PROGRAM MATERIALS
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Relationships and Conflicts— How Friendly Is Too Friendly?

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Relationships and Conflicts: How Friendly Is Too Friendly?

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About
Daniel J. Siegel, Esquire

- Chair, Pennsylvania Bar Association Committee On Legal Ethics & Professional Responsibility
- Providing Ethical and Techno-Ethical Guidance & Disciplinary Representations To Attorneys & Law Firms
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Today's Program

This program will provide practical guidance about what to do when you or colleagues are "friends"

Today's Program

This program will highlight the underlying ethical considerations relating to situations involving "friends"

Today's Goal

Providing an introduction to the relevant Model Rules of Professional Conduct

Today's Goal

Explaining how the Model Rules of Professional Conduct address "friendships"

So, Why Do I Care About the Model Rules?

Every state's Rules of Professional Conduct are based on the Model Rules promulgated by the ABA

So, Why Do I Care About the Model Rules?

They set forth the standard of conduct applicable to all attorneys

So, Why Do I Care About the Model Rules?

States may adopt the Model Rules as written, or adopt parts of the Rules, or revise them as necessary

So, Why Do I Care About the Model Rules?

Always verify if your jurisdiction has adopted the relevant Model Rule(s)

Let’s Look at “Legal” “Relationships”

What is the definition of “friend” and the definition of “relationships” in the Model Rules (or most state Rules)?

Who Is A Friend?

What seems like an easy question isn’t as easy to answer as you think

And What About Your Lawyer Friends?

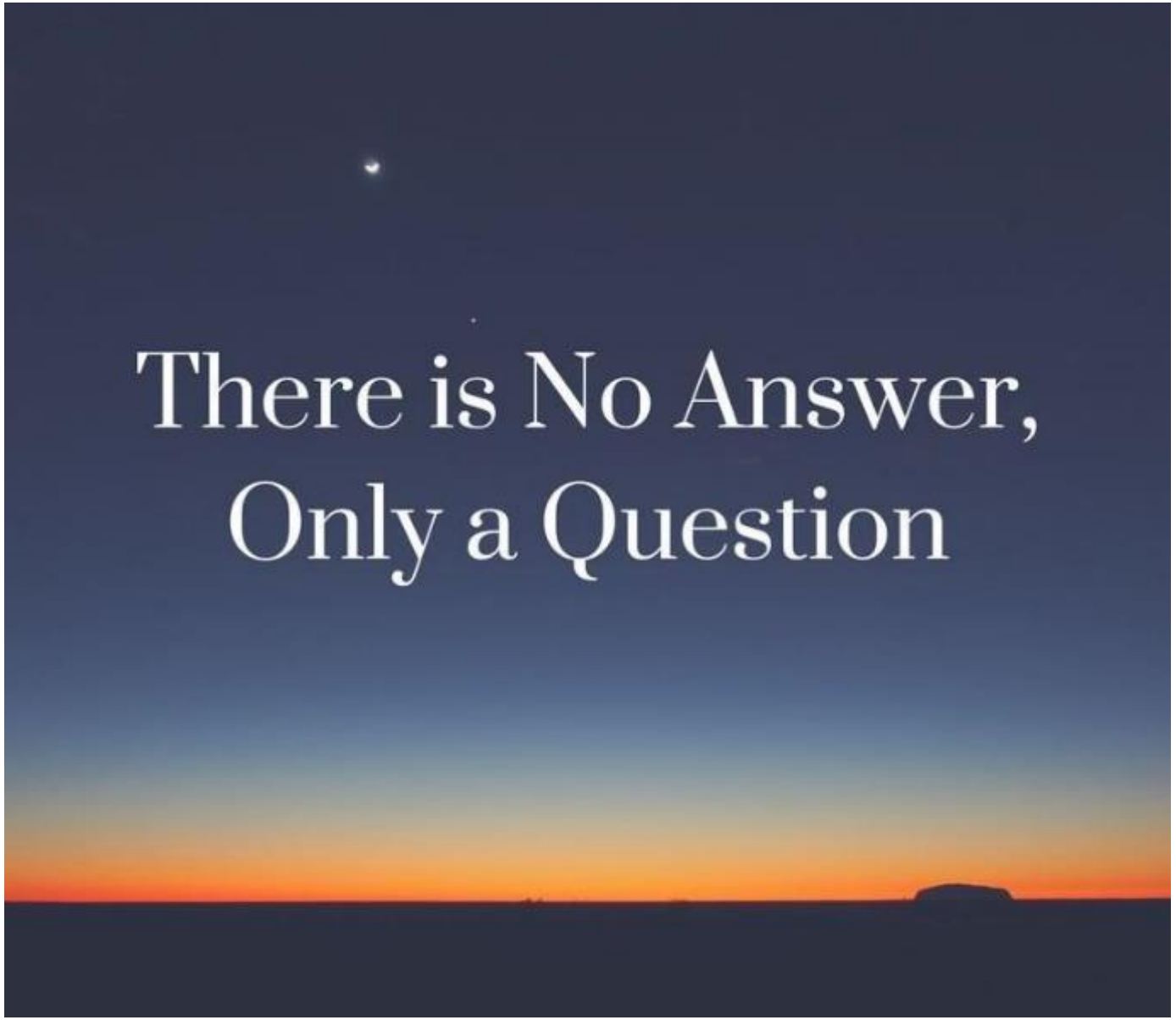
- Not the ones you only see socially
- The ones you have cases or matters with

