Rule 1.9. DUTIES TO FORMER CLIENTS

(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) 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 the former client gives informed consent, confirmed in writing.

(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.—Amended June 17, 2009, eff. September 1, 2009.

Comment

[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.

Reporter's Notes — 2009 Amendment

V.R.P.C. 1.9 is amended to conform to changes in Model Rule 1.9.

The Supreme Court considered former V.R.P.C. 1.9 in a number of cases: *State v. Baker*, 2007 VT 84, 182 Vt. 583, 934 A.2d 820 (mem.) (on motion to disqualify prosecutor on ground of representation of co-defendant as defense attorney in a prior case, held matters not substantially related and appearance of

impropriety alone not sufficient); *Cody v. Cody*,2005 VT 116, 179 Vt. 90, 889 A.2d 733 (on motion to disqualify where plaintiff alleged that law firm had represented him while he was employee of defendants, remanded for evidentiary hearing on existence of attorney-client relationship); *In re Gadbois*, 173 Vt. 59, 786 A.2d 393 (2001) (conduct that would have violated V.R.P.C. 1.9(a) held not ground for discipline under provisions of Code of Professional Responsibility, which applied to the case); *Stowell v. Bennett*, 169 Vt. 630, 739 A.2d 1210 (1999) (mem.) (on motion to disqualify for prior representation of defendant in unrelated criminal matter, standards of V.R.P.C. 1.9, though not yet in effect, were applied, together with "appearance of impropriety" standard from former Code).

The ABA Reporter's Explanation of the changes is as follows

TEXT:

1. New caption

Because paragraph (c) addresses confidentiality, the [former] caption is under-inclusive.

2. Paragraphs (a) and (b): Substitute "informed consent, confirmed in writing" for "consents after consultation"

In paragraphs (a) and (b), the phrase "consents after consultation" has been changed to "gives informed consent to the representation, confirmed in writing." This change is consistent with a similar change in Rule 1.7 and reflects a judgment of the Commission that both lawyers and their former clients benefit when the lawyer is required to secure the former client's informed consent, confirmed in writing, to a representation that is materially adverse to the former client in the same or a substantially related matter. See Rule 1.0(e) for the definition of "informed consent" and Rule 1.0(b) for the definition of "confirmed in writing."

3. Paragraph (c): Replace "Rule 1.6 or Rule 3.3" with "these Rules"

This change was made because there are Rules other than Rule 3.3 that may require disclosure (at least when disclosure is permitted by Rule 1.6) -see Rules 1.2(d), [1.6(b),] 4.1(b), 8.1 and 8.3.

COMMENT:

[1] Comment [1] has been amended to make clear that this rule applies when common clients have had a falling out and one or more of them has dismissed the lawyer. The Comment has also been amended to make the important point that Rule 1.11 now determines when Rule 1.9 is applicable to present and former government lawyers. No change in substance is intended as to how Rule 1.9 applies to lawyers who do not or have not worked for the government. [Thus, in addition to the examples in the Comment, the principles of V.R.P.C. 1.7 will still guide a determination of material adversity, despite the elimination of an express reference to that provision in the amended Comment.]

[2] These changes are designed to further refine and cabin the concept of substantial relationship, particularly as it affects the potential disqualification of former lawyers for an organization, including the government.

[3] This new Comment explains when matters are "substantially related." That term has been the subject of considerable case law, and this definition and suggestions about applying it are an effort to be helpful to lawyers in complying with the rule and courts in construing it. No change in substance is intended.

These Comments have been deleted as no longer helpful to the analysis of questions arising under this rule. No change in substance is intended.

[5] This Comment has been modified to correct the erroneous reference to paragraph (b) in the first sentence.

[6] This Comment combines [former] Comments [6] and [7] in an effort to increase the clarity of each. No change in substance is intended.

[7] Because this sentence addresses confidentiality rather than disqualification, the reference to Rule 1.9 has been narrowed to a reference to Rule 1.9(c). No change in substance is intended.

This Comment has been deleted as no longer helpful to the analysis of questions arising under this rule. No change in substance is intended.

[8] A minor wording change was made for clarification. No change in substance is intended.

[9] This Comment combines [former] Comments [12] and [13] and adds a cross-reference to the Comment in Rule 1.7 that addresses advance waivers of conflicts of interest.

Reporter's Notes

This rule prohibits serial representation of adverse interests in the same or substantially related matters unless the former client consents after consultation. There is no specific counterpart to this rule

in the Vermont Code. Similar results were reached under case law, however. See *In re Vermont Electric Power Producers*, 165 Vt. 282, 683 A.2d 716 (1996); *In re Themelis*, 117 Vt. 119, 83 A.2d 507 (1951).

ANNOTATIONS

1. Purpose. This rule is designed to ensure that a lawyer does not use confidential information acquired from a former client against that client, and to avoid even an appearance of impropriety. Cody v. Cody, 2005 VT 116, 179 Vt. 90, 889 A.2d 733.

2. Attorney-client relationship. For purposes of this rule, the intent and conduct of the parties are relevant considerations in determining if an attorney-client relationship exists. Cody v. Cody, 2005 VT 116, 179 Vt. 90, 889 A.2d 733.

Cited. Cited in Stowell v. Bennett (1999) 169 Vt. 630, 739 A.2d 1210 (mem.).