See Comment 3 to Rule 1.9)

The written document necessary to obtain informed consent will vary. The specifics of the written document cannot be set forth without specific knowledge of the nature of the matter which is the subject of the written informed consent. The lawyer must make reasonable efforts to ensure that the client possesses information reasonably adequate to make an informed consent.

Rule 1.9 does not appear to address the issue of whether the lawyer has any duty to inform the prospective client of the lawyer's former representation of the adverse party in the earlier, substantially related matter. Unlike situations arising under Rule 1.7(a) (1), involving conflicting representations that are concurrent, there can be no requirement under Rule 1.9 that the prospective client consent to the prior representation, because that representation is already over.

However, the lawyer may still have an ethical duty to disclose to the prospective client the fact that the lawyer previously represented a person with adverse interests. For example, the prospective client could have legitimate concerns about whether the lawyer's loyalty would be affected by her interest in obtaining future work from her former client. In addition, the lawyer's judgment on behalf of the prospective client could be influenced by her interest in avoiding issues about the quality of her services in the former representation. Moreover, even though it is assumed that the former client expresses consent to the new representation, conditions on such consent may be imposed, or other circumstances may exist, that create a risk of future motion to disqualify the lawyer from the new representation.

Due to these possibilities, the prudent lawyer must carefully consider whether, under Rule 1.7(a)(2), there is a significant risk that her judgment will be adversely affected by her own interests, as illustrated above. If Rule 1.7(a) (2) does apply, the necessary informed consent must be obtained from "each affected client" [Rule 1.7(b) (4)], requiring the lawyer, among other things, to discuss with the prospective client the risks that could arise due to the former adverse representation [Rule 1.00]. Of course, before making disclosures to the prospective client about the former representation, the lawyer would need to secure the former client's consent to any disclosures of that client's confidential information (Rule 1.6)

It should be noted that a lawyer is not authorized to reveal confidential information unless the consent specifically authorizes the lawyer to reveal such information.

If the consent does not authorize that confidential information be revealed, then the current client must be advised that the prior client has not authorized the revelation of confidential information.

Rule 1.6 provides:

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyers legal knowledge or legal research or (ii) information that is generally known in the legal community or in the trade, field profession to which the information relates.

CONCLUSION

A lawyer may not represent another person in a matter where the lawyer has formerly represented a client in a substantially related matter unless the former client provides written informed consent.