The Question Isn't Simple

What do you do about your clients, and their views on your "friends" and how that impacts your handling of their cases or matters?

The question may raise ethical concerns…

What is the definition of “friend” in the Model Rules (or most state Rules)?



Consider some scenarios

WHAT ABOUT THIS

Let’s look at some scenarios

- **You and opposing counsel know each other through Bar Association activities**
- **You do not otherwise socialize**

WHAT ABOUT THIS

Let’s look at some scenarios

- You and opposing counsel know each other through Bar Association activities
- You socialize, having drinks or similar activities

WHAT ABOUT THIS

Let’s look at some scenarios

- You and opposing counsel know each other through Bar Association activities
- You have become close friends, but do no socialize outside of your legal relationship

WHAT ABOUT THIS

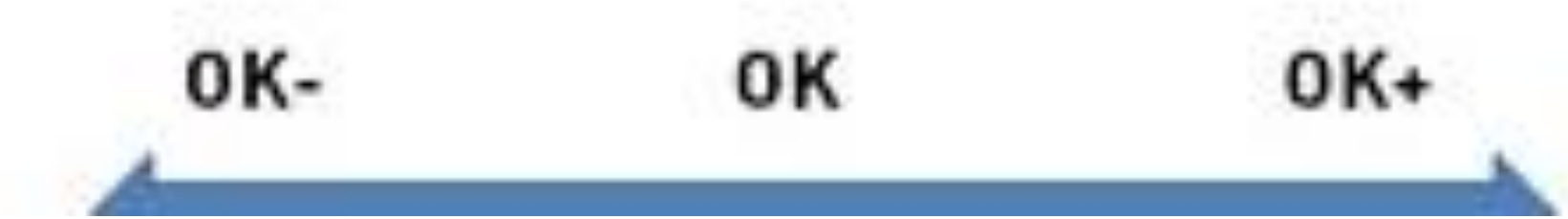
Let’s look at some scenarios

- **You and opposing counsel are close friends, but do no socialize outside of your legal relationship**

