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# THE VAPOROUS AND THE REAL IN FORMER-CLIENT CONFLICTS

*Charles W. Wolfram*

Thanks very much, Roy. Twenty minutes is a very short time to talk about a very complicated topic, particularly when, as it turns out, I have to shift gears very quickly. I just gave what I thought was a bit of an impassioned expression of outrage at suing your own client. It will appear shortly that I'm about to defend the proposition that, of course, you may sue your own client. That's perfectly fine under the former client rules. The notion that I'm going to talk about is the substantial relationship "standard" as I call it. Indeed, one of the things that I do in the paper is try to tease out a test for the substantial relationship standard. The test, arose somewhat recently, as law goes, in 1953 in the T.C. Theatres case. In it, Judge Weinfeld, somewhat unusually set the standard followed by the Supreme Court of the United States and the supreme courts of many jurisdictions. It's one of those unusual events in jurisprudence. It's also unusual because there wasn't anything terribly new about what Judge Weinfeld was holding. What was appealing was just the nice turn of phrase, the "substantial relationship" test.

The substantial relationship test is now built into the law of, I think, every jurisdiction except, sure enough, California—always doing its own thing in professional regulation. In the 1983 model rules, Rule 1.9, of course says right there in the rule that substantial relationship is the standard for determining whether or not there is a former client conflict. It has become so universal that I think that explains one of the most amazing phenomenon that I discovered in doing research on this. There are two or three student works, but a law professor to this date has never written about the substantial relationship test. Maybe I'm about to indicate why that is. Maybe it's entirely too vacuous a subject, too simple a subject. I am more likely to prove that it's so complex a subject that you can get it very badly wrong very quickly, which I will try to do in the next couple of minutes.

What I'm going to try to do in the time that I have available is to talk, first of all, about theory. It turns out to be quite important, I think. My chief theoretical problems are, first of all, to investigate the confiden-

tiality basis for the substantial relationship standard. It's easy, but it turns out to be a somewhat limiting set of considerations.

Secondly, I want to go on to ask whether there's anything beyond confidentiality that the substantial relationship standard seeks to protect. To look ahead, I indicate that in fact, and we've done this in the Restatement, there's an additional area that's worthy of protection that we have called the attack your own work prohibition. You can't attack the work that the lawyer did for the former client even if the particular attack doesn't expose any confidential information. As I'll argue, that's a theoretically interesting but practically irrelevant consideration. I think we are left with confidentiality as the core concept behind substantial relationship, and with this one exception we can put aside the attack-your-own-work limitation, because as a practical matter it hardly ever arises. We are dealing in the end with only confidentiality.

Now in the process, I deal with a number of cases that have talked about something other than confidentiality—loyalty. A recent Fifth Circuit opinion indeed decides the case on the basis of a loyalty consideration extending beyond confidentiality. I want to deal with the implications of that in *In re American Airlines*.

There are a couple of problems I won't have time to talk about, that have loyalty impacts, non-confidentiality impacts, that I think are important. One of them is reflected in the case that Tom Morgan was talking about earlier, *IBM v. Levin*. One of the funny things about *IBM v. Levin* is that the lawyer was not currently doing any work and indeed for, it was almost a year I think, had not done any work for IBM, yet the Court said IBM was a current client. I call this the "sunset" problem. When does a representation end for purposes of the shift from the per se rule that you cannot sue your own client to the quite different and much more relaxed rule of substantial relationship, which in effect says you *can* sue your own client so long as it's not substantially related? When is that shift from client to former client? The sunset issue, I think, is in part, informed by a concept of loyalty which I would define as a concept of reasonable client expectation of availability.

Secondly, there's the "hot potato" doctrine familiar to all of us who spent our lives with the subject, although not necessarily to the general lawyer audience. "Hot potato" is basically a rule that says that you can't convert a current client into a former client by dropping them. This has become quite possible to do because in the 1983 model rules which have been adopted very widely, there is now permission to withdraw from representing a client if it doesn't materially injure the client. And, it doesn't materially injure the client to sue your own client, or at least so

the argument goes. What the courts have said in effect is it's alright to go ahead and withdraw but you can't sue this person. That's simply too disloyal an act to be permitted. You can't convert a current representation into a former representation. So at least to those important extents it turns out that loyalty is an active consideration. But note it doesn't extend the concept of substantial relationship. It simply defines the limits on who is a current client and who is a former client.

