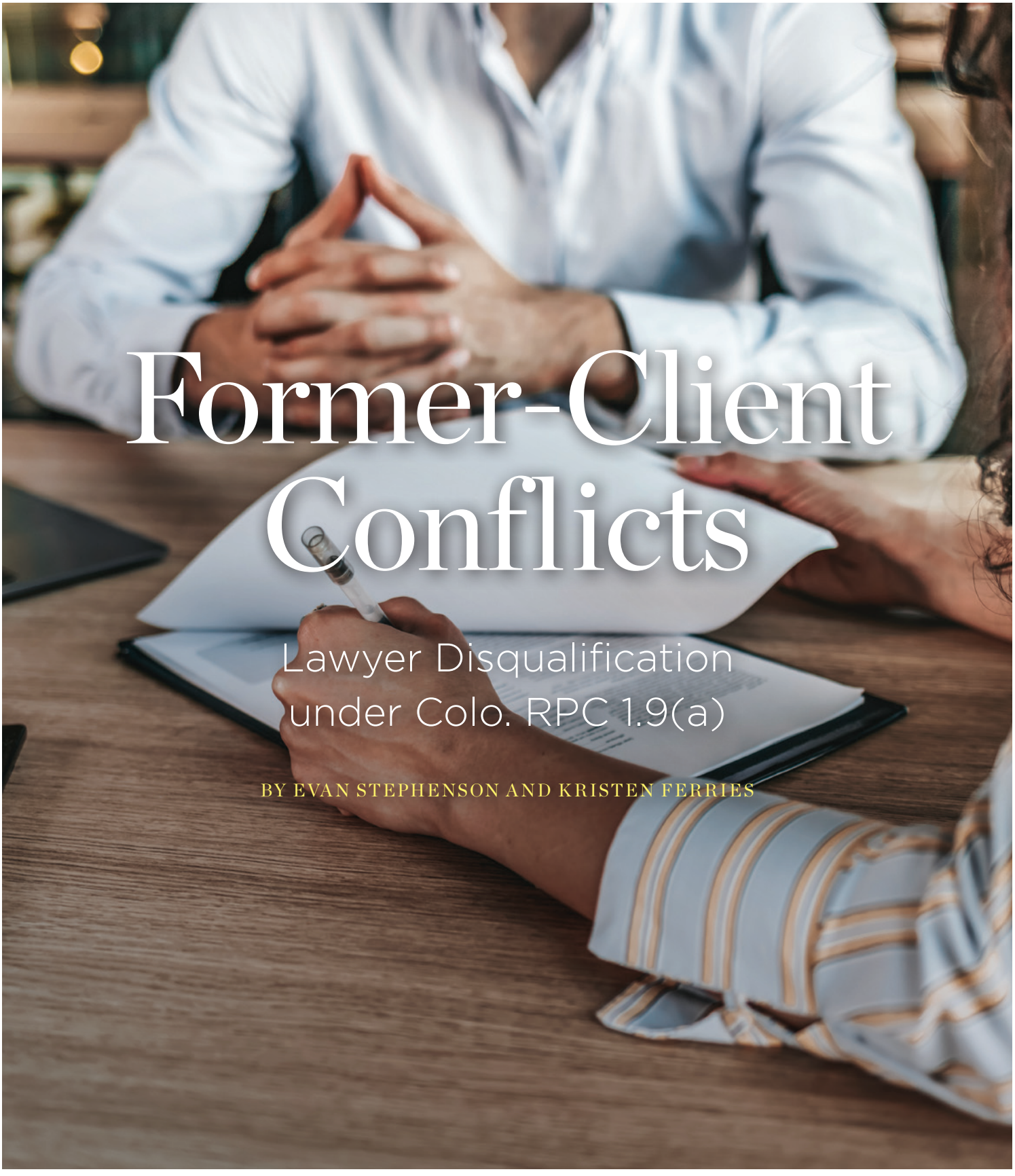

Former-Client Conflicts

Lawyer Disqualification under Colo. RPC 1.9(a)

BY EVAN STEPHENSON AND KRISTEN FERRIES

This article addresses lawyer disqualification due to a former client conflict under Colorado Rule of Professional Conduct 1.9(a). It focuses on the recent Colorado Supreme Court opinion in Persichette v. Owners Insurance Co.

