## **How Past Representations Can Become a Current Problem**

## **By Mark Bassingthwaighte, Esq.**

## **Risk Manager, ALPS**

**Malpractice claims alleging a conflict of interest have been a serious concern for insurers for years**. One of the reasons is this. Conflict claims can get expensive fast, if for no other reason than they almost always boil down to a greedy attorney putting his or her financial interests above someone else’s. So not good, particularly if a jury has any say in the matter.

As a risk guy working in the malpractice insurance arena, I’ve taken a number of calls over the years from attorneys wanting help in working through a potential conflict situation. These are the calls that both challenge and fascinate me the most. Suffice it to say, before becoming a risk manager, I had no idea how complicated and crazy some of the conflict fact patterns could get.

Given the frequency of conflict questions that come my way, I wanted to share a little advice concerning one particular conflict resolution misstep lawyers sometimes make with **Rule 1.9 of the Rules of Professional Conduct, commonly known as the past client rule**. Let’s start with a fact pattern. Nine years ago, Attorney Smith defended a prosecutor in an ethics probe. Six years ago, Attorney Smith made a lateral move and joined the firm of Jones, White and Parker. Attorney Parker, one of Smith’s current partners, has been asked by the city, a long-term client of the firm, to defend the city in a gender discrimination suit. The employee suing the city happens to be the prosecutor that Smith represented nine years ago. The question is, can the Attorney Parker accept the new matter?

At the outset, let’s assume that Attorney Smith properly closed her file nine years ago by sending a closure letter to the prosecutor once the ethics probe was resolved; because, if that never happened, there could be an argument that the prosecutor remains an inactive current client and we’d need to review **Rule 1.7, the current client rule**. With documentation that the prosecutor is a past client in place, however, we’re clearly now dealing with Rule 1.9.

Thinking about Rule 1.9 part (a), which most of us readily recall, it’s tempting to look at the above fact pattern and conclude that even though the situation involves the same person, the same employee, and the same position there’s no conflict because a gender discrimination suit and an ethics probe are not the same matter nor are they substantially related matters. The conflict resolution misstep that sometimes occurs is in stopping here because this is all the attorney remembers Rule 1.9 saying. Unfortunately, the decision to stop here ignores the fact that it is the same person, same employee and same position and it’s a potential misstep because Rule 1.9 part (c), which prevents Attorney Smith from using information relating to or gained in the course of her prior representation to the disadvantage of her former client, has been overlooked.

Prior to the firm agreeing to represent the city, Attorney Smith would need to review her file to see if any information was learned that could be used to her past client’s disadvantage. If the answer is yes, then the firm cannot represent the city. Yes, it’s Smith’s partner, Attorney Parker, who would be defending the city but the information Smith has will be imputed to her partner under **Rule 1.10, the imputation of conflicts rule**.

**Conflict of interest situations are something every lawyer should take very seriously**. Perhaps it comes as no surprise that I chose to discuss this fact pattern because it’s real. Learn from the missteps of others. The above referenced firm ended up being disqualified by the judge. One must always remember that there’s more to Rule 1.9 than the question of whether the past and current matters are the same or substantially related. Rule 1.9 also requires you to think about what you know, to include any information that is in your files that you may have forgotten about. Forget that and you could find yourself facing a similar outcome.

Mark Bassingthwaighte, Esq., ALPS Risk Manager, has conducted over 1,000 law firm risk assessments and presented 700+ legal education seminars across the U.S. He writes extensively on risk management and technology. Looking for more resources to support your solo firm? Check out Marks’ recent posts on the [ALPS Risk Management page](https://www.alpsinsurance.com/resources/risk-management?utm_campaign=Bar%20Program%20Asset%20Tracking&utm_source=Nevada_bar&utm_medium=referral&utm_term=handle_bar&utm_content=alps_rm_resources). You can reach Mark directly at mbass@alpsinsurance.com.