WHAT ABOUT THIS

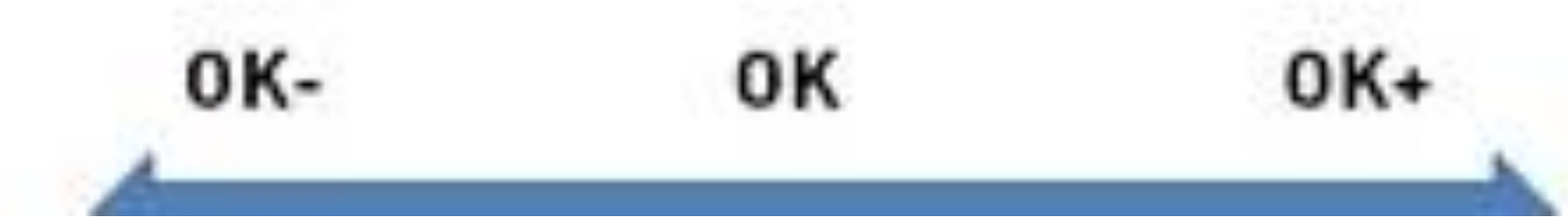
Let’s look at some scenarios

- **You and opposing counsel are having an intimate relationship**



What’s OK?

What’s not OK?



And do you have to disclose your friendship/relationship to your client?

Let’s look at the Rules for Guidance

Model Rule 1.7 (Conflict Of Interest: Current Clients: Specific Rules)

(a) 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:
(1) the representation of one client will be directly adverse to another client; or
(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.

But Rule 1.7 doesn't really help…

The word "friend" doesn't appear in the Rule

Model Rule 1.7, Comment [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.

Finally…
ABA provided guidance

Standing Committee on Ethics and Professional Responsibility Formal Opinion 494, "Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel," July 29, 2020

ABA Formal Opinion 494

Lawyers must examine the nature of the relationship to determine if it creates a Rule 1.7(a)(2) conflict

ABA Formal Opinion 494

If there is a Rule 1.7(a)(2) conflict, the lawyer must determine if he or she reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client who must then give informed consent, confirmed in writing.

ABA Formal Opinion 494

The opinion identifies three categories of personal relationships that might affect a lawyer's representation of a client: (i) intimate relationships, (ii) friendships, and (iii) acquaintances.

ABA Formal Opinion 494

Intimate relationships with opposing counsel involve such things as cohabiting, engagement to, or an exclusive intimate relationship. These relationships must be disclosed to clients, and the lawyers ordinarily may not represent opposing clients in the matter, unless each client gives informed consent confirmed in writing.

ABA Formal Opinion 494

Because friendships exist in a wide variety of contexts, friendships need to be examined carefully.

ABA Formal Opinion 494

Some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor must clients' informed consent be obtained.

ABA Formal Opinion 494

Close friendships with opposing counsel should be disclosed to clients.

ABA Formal Opinion 494

Close friendships with opposing counsel should be disclosed to clients, and, when required by the opinion, informed consent should be obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor must clients' informed consent be obtained. Regardless of whether disclosure is required, however, the lawyer may choose to disclose the relationship to maintain good client relations.

ABA Formal Opinion 494

Regardless of whether disclosure is required, however, the lawyer may choose to disclose the relationship to maintain good client relations

ABA Formal Opinion 494 – Suggested Analysis

- Not all personal relationships with opposing counsel create a conflict that would require client informed consent or even disclosure.
- Some relationships with opposing counsel are so casual that they would not affect a lawyer's independent professional judgment.

ABA Formal Opinion 494 – Intimate Relationships

Lawyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes. The same is true for couples who are engaged to be married or in exclusive intimate relationships. 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, assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client.

ABA Formal Opinion 494 – Suggested Analysis

For other relationships, a lawyer's duty of communication under Rule 1.4 might obligate the lawyer to disclose a relationship, even if the lawyer believes that the relationship would not create a conflict under Rule 1.7.

ABA Formal Opinion 494 – Suggested Analysis

For still other relationships, a conflict based on personal relationships with opposing counsel exists and may be waived if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to [the client]" and the lawyer obtains the affected client's informed consent, confirmed in writing.

ABA Formal Opinion 494 – Suggested Analysis

- The reasonableness of the lawyer's belief will depend on the circumstances.
- "Reasonable" is defined in Model Rule 1.0(h). For instance, a lawyer's independent judgment is likely to be in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."
- Consider Model Rule 1.0(i) which reads: "'Reasonable belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

ABA Formal Opinion 494 – Friendships

- Friendships may be the most difficult category to navigate.
- Friendship' implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others.