The Colorado Rules of Professional Conduct (Colo. RPC or Rules) explicitly provide that "[l]awyers play a vital role in the preservation of society."[1] "As a member of the legal profession, a lawyer is more than an advocate for his or her clients; she is also 'an officer of the legal system,' having special responsibility for the quality of justice."[2] Accordingly, lawyers have a fundamental responsibility to preserve the confidentiality of their clients' information.[3] Moreover, the sanctity of the attorney-client relationship depends on lawyers keeping their clients' confidences. The inviolability of the relationship permits clients to make themselves vulnerable to their trusted lawyers, which in turn enables lawyers to counsel their clients effectively. But to feel comfortable sharing private information with a lawyer, clients must be assured that their private information will remain confidential, even after the attorney-client relationship ends. This means the legal profession must not allow lawyers to weaponize client confidences against a client at a later time. Thus, "an attorney has certain ethical duties to former clients that persist even after the attorney-client relationship has concluded."[4]

This article discusses lawyer disqualification under Colo. RPC 1.9(a), with a focus on the recent opinion in *Persichette v. Owners Insurance Co*.[5]

The Rules' Framework for Confidentiality

To protect the confidential nature of the attorney-client relationship, Colo. RPC 1.6 and 1.9, respectively, prohibit a lawyer from revealing a client's or former client's confidential information.[6] Rule 1.9(a) goes further, providing 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, confirmed in writing."[7] When a lawyer accepts a representation adverse to a former client, the lawyer must navigate the competing ethical duties owed to the current client[8] and the former client, especially with respect to safeguarding the confidentiality of the former client's information.[9] Naturally, this ethical dilemma only arises when the representations of the former and current client are related. For that reason, Rule 1.9 permits disqualification only in the limited situation where the former and current representations are "substantially related."[10]

> "When a lawyer accepts a representation adverse to a former client, the lawyer must navigate the competing ethical duties owed to the current client and the former client, especially with respect to safeguarding the confidentiality of the former client's information."

To disqualify a lawyer under Rule 1.9, the moving party must show: "(1) an attorney-client relationship existed in the past; (2) the present litigation involves a matter that is 'substantially related' to the prior litigation; (3) the present client's interests are materially adverse to the former client's interests; and (4) the former client has not consented to the representation after consultation."[11] The movant has the burden to establish these elements.[12]

> 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.[13]

This definition left trial courts wondering: When is there a "substantial risk" that "confidential factual information" would "materially advance" the client's position in the subsequent matter? In 2017, the Colorado Supreme Court provided some guidance on this question in *Villas at Highland Park Homeowners Association, Inc. v. Villas at Highland Park*, a case primarily concerning issue preclusion.

The *Villas* Case

In *Villas*, a homeowner's association brought a construction defect case against a developer.[14]

The developer moved to disqualify the association's lawyer because she had previously represented the developer in construction defect cases.[15] The developer argued that the representations were substantially related because both involved construction defect allegations. The district court, however, invoked the doctrine of issue preclusion and denied the motion without substantively analyzing Rule 1.9.[16] The court concluded that because other courts had previously denied the developer's motion to disqualify his former lawyer, the doctrine precluded the developer, as a threshold matter, from moving to disqualify in *Villas*.[17]

The Supreme Court reversed, holding that the dispositive legal issue in the developer's motion to disqualify—whether the case was "substantially related" to the lawyer's prior representation of the developer—was not identical to the dispositive legal issue in his other motions to disqualify.[18] This was because the question of whether one case is substantially related to a lawyer's prior representation could not be identical to the question of whether a *different case* is substantially related to that same prior representation.[19]

In analyzing the district court's application of issue preclusion, the Court also addressed the requirements for disqualification under Rule 1.9. First, the court explained that Rule 1.9 "is concerned with the type of confidential factual information that normally would have been revealed in a typical representation, rather than the confidential factual information that was actually revealed."[20] Thus, the moving party need not reveal the confidential information it seeks to protect in moving to disqualify (which would defeat the purpose of the Rule). The Court added that because Rule 1.9 is "concerned with the *risk* of disclosure" of former client information, "the crucial question is whether the confidential factual information in the attorney's probable possession is relevant to subsequent claims *in a manner that would materially advance those claims*—which, in turn, depends on the precise legal theories and allegations in those claims."[21]

