Lawyers' Risk Management Newsletter

January 2021

CLYDE&CO

Personal interest conflicts involving lawyers' relationships with opposing counsel

The ABA Standing Committee on Ethics and Professional Responsibility recently published Formal Opinion 494 ("Opinion 494"), which examines a hitherto often overlooked component of Rule of Professional Conduct ("RPC") 1.7, the meaning and scope of personal interest conflicts specifically in connection with lawyers' relationships with opposing counsel. In this newsletter, we will discuss the principal conclusions in the Opinion, and the lessons it holds.

Personal relationships are addressed in Comment [11] to ABA Model Rule 1.7 which provides that:

> [11] 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. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. 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 disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

Opinion 494 recognizes that not all relationships with opposing counsel create a conflict that would require client informed consent or even disclosure. As the Opinion notes, "[s]ome relationships with opposing counsel are so casual that they would not affect a lawyer's independent professional judgment."

In this regard, Opinion 494 establishes four parameters for assessing whether or not a relationship with opposing counsel rises to the level of requiring disclosure or, at the other extreme, requires the lawyer not to take on a proposed engagement. Beginning with an example, the Opinion notes that:

> A lawyer's independent judgment is likely to be materially limited if due to the personal relationship with opposing counsel the lawyer would refrain from filing a well-founded motion for sanctions against opposing counsel. In that circumstance, the conflict may not be waivable. In addition, if the lawyer's personal relationship is one that is not known to others and the lawyer is therefore hesitant to disclose it to the client, the lawyer may not be in a position to seek the client's informed consent. For example, if the personal relationship with opposing counsel is an affair that the lawyer wishes to keep secret, the lawyer may be unable to comply with the rule's requirements of disclosure and informed consent. In that situation the lawyer is unlikely to be able to commence or continue the client-lawyer relationship.

Next, the Opinion points out that the lawyer's role in a potential matter may itself affect whether there is a meaningful personal interest conflict. A lawyer who is sole or lead counsel may be in a completely different situation from a subordinate lawyer with limited involvement, and little or no decision-making authority, or minimal contact with the opposing counsel.

Third, even when a conflict has been disclosed and consent obtained, the lawyer must not reveal information relating to the representation in accordance with RPC 1.6.

Further, if after undertaking a representation a lawyer later determines that a personal relationship with opposing counsel has arisen and that the lawyer can no longer meet the standard of being able to provide competent and diligent representation, the lawyer must withdraw.

Opinion 494 identifies three categories of personal relationships that may affect a lawyer's representation of a client:

(i) Intimate relationships;

(ii) Friendships; and

(iii) Acquaintances.

Intimate relationships with opposing counsel involve, e.g., cohabiting, engagement, or an exclusive intimate relationship. Even assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client, the Opinion states that "These lawyers must disclose the relationship to their respective clients and ordinarily may not represent the clients in the matter, unless each client gives informed consent confirmed in writing."

The Opinion points out that friendships are the most difficult category to navigate, contrasting close personal friendships involving frequent personal contact with lawyers who were college or law school classmates, or previously worked on a case together but who stay in touch only occasionally. The analysis of whether a friendship may involve a potentially disqualifying conflict turns, again, on whether:

> There is a significant risk that the representation of one or more clients will be materially limited by a lawyer's relationships, the lawyers must disclose the relationship to each affected client and obtain that client's informed consent, confirmed in writing, assuming the lawyers reasonably believe they will be able to provide competent and diligent representation to each affected client. If the lawyers cannot do so, one or both of the lawyers must decline or withdraw from the affected representations, consistent with Model Rule 1.16.

The Opinion defines acquaintances as "relationships that do not carry the familiarity, affinity or attachment of friendships." Examples given include a lawyer who meets another lawyer at bar association meetings, reunions and other gatherings where they are cordial but where neither lawyer actively seeks out the company of the other. In the view of the Opinion, this category creates a special dilemma, which is expressed as follows: "Lawyers who are acquaintances of opposing counsel need not disclose the relationship to clients, *although the lawyer may choose to do so.* Disclosure may be advisable to maintain good client relations. It may be helpful to inform a client that the lawyer has a professional connection with opposing counsel and then explain how that will not materially limit the lawyer's objectivity but may, in fact, assist in the representation because the lawyers can work collegially." [Emphasis added]

