speaking of ethics

By Saul Jay Singer

How Substantial Is *Your* Relationship?

Mick Wiggins

The big case has finally landed on your doorstep. Big Shot, president of Gas Guzzler Motors, has asked you to defend the company against a claim that a crankshaft design defect in its Ralph Nader model (the Nader)[1] caused damages. Aside from generating massive fees, this is the case that will put you and your little litigation boutique on the front page of every newspaper in the country.

And then, Big Shot advises that Caroline Client is the plaintiff.

A chill goes down your spine as you remember that your first litigation position upon graduation from law school 25 years ago was at Big Firm where, as part of your training, you spent your first two months tethered to the hip of Paul Partner, who proved to be an excellent mentor. Paul, who had agreed to represent Caroline in a Nader model steering column design defect suit against Gas Guzzler, instructed you to contact the client and prepare a facts memorandum.

When you called Caroline that very afternoon 25 years ago, she demanded that Paul name as additional defendants the Washington Redskins, the University of Baltimore School of Law marching band, and the Dalai Lama. She also advised that her application for employment with Gas Guzzler years ago was rejected and that she will do whatever it takes to make the company pay for this monumental slight. You discussed the matter with Paul, Big Firm quickly withdrew from the representation,[2] and that was the last you heard of the matter—until now.

Can it possibly be true that Big Firm's participation in this matter 25 years ago—and your, literally, five minutes of involvement with Caroline—create an irreconcilable conflict that bars your representation of Gas Guzzler in this case of a lifetime?

Rule 1.9 (Conflict of Interest: Former Client) of the District of Columbia Rules of Professional Conduct provides that:

> 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.[3]

(Emphasis added). Thus, when the "substantial relationship" test is satisfied, the lawyer may not take on the current representation.

As a preliminary matter, a lawyer's duties to his former client have no time limitation; that is, it makes no difference if a lawyer's representation terminated yesterday or a half century ago. Second, there can be no dispute that, in this case, the interests of Gas Guzzler and Caroline are "materially adverse." Third, based upon your intimate knowledge of Caroline, you have every reason to believe it would be futile to attempt to secure her consent to your representing the company in this matter.

The issue thus becomes whether the current Gas Guzzler litigation is "substantially related" to Caroline's former case against the company?

"The scope of a 'matter' … may depend on the facts of a particular situation or transaction,"[4] but the underlying question is "whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a change of sides in the matter in question."[5]

It certainly seems as if you are "changing sides;" having represented Caroline in a suit involving the design of the Nader, you now seek to represent Gas Guzzler against your former client on that very issue. However, you argue that:

> 1. "… The lawyer's involvement in a matter can also be a question of degree"[6]—and your representation of Caroline constituted perhaps the ultimate bare minimum in representation; and
> 2. "… a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type …"[7]—and, although both cases involve the design of the Nader, the instant case involves its *crankshaft* design, which is wholly distinct from the design of its steering column.

Regardless of the credibility of this argument, however, you are doomed by the particularized confidential information you received from Caroline. These client secrets render the two cases "substantially related" because there 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… Knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.[8]

Any competent and diligent lawyer representing Gas Guzzler in the instant case would be required to press Caroline's mental instability, her history of attempted meritless claims against Gas Guzzler, and her improper motive for bringing the instant lawsuit against the company.[9] However, these are the very issues you would be precluded from pursuing because of your continuing Rule 1.9 and Rule 1.6 (Confidentiality of Information) duties to your former client. As such, you advise Big Shot that, unfortunately, you must decline the representation because of a conflict relating to the design of the Nader.[10]

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coln, Juliana Mirabilio, Elizabeth J. Mone, David Olsky, Lisa Pearlman, Ryan R. Phair, Sambhav N. Sankar, Rachel A. Shachter, Julie J. Song, Nina S. Tallon, Theresa Titolo, Ariel Waldman, and **Heather Zachary** have been promoted to counsel... **Andrew W. Cohen** has been named partner at Koonz, McKenney, Johnson, DePaolis & Lightfoot, L.L.P.... **James C. Beh** has joined Jones Day as partner.