The Court remanded the case to the district court to resolve the developer's motion to disqualify with the hint that "[w]here a lawyer handles recurrent yet factually distinct problems, each individual matter is likely to involve a distinct set of dispositive facts."[22] "In such a situation," the court continued, "the information that an attorney obtains in a prior representation is not necessarily relevant in later matters and consequently, there is no substantial risk that the attorney could use the information to gain an unfair advantage."[23]

"The Court held that a law firm, which had a decade-long attorney-client relationship with an insurance company in which the firm 'helped put in place' the insurance company's claims-handling practices, could not subsequently represent the plaintiff in a bad faith case against the same insurance company."

On remand, the district court denied the developer's motion to disqualify, this time after substantively applying Rule 1.9.[24] The court found that the evidence required to succeed on a construction defect claim "is unique to the facts of the case which are probative of whether the builder used reasonable care and skill in constructing the particular homes at issue."[25] The court explained that, to the extent the lawyer learned any confidential factual information about the developer's general litigation strategy in construction defect cases, such information was "playbook information" (knowledge about a company's general operations) that did not justify disqualification. The court further explained that under Rule 1.9 comment [3], playbook information is only disqualifying when the lawyer has knowledge of "specific facts gained in a prior representation that are relevant to the matter in question."

The developer did not show what confidential facts his lawyer would have learned in the prior construction defect cases that would be relevant to the subsequent case. Thus, the district court concluded that "the vast majority of the information she would have acquired would be the 'nuts and bolts' of the particular case—the innumerable details regarding site, design, materials, workmanship, etc.—which would have little, if any, relevance even to the very next case she worked on, let alone one arising a decade or more in the future."[26]

Beyond *Villas*, which did not squarely address the substantial relationship test under Rule 1.9—indeed, the Court left that analysis to the district court—legal authority in Colorado has scarcely examined the term "substantially related." Trial courts thus received little guidance on the level of similarity among representations necessary to require the lawyer to be disqualified for an ethical conflict of interest.

In May 2020, that changed when the Colorado Supreme Court applied the substantial relationship test in the context of an insurance bad faith case.[27] The Court held that a law firm, which had a decade-long attorney-client relationship with an insurance company in which the firm "helped put in place" the insurance company's claims-handling practices, could not subsequently represent the plaintiff in

a bad faith case against the same insurance company.[28] In so ruling, the Court both protected the insurance company from disclosure of its confidential information and bolstered Rule 1.9's purpose of protecting the sanctity of the attorney-client relationship and promoting trust between client and lawyer.

Persichette in the District Court

In *Persichette*, the plaintiff sued Owners Insurance Co. (Owners), alleging bad faith breach of an automobile insurance policy's underinsured motorist (UIM) coverage and seeking statutorily multiplied benefits and fees under CRS §§ 10-3-1115 and -1116.[29] Approximately three months after the lawsuit began, a lawyer from a second law firm appeared as co-counsel for the plaintiff. The second firm previously had defended Owners in bad faith cases in Colorado for more than a decade.[30]

Owners requested that its former law firm withdraw, but the firm refused, contending that the information it acquired while representing Owners was neither confidential nor disadvantageous to Owners.[31] Owners filed a motion to disqualify its former firm under Rule 1.9.[32] The parties agreed that three of the four elements for disqualification under Rule 1.9 were met: (1) the existence of a prior attorney-client relationship; (2) adversity in the subsequent matter; and (3) the former client's lack of consent. Thus, the only dispute was whether the law firm's former representation of Owners was "substantially related" to its subsequent representation of the plaintiff.[33]

Owners argued that its former law firm must be disqualified because its prior representation of Owners in bad faith UIM cases—in which the firm advised and trained Owners' claim representatives regarding UIM claim-handling practices—was "substantially related" to the law firm's subsequent representation of the plaintiff in a bad faith UIM case against Owners.[34] Specifically, Owners contended that the prior and current representations involved substantially related facts because the crux of both representations involved whether Owners' UIM assessment and claim-handling practices gave rise to bad faith tort liability, practices that had been implemented by the same employees whom the law firm had advised and trained.[35] The plaintiff did not contest any of the facts in Owners' motion, but argued that the law firm only possessed playbook information, which the plaintiff contended did not require disqualification.