In the paper, I then turn to the specific tests. I'm not going to spend a great deal of time on that today, except to say that I think the appropriate test has to be fact specific. I don't think you can program a computer to do what the courts are doing more and less, by and large, in the use of the substantial relationship test. What the courts are doing when they're thinking sensibly about how to apply the test, is to use something close to a test used in the Seventh Circuit and now copied very widely, the factual-reconstruction test. You reconstruct what the former representation probably exposed the lawyer to by way of confidential information without probing — for the obvious reason that you don't want to expose the confidential information in the process of determining whether or not to protect it. With the same limitation, you then reconstruct the second representation. And then with that set of reconstructions you do your match and determine whether or not there's a significant factual overlap between what you learned and what is relevant to know in the second representation for the purpose of determining whether in fact there is a substantial relationship.

I then look at a number of problems that the test has generated, particularly the playbook test. Playbook involves the claim that although the lawyer doesn't know anything specific about the matter, the lawyer knows a lot of generalities about the former client and therefore the lawyer is disqualified.

I then conclude with a couple of suggestions about more appropriate limitations on the substantial relationship test than what is found necessarily in the cases.

First of all with respect to confidentiality, it's a rule that Monroe Freedman and every other scholar has written about. Confidentiality here is terribly important for the same reason that it's terribly important in the field of the attorney/client privilege. It's important for both private reasons of the former client having to do with the maximization of the value of legal services. To put it in one way, the public dimension of that, as a number of cases have indicated, is that it's important that clients or prospective clients realize that when they approach lawyers they are approaching an aura that is welcoming because it's confidential, at

least in part because it's confidential. And this need to attract clients to lawyers is important because we think lawyers do important social work and therefore as a social matter it's important to protect confidentiality. That's important. It seems to me it's also fairly obvious and fairly non-controversial. What is controversial, I think, is extending the notion of confidentiality.

Let me get to the American Airlines case. American Airlines was a case in which a Houston law firm had given some legal advice to American Airlines in a very important matter. American Airlines was thinking of buying Continental Airlines. They wanted antitrust advice on it for obvious reasons. The lawyer's advice was that the acquisition would probably run afoul of the antitrust guidelines of the Justice Department unless they delayed at least a year to make the acquisition. American said thank you for the advice. The representation was ended. Halt. Over. Now American Airlines is a former client. That representation ended in January of 1991. In June, 1992, a year and a half later, Northwest Airlines comes to the same Houston law firm and asks them to sue American Airlines, their former client, in an antitrust matter. The antitrust matter had not, I think, very much if anything to do with the former matter. It had to do with American's maintenance of a nationwide computer system which Northwest was claiming was monopolistic in its own way, quite apart from the questions of monopoly involved in the possible acquisition of Continental Airlines which had to do with their overlap of service in the Denver market. In a disqualification motion filed by American Airlines, the district court said no, there's no substantial relationship between the matters and that's the end of it. On mandamus, the Fifth Circuit said there *is* a violation of the former client rule and I want to read you a bit of the Court's opinion. This is a part of the opinion in which the Court is responding to the Houston's law firm's argument that the appearance of impropriety standard shouldn't apply. The Court says we reject Northwest's argument. A party seeking to disqualify counsel under the substantial relationship test need *not* prove that the past and present matters are so similar that a lawyer's continued involvement threatens to taint the trial, talking about a Second Circuit standard. Rather the former client must demonstrate that the two matters are substantially related. We might draw an easy breath at that point, but hang on. "Second, we adhere to our precedents in refusing to reduce the concerns underlying the substantial relationship test to a client's interest in preserving his confidential information. The second fundamental concern protected by the test is *not* the public interest in lawyers avoiding

even the appearance of impropriety but the client's interest in the loyalty of his attorney."

And the Court goes on in another part of the opinion after a basic diversion to say "the substantial relationship test aims to protect the adversary system, confidentiality; but also, or as part of this concern, seeks to provide conditions for the attorney/client relationship. What credence, for instance, might American attach to the firm's December 1990 counsel that the airline's interest would be better served by postponing acquisition of Continental for at least year if it had even suspected at that earlier time that the same firm might soon be representing one of its competitors in a suit against American, charging that it abused its market power to the detriment of competition in the American passengers' services market." I think I know the answer to that Socratic question, of course, it would be outraged. But what client wouldn't be outraged to know at an earlier point that the same lawyers, the same firm at least, is going to sue the client at a much later point?