ABA Formal Opinion 494 – Friendships

- On the one hand, an adversary may be a dear and longtime friend or someone with whom the lawyer regularly socializes.
- On the other hand, an adversary may be considered a "friend" even though contact is occasional, brief, or superficial.

ABA Formal Opinion 494 – Acquaintances

- Acquaintances are relationships that do not carry the familiarity, affinity or attachment of friendships. Lawyers, like judges, should be considered acquaintances when their interactions are coincidental or relatively superficial, such as being members of the same place of worship, professional or civil organizations, or the like..

ABA Formal Opinion 494 – Acquaintances

- Lawyers who are “acquaintances” may see each other at bar association or other business events, present continuing education programs together, or serve on bar association committees or boards together where their relationships may be collegial but not necessarily fall into the category of a “friend” that could materially limit the lawyer’s independent professional judgment on behalf of a client.

ABA Formal Opinion 494 – Acquaintances

- Lawyers who regularly see each other at civic or social events but do not make any particular effort to seek each other's company do not have the type of close personal friendship requiring disclosure and informed consent.

Conclusions

A lawyer's personal relationship with opposing counsel may create a conflict under Model Rule 1.7(a)(2).

Conclusions

Lawyers must examine the nature of the relationship to determine if there is a significant risk that lawyer's representation of the client will be materially limited by the lawyer's personal relationship and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client and each affected, who must then give informed consent, confirmed in writing.

Conclusions

Lawyers should evaluate whether the relationship is a close personal or intimate relationship, a friendship, or the adversary is merely an acquaintance.

Conclusions

Cohabiting, intimate and similar relationships with opposing counsel must be disclosed, and the lawyers ordinarily may not represent clients in the matter, unless each client gives informed consent confirmed in writing.

Conclusions

Because friendships exist in a wide variety of contexts, friendships need to be examined closely.

Conclusions

Close friendships with opposing counsel should be disclosed to clients and, where appropriate, their informed consent, confirmed in writing, obtained.

Conclusions

By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor is clients' informed consent required.

Conclusion – Better Safe Than Sorry

- Regardless of whether disclosure is mandated, lawyers should consider disclosing the relationship.
- Disclosure may even be advisable to maintain good client relations.

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MODEL RULE OF PROFESSIONAL CONDUCT 1.0: TERMINOLOGY

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

MODEL RULE OF PROFESSIONAL CONDUCT 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) 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:

(1) the representation of one client will be directly adverse to another client; or

(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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by

the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] And [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[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.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client- lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of

the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or

transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a) (2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer

seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the

representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Relationships and Conflicts—How Friendly Is Too Friendly?

law.com/thelegalintelligencer/2020/10/22/relationships-and-conflicts-how-friendly-is-too-friendly

By Daniel J.
Siegel

Daniel J. Siegel of Law Offices of Daniel J. Siegel. Courtesy photo

Lawyers interact with each other every day. It is a natural consequence of those interactions that in some instances lawyers develop close relationships with their colleagues. In and of itself that is not a problem. But in some instances, how close the relationship is can create problems, either potential or real.

When I was a young attorney, I remember explaining to a client that opposing counsel and I were close friends in law school but that we had not seen each other since graduation. I emphasized that our relationship would have no impact on the case. She would do her job and I would do mine. The client said he understood.

Minutes before the deposition began, opposing counsel arrived. When she saw me, she came over and gave me a big hug. I hugged her back. The deposition proceeded as expected, with no surprises. My classmate did her job, and asked the questions for which I had prepared the client. I had also explained to the client that, because this was the defendant's deposition, it was unlikely I would ask any questions, and I did not.

After the deposition concluded and opposing counsel left our office, the client went ballistic. He screamed that I had undermined his case and that her hug showed I was not willing to fight for his case. He was wrong, and eventually the case settled, for its proper value. What I never told the client, however, was that our friendship made the negotiations much easier and facilitated the resolution.

Ever since that case, roughly 30 years ago, I always wondered what the limits were on lawyers' relationships with colleagues, and when, or if, lawyers should disclose those relationships. They are not true conflicts, so what are they?