> "The district court's ruling highlighted the lack of clarity in the decisional law governing the 'substantially related' test and posed an important question: How could two matters be 'substantially similar' but *not* 'substantially related'?"

Relying on *Villas*, the district court denied Owners' motion. Analogizing to the construction defect cases in *Villas*, the court believed the insurance bad faith cases in *Persichette* involved "factually distinct problems of the same type."[36] The district court ruled that the law firm's prior representation of Owners in bad faith cases involved "separate" and "distinct" UIM claims from the UIM claim at issue in *Persichette*, and therefore the representations were not "substantially related."[37] The court also reasoned that any information the law firm had learned about Owners' claim-handling practices constituted broad playbook information—knowledge about the company's general internal operations—which ordinarily does not require disqualification under Rule 1.9.[38]

Still, the district court found that Owners' former law firm had "helped put in place" the claim-handling practices that were at issue in the subsequent case.[39] It also found that the law firm was "intimately familiar" with those practices, as well as with Owners' negotiation strategy, its settlement pay ranges, and the factors that would motivate Owners to settle or view bad faith cases as high risk to the company.[40]

Admittedly struggling with a "close call" under Rule 1.9, the district court concluded that while the litigation "involves a matter that is substantially similar to the prior representation" and the "similarities between the current and prior representations are numerous and substantial," the matters nevertheless were not "substantially related" under Rule 1.9.[41] If nothing else, these findings conveyed that further guidance was required for trial courts to meaningfully apply the "substantial relationship" test under Rule 1.9. The district court's ruling highlighted the lack of clarity in the decisional law governing the "substantially related" test and posed an important question: How could two matters be "substantially similar" but *not* "substantially related"?

The Supreme Court Clarifies Disqualification Requirements

Owners brought an original proceeding in the Colorado Supreme Court under Colorado Appellate Rule 21, challenging the district court's denial of its motion to disqualify.[42] The question presented was whether Rule 1.9 prohibited a lawyer who previously defended a client in materially identical past matters and helped shape its practices from suing the former client and attacking those same practices as "bad faith." The Court issued a rule to show cause and, after briefing and oral argument, made

the rule absolute.[43] The Court held that, given the trial court's factual findings, there was "no doubt" that the law firm must be disqualified under Rule 1.9's "substantial relationship" test.[44]

What is a "Substantially Related" Matter?

The Court began its analysis with Rule 1.9, which does not define "substantially related." The comments to Rule 1.9, however, provide that two matters are "substantially related" if (a) "they involve the same transaction or legal dispute" or (b) "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."[45] Critically, "while the moving party must show that its former lawyer would normally have obtained material information of a confidential factual nature in the prior representation, it need not establish that the attorney *actually obtained* such information in that representation."[46] Otherwise, the moving party necessarily would have to disclose the confidential information it sought to protect when it moved to disqualify, thereby defeating the purpose of protections afforded by attorney-client confidentiality.[47]

The Court rejected the district court's reasoning that the current and former matters could not be "substantially related" simply because the law firm's prior representation of Owners involved "distinct facts" from those at issue in the subsequent representation against Owners.[48] The Court explained that, unlike in *Villas*, multiple common threads tied the law firm's defense of Owners in prior bad faith UIM cases to its subsequent representation of the plaintiff in a bad faith UIM case against Owners. These common threads included "Owners' general claims-handling policies and procedures, hierarchy of settlement authority, negotiation strategies, settlement pay ranges, and the factors Owners considers in assessing whether to settle a claim."[49] They also included commonalities "[m]ore specific to this case," such as "advice and training to Owners and Owners' employees on the policies and procedures Owners uses to handle claims involving uninsured motorists, unreasonable delay, and bad faith—precisely the types of claims at issue here."[50]

Additionally, the law firm had "defend[ed] Owners in many cases against claims like the ones brought by" the plaintiff.[51] By ruling that the two matters could not be "substantially related" if they involved "distinct" underlying "events," the district "court essentially collapsed 'a substantially related matter' into 'the same' matter." Thus, the Court concluded, the district court, for all intents and purposes, had "read '[the] substantially related matter' [requirement] out of the rule."[52] But "[t]his the court could not do."[53]

> "In this way, *Persichette* clarified that disqualification is required only when there is a substantial risk that the lawyer learned specific, confidential, factual information that is relevant to the subsequent case against the former client."