While Opinion 494 is helpful in raising awareness of what constitutes a personal interest conflict in the context of relationships with other lawyers, it does not set out a clear process that lawyers may use to detect and resolve this (or any) kind of personal interest conflicts. Although their treatise is aimed at New York lawyers, Professor Roy Simon, and his co-author Nicole Hyland, suggest four steps that lawyers may use for this purpose:

> ***Step 1. Does the lawyer have "personal interests"—whether financial, business, property, or otherwise—that could be negatively affected by the process or outcome of the client's legal matter?*** *If not—if the lawyer has no personal interests that could be adversely affected by the matter at hand—then the lawyer does not have a conflict under Rule 1.7(a)(2) and it is not necessary to go on to steps 2, 3, and 4.*
>
> ***Step 2. If the lawyer does have personal interests that could be adversely affected, what is the level of risk that these interests will adversely affect the lawyer's professional judgment in representing or advising the client?*** *If the risk level is not "significant," then the lawyer does not have a conflict under Rule 1.7(a)(2) and it is not necessary to go on to steps 3 and 4.*
>
> ***Step 3. Given the "significant risk" that the lawyer's personal interests will adversely affect the lawyer's professional judgment in the matter, does the lawyer nevertheless "reasonably believe[]" within the meaning of Rule 1.7(b)(1) that the lawyer "will be able to provide competent and diligent representation" to the client?*** *If not…then the conflict is non-consentable, and the lawyer may not accept or continue the matter even if the client is willing to provide informed consent as called for by step 4. Conversely, if the lawyer does reasonably believe she can provide competent and diligent representation to the client despite the lawyer's personal interests, then the lawyer may accept or continue the representation if the lawyer satisfies step 4.*
>
> ***Step 4. Has the lawyer obtained the client's informed consent to the lawyer's representation, confirmed in writing?*** *If not—if either the lawyer has not sought the client's consent or the client has refused to give consent—then the lawyer may not accept or continue the representation no matter how confident the lawyer is that she can provide competent and diligent representation despite her personal interests. If so, then the lawyer may accept or continue the representation.*[1]

1. See, Simon's *New York Rules of Professional Conduct Annotated*, Section 1.7.49, on page 382 of the 2019 edition.

One important subset of situations that fall within Step 4 needs to be emphasized. If the lawyer has not sought the client's consent because the lawyer does not want the relationship with the other lawyer known, then the lawyer may not accept or continue the representation. Nevertheless, these are all fact-sensitive questions to which lawyers need to give careful consideration whenever they become aware of a circumstance possibly giving rise to this most sensitive kind of conflict.

Lastly, the Opinion deals with imputation of conflict. Here, the ABA Model Rule materially differs from the equivalent rule in some states. The Model Rule provides that personal interest conflicts are not imputed, but in some jurisdictions there is no such exception in place, so it is important to check each state's own Rules of Professional Conduct to determine if Rule 1.10 does or does not include this exception to the normal imputation rule.

Some other specific state rules relating to these conflicts are worth noting. First, in footnote 16, Opinion 494 incorrectly suggests that New Jersey has a specific rule to deal with these conflict situations. New Jersey has deleted and removed the former provision NJ RPC 1.8(i) from its professional responsibility rules, so that New Jersey follows the Model Rule approach. Second, California has a more specific rule to deal with these conflicts, Cal. Rules of Prof'l Conduct R. 1.7(c), which provides that:

> Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where: … (2) the lawyer knows or reasonably should know that another party's lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer's firm, or has an intimate personal relationship with the lawyer.

Accordingly, in California, these situations are always treated as conflicts requiring client consent (and, necessarily therefore, disclosure) before the lawyer may accept or continue with the representation.

Further information

If you would like further information on any issue raised in this update please contact:

J. Richard Supple, Jr.

Partner, Clyde & Co LLP
+1 212 710 3914
rick.supple@clydeco.us

Anthony E. Davis

Of Counsel, Clyde & Co LLP
+1 212 710 3976
anthony.davis@clydeco.us

Janis M. Meyer

Of Counsel, Clyde & Co LLP
+1 212 710 3942
janis.meyer@clydeco.us

Nataniel Arabov

Associate, Clyde & Co LLP
+1 212 710 3944
nataniel.arabov@clydeco.us

1357262 - 12 - 2020