Company Changes

Fragomen, Del Rey, Bernsen & Loewy, LLP has relocated to 1101 15th Street NW, suite 700… **Wilson Elser Moskowitz Edelman & Dicker LLP** has established an affiliation with the law firm of Rubio Villegas y Asociados, S.C. in Mexico City… **Hiscock & Barclay, LLP** has opened its eighth office in Washington, D.C.

Author! Author!

Bruce Goldstein, executive director of Farmworker Justice, has written an essay on immigration policy for a book by photographer Rick Nahmias, *The Migrant Project: Contemporary California Farm Workers*, published by the University of New Mexico Press... **Steven A. Solomon**, principal legal officer at the Office of Legal Counsel of the World Health Organization in Geneva, Switzerland, has coauthored "The International Law of *Hamdan v. Rumsfeld*" for *The Yearbook of International Humanitarian Law*, published by the T.M.C. Asser Institute and Cambridge University Press... **Mary Claire Mahaney** has written a book, *Osaka Heat*, which is a finalist for *ForeWord* magazine's 2007 Book of the Year Award in the Literary Fiction category.

D.C. Bar members in good standing are welcome to submit announcements for this column. When making a submission, please include name, position, organization, and address. Kathryn Alfisi can be reached by e-mail at kalfisi@dcbar.org.

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The next day, Big Shot calls you and reiterates his request that you represent Gas Guzzler, but only as to the *damages* phase of the case. He says your reputation as an expert in defeating plaintiffs' damages claims is broadly recognized, and he is willing to limit your representation to demonstrating that:

1. Even if, strictly *arguendo*, the Nader crankshaft was defectively designed, it was not the proximate cause of Caroline's injuries; and

2. Caroline's claimed damages are fictional or, at the very least, significantly overstated.

Does Rule 1.9 prohibit such representation? Does so limiting your representation of Gas Guzzler in this case render the two matters no longer substantially related?

In Legal Ethics Opinion 343 (2008), the D.C. Bar Legal Ethics Committee determined that a lawyer *can* potentially avoid the heavy hand of the substantial relationship test by limiting her representation to a discrete issue,[11] but only if:

1. The representation can "genuinely" be limited so as to satisfy Rule 1.9;

2. She is hypervigilant to ensure that her participation in the case never extends beyond the carefully delineated limitation; and

3. The current client, who will most certainly have to bear the expense and inconvenience of maintaining two wholly separate litigation teams, is advised in detail regarding the disadvantages and peculiarities inherent in such an arrangement and gives his informed consent thereto.

However, the committee was careful to note the examples it discusses where such limited representations are permitted "present a rather idealized set of circumstances;" that lawyers undertaking such representations should "err well on the side of caution;" and that, while hypothetical examples can be found where such limited representations do not run afoul of the substantial relationship test, "it may prove very difficult for lawyers to do so in fact."

The strong sense of the opinion is that, while the committee could not rule out all such efforts by lawyers to get around the substantial relationship test, it nonetheless made every effort to uphold and reinforce the critical mandates of Rules 1.9 and 1.6, and it endeavored to ensure that lawyers think twice before entering into such representations, where the possibility of an ethical violation is so high. As such, could you ethically undertake to represent Gas Guzzler only as to the damages phase of its case against your former client?

Perhaps an equally important question is: even if so, *should* you?

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 231 and 232, respectively, or by e-mail at ethics@dcbar.org

Notes

1 *See* Nader, Ralph. *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (1965).

2 *See* Rule 1.16 (Declining or Terminating Representation).

3 *Informed consent* is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

4 Rule 1.9, comment [2].

5 *Id. See also Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc), the seminal case in the District of Columbia on Rule 1.9 in general and the substantial relationship test in particular.

6 Rule 1.9, comment [2].

7 *Id.*

8 Rule 1.9, comment [3].

9 *See* Rule 1.1 (Competence) and Rule 1.3 (Diligence and Zeal).

10 In doing so, you must be particularly cautious about Rule 1.6 (Confidentiality of Information). For example, even the mere mention of the fact that, a quarter century ago, Caroline contemplated bringing suit against Gas Guzzler—a fact perhaps not known to the company—might constitute improper disclosure of a client "secret" in violation of Rule 1.6.

11 The D.C. Bar Legal Ethics Committee also discussed a scenario where a lawyer can avoid the substantial relationship test by limiting her representation to a discrete *stage* of the litigation where "the only issue is a pure question of law that does not depend on the underlying factual record for resolution."