The Court opined that two matters need not be "the same" to be "substantially related."[54] So while it may be true that a string of construction defect cases will rarely bear a substantial relationship to one another, because each depends entirely on unique facts giving rise to the particular alleged defect, the same is *not* true in the context of insurance bad faith cases where there are common underlying threads. These latter cases frequently balance on the same fulcrum of client-focused critical facts—whether a tort arises from the insurance company's claim handling, claim-processing procedures, claim-settlement conduct, training, or personnel. Because the law firm in *Persichette* "provided advice and training to Owners and Owners' employees on the policies and procedures Owners uses to handle claims involving uninsured motorists, unreasonable delay, and bad faith—precisely the types of claims at issue here"—the Court found that the law firm "likely possesses" confidential factual information "about Owners that is probably relevant to [the plaintiff's] claims in a way that is advantageous to [the plaintiff] and detrimental to Owners."[55]

The Court's explanation and application of the substantial relationship test in *Persichette* is largely consistent with its prior articulation of the test in *Villas* and the district court's application of the test in that case. In *Villas*, there was no overarching factual similarity between the individual construction defect cases in which the lawyer previously represented the developer and the later construction defect cases in which the lawyer represented the developer's opponent. Unlike *Persichette*, in which common facts regarding Owners' claim handling practices were present in both the former and present representations, in *Villas* there was no factual commonality in the construction defect cases that could render the lawyer's prior representation of the developer and subsequent representation of the homeowner's association "substantially related." In this way, *Persichette* clarified that disqualification is required only when there is a substantial risk that the lawyer learned specific, confidential, factual information that is relevant to the subsequent case against the former client.

Is Playbook Information Disqualifying?

The Court in *Persichette* also rejected the district court's expansive view of playbook information. Generally, playbook information refers to an organizational client's policies and procedures.[56] The term stems from the comments to Rule 1.9, which provide that "[i]n the case of an organizational client, *general* knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation."[57] Courts have long held that information regarding an organizational client's "litigation playbook," without more, does not require disqualification under Rule 1.9.[58] However, a lawyer's knowledge of "specific facts" gained during the prior representation regarding a former client's policies and procedures "that are relevant to the matter in question ordinarily will preclude such a representation."[59]

In *Persichette*, the district court ruled that confidential information regarding Owners' claim-handling policies and procedures merely constituted playbook information that should not ordinarily be disqualifying under Rule 1.9.[60] The Supreme Court disagreed, reasoning that the district court's factual findings—which established that those policies and procedures were directly relevant in the subsequent litigation and were inextricably related to the law firm's prior representation of Owners—rendered the representations "substantially related" under Rule 1.9.[61] The Court rejected the notion that playbook information about an organizational client's policies and procedures could not ever be disqualifying.[62] To the contrary, it held that when internal client information is relevant to the litigation, it is disqualifying even when characterized as playbook information.[63]

This reasoning is consistent with the district court's denial of the motion to disqualify in *Villas*. In *Villas*, the developer relied on his former lawyer's possession of generic information about his litigation strategy in construction defect cases in moving to disqualify the lawyer. But the developer pointed to no specific facts regarding his litigation strategy that could have benefited his opponent in the subsequent matter. In *Persichette*, on the other hand, the law firm's possession of specific facts regarding Owners' claim handling practices, which were implicated in the subsequent lawsuit, required disqualification under Rule 1.9.

Can a Lawyer Limit Representation of a New Client to Avoid Disqualification?

In *Persichette*, in response to Owners' motion to disqualify, the law firm argued that disqualification was not required because the law firm would limit the plaintiff's bad faith claim against Owners so as not to implicate the claim-handling practices on which the firm had previously advised Owners.[64] The Court rejected this gambit, stating:

> In any event, Persichette's proposal to cast away part of his case to sidestep a former-client conflict under Rule 1.9(a) may give rise to a concurrent conflict under Colo. RPC 1.7(a)(2). . . . Hence, in attempting to stave off Owners' motion for disqualification, [the law firm] may be hopping out of the Rule 1.9(a) frying pan and into the Rule 1.7(a)(2) fire.[65]

The Court held that a lawyer may not limit representation of a current client to avoid disqualification due to a former-client conflict.[66]

What is Required to "Preserve the Integrity and Fairness of the Proceedings"?

