538 Preston Ave.
3rd Floor
Meriden, CT 06450

P: (860) 223-4400
F: (860) 223-4488

***Committee On Professional Ethics***
***And The Unauthorized Practice of Law***

# Informal Opinion 25-2

## Duty To Former Client

From 2002 to 2019 the requester was an in-house counsel for a large insurance company, representing the company in all manner of legal issues with its employees, including preparing separation agreements and making inquiries into workplace misconduct.

In August 2019, she left the company. One month later, the person whom she directly advised on these issues, the head of Human Resources, also left the company and was replaced by a person she had not previously advised. It appears that soon thereafter there was considerable change in staffing in the portion of the Legal Department dealing with employee issues.

Since the requester left the company, she has represented twelve current and former employees of the company on issues similar to those in which she had represented the company previously. However, none of the twelve were involved in any problem on which she had worked before her departure from the company in August 2019. The company said nothing about any conflict until 2024, when it claimed a violation of Rule 1.9(c)(1) and (2) because of her "vast knowledge of the [company's] leaders and managers, [its] internal procedures, and [its] strategies and propensities for resolution of employment disputes," and said it would not waive any conflict as to any representation of its current or former employees at any time in the future. The company did not mention anything specific about the twelve employees, nor did it claim a violation of Rule 1.9(a) or 1.9(b), which concern conflicts arising out of representation in "the same or substantially related matter."

Rule 1.9 is entitled "Duties to Former Clients." It states:

> (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 the former client gives informed consent, confirmed in writing.
> (b) …[1]

[1] Subsection (b) applies (a) to the whole law firm.

> (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 the representation to the disadvantage of the former client except as these Rules 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 these Rules would permit or require with respect to a client.

Even though subsection (a) is not raised by the requester or the company, we must discuss it first in order to understand subsection (c). Rule 1.9(a) prohibits changing sides "in the same or a substantially related matter." We look to the Official Commentary to construe the rules because it serves "to explain, illustrate and guide" the decision-making process. *Cohen v. Statewide Grievance Committee,* 339 Conn. 503, 516 (2021). The Commentary states:

> 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. 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.

In construing "confidential factual information" in the context of the "same transaction or legal dispute", the Commentary thus distinguishes between facts at a high level of specificity (such as a client's finances in a divorce proceeding) and those at a high level of generality (such as a company's policies and practices). An example of the former is *Fallacaro vs. Fallacaro,* 1999 WL 241743 (Ap. 8, 1999), involving the individual client's earnings in both the current and previous cases. An example of the former is *Fallacaro v. Fallacaro*, 199 WL 241743 (Apr. 8, 1999), involving the individual client's earnings in both current and previous cases.

The American Bar Association likewise gives a relatively narrow reading of (a) by apparently agreeing with a test followed by the Second Circuit that the relationship between the issues must be "'patently clear' or that the issues are 'identical or essentially the same'". ABA Formal Opinion 99-415, page 4. We essentially adopted that view in our Informal Opinion 06-11, in which we advised that "the type' of relationship the Rule is concerned are with depends on the similarity of the *factual* issues." (Emphasis in original.)

We have reviewed the company's letter to the requester and the requester's letter to us. It appears to us that the relationship between the matters is at a high level of generality and thus not

"the same or a substantially related matter." That the company does not even claim a violation of subsection (a) fortifies our conclusion.

We now turn our attention to subsection (c) of Rule 1.9.

Neither 1.9 nor Rule 1.0 defines "matter" or "information." While in one sense subsection (c) is narrower than subsections (a) and (b) in that a violation of (c) does not automatically mandate disqualification, in another sense subsection (c) is broader than (a) and (b) because the subsequent representation need not be substantially related to the former representation. Nevertheless, "matter" and "information" should not be interpreted so broadly that they refer to *any* prior representation of the company, or lawyers could never take on matters on other side. The Official Commentary supports a cautious reading of subsection (c) with language that is directly on point here:

> 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.

(Emphasis added.) This language suggests that the requester's representation of the company's current or former employees is not likely to create a risk of a violating subsection (c). She "recurrently handled a type of problem" for the company and "is not precluded" from representing the twelve clients "in a factually distinct problem *of that type*" (emphasis added) "adverse to the" company.

Nevertheless, as we cautioned in Informal Opinion 06-11, the requester needs to be alert to the fact that if she does have information from her prior representation that is specific to the representation of her current clients she may not use such information to the disadvantage of the company or otherwise reveal such information. For example, in our Informal Opinion 99-14 we addressed the situation of a lawyer who wanted to represent a parent in a special education case in which she would need to cross-examine the child's teacher about information the lawyer apparently had learned in the course of representing the teacher in an unrelated matter. The lawyer could not resolve such a *current* client conflict by terminating the representation of the teacher because even if the teacher became a *former* client, the lawyer could not cross examine the teacher without violating Rule 1.9(c).

Unlike the situation in 99-14, the company here claims only that the lawyer violates her duty because of her vast knowledge of its internal processes and strategies. While this reference is remarkably general, there may be specific confidential information she knows from her prior job that is tailor-made for one or more of her current clients. Her use of that information would violate subsection (c), especially if she would need to cross-examine someone at the company on it. Moreover, if she is prevented from using that information by Rule 1.9(c), then she then must consider whether she would have to withdraw from her current representation under Rule 1.7(a)(2) because her work may be materially limited.

With that major caveat in mind, the lawyer in 2024 does not violate her duty ho her former employer-client by her representation of the company's current or former employees as to whom the lawyer did not advise the company before her departure in August 2019. [2]

**THE COMMITTEE ON PROFESSIONAL ETHICS AND THE UNAUHORIZED PRACTICE OF LAW**

*Stuart C. Johnson*

BY Stuart Johnson, Chair

[2] Had we received the inquiry shortly after the requester left the company rather than five years later, we might have reached a different conclusion. On the one hand, passage of time itself does not waive a conflict. On the other hand, the requester's knowledge of the company's internal processes and strategies is likely to have been a lot more specific shortly after she left the company.