By Will Jordan

Will Jordan is an attorney with Sowell Gray Robinson Stepp & Laffitte, LLC in Columbia, SC and focuses his practice on defending legal malpractice claims. Will and his wife just welcomed their fourth child. Quoting Jim Gaffigan, Will says, “If you want to know what it’s like to have a fourth kid, just imagine you’re drowning, then someone hands you a baby.”

As a preliminary matter, the fact that it was your partner and not you who previously represented OldCo is of no importance. The Model Rules prohibit lawyers associated in a firm from representing a client “when any one of them practicing alone would be prohibited from doing so by [Rule 1.9].”1

The key inquiry under Rule 1.9 is what the term “substantially related” means. The comments explain that “[m]atters are ‘substantially related’ . . . 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.”2

Courts have recognized that determining whether, for purposes of Rule 1.9, matters are “substantially related” requires a fact-specific inquiry.4 “Two different matters do not constitute the ‘same transaction or legal dispute’ merely because they involve closely related issues.”5 Courts analyze “the extent to which the factual and legal issues in the two representations overlap” and examine “any other relevant circumstances.”6 Courts have considered several factors, including, for example, “the nature and scope of the prior representation [and] the present lawsuit,”7 whether the client might have disclosed a confidence to his attorney in the prior representation which could be relevant to the present action,8 whether that information has been rendered obsolete by the passage of time,9 and “whether confidential information provided to the attorney in the prior representation subsequently has been disclosed to the public.”10

So, how should you determine whether or not you can move forward with your representation of NewCorp? Here are some questions you might ask yourself:

1. How similar are the contracts at issue in the current case and the prior case?
2. To what extent do the factual and legal issues overlap? For example, do the cases turn on the same clause of the contract or the same principal defenses?
3. What confidential information did my partner acquire from OldCo in the course of his prior representation?
4. Would any of that confidential information be relevant in my case?

The Model Rules leave no doubt that an attorney owes his client a duty of loyalty1, but how far do the Rules allow you to take it?

Your phone rings and it’s the call you’ve been waiting for. NewCorp, a potential client you’ve been pursuing for years, has been sued in a breach of contract action and wants to retain you. NewCorp has been sued by OldCo. OldCo is a material supplier for NewCorp and alleges NewCorp failed to pay for goods it received. You discover that five years earlier one of your partners represented OldCo in a breach of contract action against a third party. In that case, OldCo asserted that the third party failed to pay for goods OldCo delivered under a similar contract. You want the case, but do the Rules allow you to take it?

The Model Rules leave no doubt that an attorney owes his client a duty of loyalty, but how far does this duty of loyalty extend after the conclusion of the representation? Rule 1.9(a) provides the framework for what proves to be a fact-specific determination. Addressing a lawyer’s duties to a former client, Rule 1.9(a) provides as follows:

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.

**Winter Tech Tip:**

It can be difficult to remain objective when asking yourself these questions. If in doubt, consider running the scenario by a colleague who is not involved or contacting your state bar’s ethics hotline.

1 See, e.g., Mod. Rule Prof. Cond. ¶ 1.6 (prohibiting an attorney from revealing information relating to the representation of a client “when any of them practicing alone would be prohibited from doing so by [Rule 1.9].”)

2 Mod. Rule Prof. Cond. ¶ 1.9(a).

3 Mod. Rule Prof. Cond. ¶ 1.9 cmt. 3.

4 State ex rel. Swanson v. J.M. Co., 845 N.W.2d 808, 816 (Minn. 2014); see also Magni v. Solitude Homeowner’s Inc., 255 P.3d 920, 926 (Wyo. 2011) (“[T]he determination of whether the current and former matters are substantially related is inherently fact-based.”).


6 Swanson, 845 N.W.2d at 816.


8 NuStar, 880 N.W.2d at 485.

9 Swanson, 845 N.W.2d at 816.

10 Id.