The existence of a former client conflict under Rule 1.9, by itself, is not enough to compel disqualification of a lawyer in Colorado state court.[67] Disqualification under Rule 1.9 becomes mandatory, however, "when it is required to preserve the integrity and fairness of the proceedings."[68] In *Persichette*, the Supreme Court determined there was "no doubt that, given [the law firm's] prior representation of Owners," the plaintiff was "likely to obtain an advantage for him and a disadvantage for Owners."[69] The Court thus concluded that

allowing the law firm to remain in the case as the plaintiff's counsel "would seriously threaten the integrity and fairness of the proceedings," and because no remedy other than disqualification would cure that defect, the law firm had to be disqualified.[70] Under the Court's reasoning, a former client ordinarily can meet this test by making a sufficiently strong case that the "substantial relationship" test has been satisfied. The considerations inherent in showing a substantial relationship and the need to preserve the integrity and fairness of the proceedings thus have much in common.

Conclusion

Persichette reinforces Colorado's commitment to attorney-client confidentiality. It clarifies Rule 1.9's "substantial relationship" test and confirms that a lawyer's possession of confidential factual information about a former client—including an organizational client—precludes the lawyer from later representing the client's opponent in a matter implicating that same information. The Supreme Court's decision strikes a necessary balance between a lawyer's duty to represent clients that may, over time, find themselves on opposite sides of the courtroom, while still protecting clients' ability to confide in their lawyers. The decision also protects clients from concurrent conflicts of interest by preventing lawyers from being torn between competing ethical responsibilities to current and former clients. CL


Evan Stephenson is a partner at Wheeler Trigg O'Donnell LLP in Denver. He focuses his practice on insurance, commercial, and class action litigation, with an emphasis on trials and appeals—stephenson@wtotrial.com. **Kristen Ferries** is an associate at Wheeler Trigg O'Donnell LLP in Denver. She represents clients in complex litigation, particularly in personal injury and product liability matters—ferries@wtotrial.com.

The authors represented Owners Insurance Co. in *Persichette v. Owners Insurance Co.* and coordinating editor Stephen Masciocchi was Owners' expert witness.

Coordinating Editors: Stephen G. Masciocchi, smasciocchi@hollandhart.com; Joseph G. Michaels, joseph.michaels@coag.gov

NOTES

1. Colo. RPC Preamble [13].

2. *Persichette v. Owners Ins. Co.*, 462 P.3d 581, 583 (Colo. 2020) (quoting Colo. RPC Preamble [1]).

3. Colo. RPC 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."). Rule 1.6(b)(1) permits a lawyer to disclose client information without consent in certain limited circumstances, such as when the lawyer reasonably believes disclosure is necessary "to prevent reasonably certain death or substantial bodily harm."

4. *Villas at Highland Park Homeowners Ass'n, Inc. v. Villas at Highland Park, LLC*, 394 P.3d 1144, 1147 (Colo. 2017).

5. *Persichette*, 462 P.3d 581.

6. *See* Colo. RPC 1.6(a) and 1.9(c)(2). *See also* Colo. RPC 1.6 cmt. [2] ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.").

7. Colo. RPC 1.9(a).

8. Colo. RPC 1.7 ("Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."). *See also People v. Hoskins*, 333 P.3d 828, 835–36 (Colo. 2014) ("Colo. RPC 1.9 applies only to situations involving an inherent and substantial risk of violating an attorney's duty of loyalty to former clients. The prohibition of Rule 1.9 is therefore limited to representations that combine the same or substantially related legal disputes with a motive to harm a former client, in order to advance the interests of a current client.").

9. Colo. RPC 1.9.

10. Colo. RPC 1.9(a).

11. *Villas*, 394 P.3d at 1152.

12. *Fognani v. Young*, 115 P.3d 1268, 1272 (Colo. 2005) (noting that "the moving party has the burden to establish grounds for disqualification").

13. Colo. RPC 1.9 cmt. [3].

14. *Villas*, 394 P.3d at 1147.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1148.

19. *Id.* at 1153 ("Given that attorney-disqualification issues depend on the particular facts and legal theories involved in each case, issue preclusion will rarely, if ever, apply to attorney-disqualification motions under Rule 1.9 because the issue raised by one attorney-disqualification motion rarely will be 'identical' to one in another case.").

