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Lawyers' Lawyer Newsletter – Recent Developments in Risk Management – March 2021 Edition

Lawyers' Lawyer Newsletter | 6 min read
Mar 17, 2021

In this edition of the *Lawyers' Lawyer Newsletter* we cover the following:

When Do an Attorney's Personal Relationships Create a Conflict Requiring Disclosure to the Client and Informed Consent?

ABA Formal Opinion 494

Risk Management Issues

Client Relationships | Conflicts of Interest | Personal Interest Conflict | Informed Consent

The Opinion

A lawyer may find herself adverse to a party represented by counsel with whom the lawyer has a personal relationship. Recently issued ABA Formal Opinion 494 addresses ethical considerations arising from such a situation.

Model Rule 1.7(a)(2) provides that, lacking informed consent, a lawyer may not represent a client where there's a significant risk that the lawyer's ability to represent a party will be materially limited by responsibilities owed to anyone other than the client. According to the Opinion, when lawyers in a close personal relationship represent opposing parties, there's a significant risk that client confidences will be revealed—that the lawyer's relationship will interfere with loyalty to the client and the lawyer's independent professional judgment. Where there is a concurrent conflict under the Rule, the lawyer must obtain informed consent.

Not all personal relationships will create conflicts. However, the Rule requires that lawyers reasonably consider if such a situation will interfere with the ability to provide competent and diligent representation. Even if the lawyer does not believe there is a conflict requiring informed consent, the attendant risks may trigger a duty under RPC 1.4 to disclose the relationship.

The closeness of the relationship is the starting point for the analysis. The Opinion distinguishes duties arising from three types of personal relationships.

First, lawyers who are in exclusive intimate relationships, cohabit in an intimate relationship, or who are engaged, should consider themselves to be similar to married couples for conflicts purposes. Both lawyers must disclose the relationship to their respective clients and may not represent those clients unless each client gives informed consent. In addition, each lawyer must reasonably believe that she will be able to provide competent and diligent representation to each client.

Attorneys who are in intimate relationships with opposing counsel without exclusivity or cohabitation must carefully consider whether the relationship creates a significant risk that the representation will materially limit their abilities. The most prudent course for such attorneys is to disclose the relationship and obtain informed consent.

Second, the Opinion addresses non-intimate friendships. A close friendship with opposing counsel will require disclosure to all affected clients, and informed consent must be obtained when the friendship involves significant involvement in the lawyers' personal lives. On the other hand, disclosure may be required—but not informed consent—where the friend is a school classmate, colleague, or someone with whom the lawyer only occasionally communicates.

Finally, the Opinion discusses personal relationships involving "acquaintances," defined as relationships lacking the familiarity and attachment of friendships. Most relationships within the legal profession are considered acquaintanceships if interactions are limited to professional or social settings. Acquaintances are not required to disclose their relationship to clients or obtain informed consent. Nevertheless, lawyers should consider disclosure, even if only to maintain good client relations.

Importantly, a personal relationship conflict will not be imputed to an entire firm so long as the disqualified lawyer's interest does not present a material risk limiting the representation.

Risk Management Solution

Attorneys in a personal relationship with opposing counsel should examine the closeness of the relationship. Differing duties apply to intimate relationships, friendships, and acquaintance relationships.

The first consideration in deciding to disclose the relationship and obtain informed consent is whether the lawyer reasonably believes she can competently and diligently represent the client. Assuming informed consent is available and is obtained, lawyers should take reasonable measures to guard against inadvertent disclosure of confidential information to opposing counsel. If at any time during the representation an attorney determines that the personal relationship will undermine competent and diligent representation, then one or both of the attorneys in the relationship must decline or withdraw from the representation.

May a Lawyer Ethically Represent a Client with Interests Materially Adverse to a Former Client?

ABA Opinion 497

Risk Management Issues

Model Rules 1.9(a) and 1.18(c) | Former Client Conflicts | Materially Adverse

The Opinion

May a lawyer ethically represent a current client whose interests are materially adverse to the interests of a former client? And what constitutes material adverseness? Formal Opinion 497 issued by the American Bar Association Committee on Ethics and Professional Responsibility outlines the answers to both of these questions under Model Rules 1.9(a) and 1.18(c).

Model Rule of Professional Conduct 1.9(a) prohibits a lawyer from representing a new client in the "same or substantially related matter in which that person's interests are materially adverse to the interests of [a] former client." Similarly, Rule 1.18(c) prohibits the representation of a prospective client whose interests are "materially

adverse to those of a prospective client in the same or substantially related matter". Materially adverseness, different from the standard of directly adverse, can exist where direct adverseness does not.

The Committee offered a non-exhaustive list of scenarios that would trigger a materially adverse conflict, including:

- Negotiating or litigating against a former client is the "classic" example of representing materially adverse interests. In this example, the lawyer who is representing interests on both sides of the "v" in litigation has a conflict that is both directly adverse and materially adverse. According to the Committee, negotiating against a former client in a transactional matter would also create a materially adverse conflict.
- Attacking a lawyer's own prior work, while unlikely because a lawyer typically does not perform legal work for a prospective client, is still possible and would trigger a Rule 1.9(a) materially adverse conflict. The Committee pointed out a number of factual scenarios where courts have stated a materially adverse conflict existed, including a lawyer challenging the same patent obtained for a former client; a lawyer challenging the same real estate restrictive covenant drafted for a former client; or advocating for a position that contradicts a term in the same settlement agreement drafted by the lawyer for a former client.
- Cross examining a former client is another example of a potentially materially adverse conflict. The Committee explained that Rule 1.9(c)(1) prohibits the use of information from a former client to the disadvantage of that client. If the examination of the former client requires use of information relating to the former representation, the lawyer has a conflict, unless the information is 'generally known.' The Committee warned that even if the information is generally known, if the new matter and former matter are substantially related, the lawyer may still have a materially adverse conflict.

The Committee opined that mere economic or financial competition does not create a materially adverse conflict within the meaning of Rule 1.9(a). A specific and "tangible direct harm" is required in addition to the financial competition in order create material adverseness under Rule 1.9(a).

While the exact process to determine the existence of material adverseness varies from jurisdiction to jurisdiction, the Committee pointed out that even if each element of a materially adverse conflict is present, a lawyer is still permitted to represent the clients involved. In order to do so, the lawyer must obtain the informed consent of the former or prospective client, confirmed in writing. As the Committee explained, "even if a lawyer is hired to sue a former client on behalf of a current client, or negotiate against a former client, or take the deposition of a former client in a substantially related matter, the lawyer may ask for the former client's informed consent to waive the conflict and permit the lawyer's representation of the current client." Of course, obtaining a waiver does not waive a lawyer's obligation to maintain the confidentiality of all information learned during the prior representation.

Risk Management Solution

Materially adverse conflicts may be difficult to identify—especially in large law firms with extensive client lists. Care should be taken to appropriately and thoroughly populate conflicts systems, and to create and enforce

proper checking procedures. Like most conflicts, material adverse conflicts are waivable. If a lawyer wishes to continue with the conflicted representation of the new client, she must obtain informed consent as defined in her jurisdiction. Doing so will allow the lawyer to ethically represent the new client while also avoiding a potential disqualification from the new matter. However, remember that just because you can, doesn't mean you should.