The problem with the Court's logic is that it completely emasculates what I think is the other part of the substantial relationship test; and that is, if there isn't a substantial relationship, you *can* sue your former client. Indeed, you can prosecute your former client, according to a recent decision in a death penalty case, even though you had represented that person earlier as a defense counsel so long as there is no substantial relationship between the two representations. The case is extreme but illustrative. A predicate of every case asking whether there is a substantial relationship is that if the answer is no substantial relationship, you can sue your former client. You can defend against the present suit by the client. You can negotiate hostilely. You can do a hostile takeover of your former client. All of this is permissible if there's no substantial relationship. What's the worth of loyalty if you can sue your own former client?

I then take a look at the attack — own — work problem. It's basically a problem that hardly ever comes up, but let's imagine a case where a lawyer has obtained a patent for a client. The lawyer ends the representation. Two years later a new client comes into the lawyer's office and says I'd like you to sue to invalidate the patent and the only ground I want you to rely on, in fact it is the only ground that has any hope of success, is prior art. The new client will rely only on evidence quite different from any material that the former client brought to you. I don't think that's quite a comfortable hypothetical. I'm working on a better one for the paper but let's simply stipulate that there's no factual connection between the earlier representation and the latter one—that this prior art question never arose during the earlier representation. Even if there

were no such connection, I think it's palpable that no lawyer should be permitted to do that—attempt to invalidate the same patent that the lawyer obtained. The reason, it turns out, has to do with loyalty, loyalty in the course of your earlier representation. What one would fear would be the Moscow Embassy equivalent in lawyering: the construction of the edifice in such a way that it can be easily wiretapped or destroyed in the case of a patent litigation. We worry about the vigor expended in the patent representation if the lawyer later is going to be able to attack it at a later point. With respect to the tests, again, I think it's necessary to pay attention to the facts. It may also be necessary to pay attention to the role that confidentiality would play in the earlier representation and the role that it should play in the latter.

In that respect let me turn to the playbook problem. There have been cases suggesting that if you know something about the way the client's head works you know something that's relevant for purposes of applying the substantial relationship test. I think those cases often are misguided, sometimes they're correct. I think if re-examined under what I hope is the sharper lens of the factual-reconstruction test, it will turn out that some of them indeed are cases of substantial relationship, but some of them have not been. Those cases that *are* cases of substantial relationship would be cases where what you probably learn about the client's inclination, the client's willingness to settle, the client's unwillingness ever to be deposed is both relevant and unknown to others in the second litigation. That is to say it's still a secret. It was a secret obviously when you obtained it but it's still a secret that others don't know it. And, obviously we're not going to put terrible burdens on clients to indicate that the information is of that kind.

Let me turn very briefly to a couple of problems in the administration of a substantial relationship test. It certainly is the case that you can't crank the substantial relationship test, if it's facts specific, into a computer. At least a computer that I can play with and I suspect that anybody who's trying to do conflicts checking can play with. It simply becomes too proliferated. You have to do a lot of hard-copy looking. You have to do a lot of hands-on analysis to determine whether or not there is a substantial relationship. You still use the computer to crank the names through and maybe the addresses and some of the affiliates and some of the addresses of residences and businesses but you end up with lots of possible hits. You have to go back to the files, some of them coming out of storage; you have to talk to lawyers and you have to be careful doing that because you don't want to taint a possible screening apparatus that you may or may not set up depending on whether or not

there's a conflict. I think there are costs, in short, for a fact-specific concept but I see no way of doing away with the cost unless we're to do a rule that you could crank into a computer. One rule you could crank into a computer is you can never sue a former client. Indeed, you can never proceed adversely to a former client. No court has ever suggested that. An ABA Ethics Committee opinion, which I hope will be overruled, did so once but it's never been repeated. I regard it as terribly aberrant. So you either have a simple rule that is either way too inclusive or way too underinclusive or you have the mish mash that requires a careful look.

One word on limitations. There are a number of limitations that courts have talked about in applying the substantial relationship test. One of them only I would like to refer to in closing and that is limiting the scope of the representation. I think that lawyers who are alert to the problem of former client conflict and who can assess a present representation as potentially giving rise to a former client problem in the future would be well advised to do one of two things. Either get consent, talked about in the last hour, or secondly, but this also requires consent, although of a now-friendlier client, limit the scope of what you are doing. If you can assess what this later matter might be, simply excise that work from the current representation, obviously with full disclosure to the current client of what you're doing. Limit the representation in such a way that it doesn't create a former client problem.

The substantial relationship standard has been around for the last, how many years is that, forty, for heaven sake, almost. I think it is time for a scholarly look at it. I think when examined it turns out to be a perfectly sound notion with respect to its confidentiality basis. I think it's pernicious if extended very much further (aside from the attack-your-own work notion) by a notion of loyalty. It does create problems of implementation, but those are hardly problems of overwhelming magnitude.

Thank you.



