ABA Issues New Ethics Guidance on Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel

Thomas G. Wilkinson
Douglas B. Fox
Cozen O'Connor
1650 Market Street
Suite 2800
Philadelphia, PA 19103
(215) 665-2000
Twilkinson@cozen.com
dfox@cozen.com

Thomas G. Wilkinson (twilkinson@cozen.com) is a member of Cozen O'Connor's Legal Profession practice group, and is a past chair of the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee. He Chairs the DRI Lawyers' Professionalism and Ethics Committee, and has served on the ABA Standing Committee on Professionalism.

Douglas B. Fox (dfox@cozen.com) is Conflicts Counsel at Cozen O'Connor and is a member of the Pennsylvania Bar Association's Professional Liability Committee and Civility in the Profession Committee.

Many lawyers are married to lawyers, socialize with other lawyers, and count lawyers they have interacted with on a professional level for years as friends. When do these relationships create conflicts of interest that require lawyers to take steps to address the conflict?

The American Bar Association's Model Rule of Professional Conduct 1.7(a)(2) prohibits a lawyer from representing a client without informed consent where there is a significant risk that the lawyer's personal interest will materially limit the lawyer's ability to represent the client.

Comment [11] to Model Rule 1.7(a)(2) discusses how the Model Rule relates to personal interest conflicts based on blood or marriage:

> When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment…Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent.

The practical implications of a personal interest conflict are easy enough to identify where the lawyers on opposite sides of a case are related by blood or marriage. For example, there would be a significant risk of a disabling personal interest conflict where a plaintiffs' personal injury lawyer handling a matter on a contingency fee basis appeared at a settlement conference or mediation where his or her spouse was on the other side of the case. The test is whether the lawyer "reasonably believes" that he or she can continue to provide competent and diligent representation to the client notwithstanding the personal interest conflict. If so, then both clients should provide informed consent, in writing, to permit the lawyer to proceed with the representation notwithstanding the personal interest conflict.

What happens, though, where lawyers adverse to each other in a matter are not related by blood or marriage, but are in an intimate relationship, are close friends, or are acquaintances? Comment [11] to Model Rule 1.7(a)(2) offers no guidance to those lawyers. As a result, the

ABA Standing Committee on Ethics and Professional Responsibility recently issued Formal Opinion 494 (July 29, 2020), offering advice to lawyers in a "personal relationship" with opposing counsel not based on blood or marriage. The Standing Committee noted that changing living patterns created the potential for conflict beyond those raised by "traditional categories" of relationships between opposing lawyers, like blood or marriage. In formulating this new guidance, the Standing Committee relied heavily on Formal Opinion 488, issued in September 2019, which addressed judges' personal relationships with lawyers or parties that may require disqualification or disclosure under Rule 2.11 of the Model Code of Judicial Conduct.

Formal Opinion 494 analyzes three types of personal relationships that may give rise to a personal interest conflict: intimate relationships, friendships and acquaintances.

As to *intimate relationships,* the Formal Opinion advises that these relationships should be treated like marriages, for conflicts purposes. Intimate relationships would include couples who are engaged to be married or lawyers who are cohabiting. In such cases, the Standing Committee advises that the lawyers must disclose this relationship to their clients and obtain the informed consent of both clients, assuming that both lawyers reasonably conclude that they can continue to offer competent and diligent representation to their clients. As one example, the Formal Opinion notes that where an assistant district attorney is in an intimate relationship with a criminal defense attorney, the two may not represent adversaries in a matter absent informed consent. In the case of the assistant district attorney, this would mean obtaining approval from an appropriate government supervisor, *citing* N.C. State Bar Formal Opinion 2019-3.

Illustrating the difficulty of defining an intimate relationship, the Formal Opinion notes that opposing counsel who are in "some type of intimate relationship" but are not exclusive, engaged or cohabiting, must carefully consider whether their relationship creates a "significant

risk" that the representation of either client will be materially limited by the relationship. The Formal Opinion also addresses in passing marriages ending in divorce, or engagements or cohabitations that have ended. The Formal Opinion advises that one factor to be considered in those cases would be whether the relationship ended amicably. The prudent course of action would be to disclose the prior relationship to the client, according to the Formal Opinion.

Friendships cover such a wide range of relationships that the Formal Opinion deems these to be the "most difficult category to navigate." Citing Formal Opinion 488, the Standing Committee observes that "not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others."

According to the Formal Opinion, close friendships should be disclosed to the client and informed consent obtained. These friendships may be characterized by exchanging holiday gifts, attending regular social events together, having regular social communication, vacationing together, having children who are close friends, and, in some cases, sharing a mentoring relationship that is social and personal.

On the other hand, friendships that are not quite as close may not require informed consent from the client, although disclosure to the client may still be appropriate under the circumstances. These types of friendships may include former colleagues or classmates, or others with whom, on occasion, a lawyer may share a meal. Whether informed consent should be obtained, or disclosure made to the client, depends on the lawyer's considered judgment as to whether Model Rule 1.7(a)(2) applies and whether the lawyer reasonably believes that he or she can competently and diligently represent the client notwithstanding the friendship. As the Formal Opinion notes, "opposing lawyers who are friends are not *for that reason* alone

prohibited from representing adverse clients. The analysis turns on the closeness of the friendship."

The final category, *acquaintances*, includes relationships that are relatively superficial or coincidental, and do not create a close personal bond. Examples include occasional joint attendance at bar association meetings, law firm functions or civic events. Under those circumstances, the Formal Opinion counsels that lawyers need not disclose those types of relationships to a client, although the lawyer is free to do so.

Three other factors should be considered in determining whether Model Rule 1.7(a)(2) applies to a relationship, and whether informed consent should be sought from or disclosure made to the client. First, there may be instances, where, for whatever reason, a lawyer simply does not wish to disclose to the client his or her intimate relationship with opposing counsel. In those instances, the lawyer would not be able to proceed with the representation because informed consent would be required under the circumstances. Second, in determining whether a personal interest conflict exists, a lawyer should consider his or her role in the matter. A lawyer who is sole counsel or lead counsel in a matter is more likely to have a disqualifying personal interest conflict than a lawyer who has a subordinate or tangential role in the matter and who has limited contact with opposing counsel. Finally, personal interest conflicts are generally not imputed to others within a law firm. One potential example to the contrary, mentioned in the Formal Opinion, is where the managing partner of the law firm is the one with the personal interest conflict.

One last important reminder: Where opposing lawyers are in an intimate relationship, there is a real risk that confidential client information might inadvertently be disclosed. This could occur where opposing lawyers are cohabiting and able to overhear each other's work

conversations, or where the lawyers leave work files in open view on a desk or table at their home. This work at home scenario is of course more likely to occur during the pandemic. Such inadvertent or careless disclosures of client confidences may violate Model Rule 1.6, dealing with confidentiality of client information, and cause harm to the affected client.