20. *Id.*

21. *Id.* (emphasis in original).

22. *Id.*

23. *Id.*

24. *Cent. Park Cmty. Ass'n, Inc. v. Cent. Park Rowhomes, LLC*, No. 2015CV33740 (Denver Dist. Ct. Mar. 26, 2018) (Findings of Fact, Conclusions of Law, and Order on Motions to Disqualify Plaintiffs' Counsel).

25. *Id.* at ¶ 196.

26. *Id.* at ¶ 242. Because the developer failed to identify the confidential information his lawyer would have learned in individual construction defect cases that would materially advance his opponent in a subsequent construction defect case, *Villas* was, in the authors' opinion, a factually weak case for supporting disqualification.

27. *Persichette*, 462 P.3d 581.

28. *Id.* at 584–85, 591.

29. *Id.* at 584.

30. *Id.*

31. *Id.* at 585.

32. *Id.* at 584. Owners also relied on Rule 1.10. *See id.* at 584 n.1. Rule 1.10 imputes one lawyer's conflict to the lawyer's entire firm, with limited exceptions. *See* Colo. RPC 1.10(a) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.").

33. *Persichette*, 462 P.3d 585 ("The court had little difficulty determining that Owners satisfied the first, third, and fourth elements of the analysis. . . . That left one question unresolved: whether this matter is 'substantially related' to any matter in which Levy Law represented Owners.").

34. *Id.* at 584–85.

35. *Id.*

36. *Persichette v. Owners Ins. Co.*, No. 2018CV31118 (Weld Cty. Dist. Ct. Aug. 14, 2019) (Order Denying Defendant's Motion to Disqualify Levy Law, P.C. and Marc R. Levy, Esq. as Plaintiff's Counsel).

37. *Persichette*, 462 P.3d at 589.

38. *Id.* at 588.

39. *Id.*

40. *Id.*

41. *Id.* at 585. "Viewing the "substantially related" query as "a close call," the district court ultimately sided with the plaintiff. It ruled that, while the present and prior representations were "substantially similar" and involved "numerous and substantial" similarities, they were not "substantially related." Thus, concluded the court, the law firm's disqualification was not warranted and the plaintiff was "entitled to counsel of his choice." *Id.*

42. *Id.*

43. *Id.* at 584–92.

44. *Id.* at 592.

45. Colo. RPC 1.9 cmt [3].

46. *Persichette*, 462 P.3d at 587 (emphasis in original).

47. *Id.* at 590 n.6 ("Requiring Owners to prove that [its former law firm] actually possesses confidential client information about Owners could allow Persichette, through his retention of [Owners' former law firm], to strongarm Owners into divulging confidential client information.").

48. *Id.* at 589 (explaining that the trial court's "analytical framework doesn't jibe with the text of Rule 1.9(a), which, in certain circumstances, precludes an attorney who has represented a client in a matter from subsequently representing another client . . . ." in the same or a substantially related matter).

49. *Id.* at 590.

50. *Id.*

51. *Id.*

52. *Id.* at 591.

53. *Id.*

54. *Id.* at 589.

55. *Id.* at 590. The Supreme Court reached this conclusion based on information contained in the district court's factual findings. *Id.*

56. *Id.*

57. Colo. RPC 1.9 cmt. [3] (emphasis added).

58. *See, e.g.*, *In re N. Am. Deed Co.*, 334 B.R. 443, 454 (D. Nev. 2005) ("The concept of 'playbook' disqualification has been rightly condemned unless there is a 'showing of substantial relationship based on confidentiality concerns [which] is equivocal.'") (citing Wolfram, "Former-Client Conflicts," 10 *Geo. J. Legal Ethics* 677, 727 (1997)).

59. Colo. RPC 1.9 cmt. [3].

60. *Persichette*, 462 P.3d at 590.

61. *Id.*

62. *Id.* at 590–91.

63. *Id.*

64. *Id.* at 591.

65. *Id.*

66. *Id.*

67. *In re Estate of Myers*, 130 P.3d 1023, 1025–27 (Colo. 2006).

68. *Id.*

69. *Persichette*, 462 P.3d at 590–91.

70. *Id.*