Recently, the American Bar Association standing committee on ethics and professional responsibility issued Formal Opinion 494, "Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel," which is intended to address the situation I described, and others. While the opinion offers some excellent guidance, its concluding sentences summarize much of the advice provided, "Regardless of whether disclosure is mandated, however, the lawyer may choose to disclose the relationship. Disclosure may even be advisable to maintain good client relations."

The issue of whether to disclose inter-counsel relationships falls under Model Rule of Professional Conduct 1.7. For example, Model Rule 1.7(a)(2) prohibits a lawyer from representing a client without informed consent if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. A personal interest conflict may arise out of a lawyer's relationship with opposing counsel. Lawyers must examine the nature of the relationship to determine if it creates a Rule 1.7(a)(2) conflict and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client who must then give informed consent, confirmed in writing.

The ABA opinion defines three categories of personal relationships that might affect a lawyer's representation of a client: intimate relationships, friendships, and acquaintances, and then distinguishes among therm.

Initially, the opinion focuses on conflicts that arise when lawyers "closely related by blood or marriage" represent "different clients in the same matter or in substantially related matters." In that situation, Comment [11] to Model Rule 1.7 states that " 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 opinion then offers another scenario that creates an impermissible conflict. Consider if the personal relationship with opposing counsel is an affair that the lawyer desires to keep secret. In that situation, the lawyer may be unable to comply with the requirements of disclosure and informed consent and would have to forego the representation.

While these types of conflicts are relatively obvious, the rules do not address the other common types of personal relationships with opposing counsel, which may also create conflicts of interest. In so opining, the opinion notes that "not all personal relationships with opposing counsel create a conflict that would require client informed consent or even disclosure." To the contrary, some are so casual that they would not have any impact upon a lawyer's independent professional judgment. In other situations, a conflict based on personal relationships with opposing counsel may exist, and may be waived, when the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to [the client]" and the lawyer obtains the affected client's informed consent, confirmed in writing. The reasonableness of the lawyer's belief will depend on the circumstances.

The opinion then looks at other scenarios to consider when analyzing whether there exists a conflict. For example, a lawyer who is sole or lead counsel is more likely to have a disqualifying conflict than a lawyer who has a subordinate or tangential role, and has little or no direct decision-making authority in the matter and minimal contact with the opposing counsel.

For most lawyers, it remains the nuances of friendships and acquaintances that create the most common concerns. In that vein, the opinion discusses how an adversary may be a dear and longtime friend, or someone with whom the lawyer regularly socializes. That relationship differs from one where opposing counsel is a "friend" where contact is occasional, brief, or superficial.

Citing ABA Formal Opinion 488, Opinion 494 defines "friendship" as "a degree of affinity greater than being acquainted with a person … the term connotes some degree of mutual affection. Yet not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others."

The opinion concludes that close friendships with opposing counsel should be disclosed to each affected client and informed consent obtained, offering the following description of such a relationship: "[Lawyers who] exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues … [or] share confidences and intimate details of their lives."

In certain circumstances, there may be friendships that might require disclosure to the affected clients but do not ordinarily require consent, such as lawyers who had previously practiced together and meet periodically, or lawyers who were law school classmates or colleagues years before.

The opinion then concludes that opposing lawyers who are friends are not "for that reason alone" prohibited from representing adverse clients, although the need for consent or disclosure depends on the lawyer's judgment whether Model Rule 1.7(a)(2) applies. If so, the lawyer must consider whether he or she reasonably believes he or she can carry out the representation diligently, notwithstanding the conflict.

The last category addressed by the opinion is "acquaintances, in which the relationships are "coincidental or relatively superficial, such as being members of the same place of worship, professional or civil organizations, or the like." Examples of "acquaintances" that, without more, do not create a close personal relationship, are attorneys who "might regularly meet at bar association or other business events, present continuing education programs together, or serve on bar association committees or boards together where their relationships may be collegial but not necessarily fall into the category of a 'friend' that could materially limit the lawyer's independent professional judgment on behalf of a client."

Consequently, lawyers who are acquaintances of opposing counsel need not disclose the relationship to clients. Attorneys may choose to make the disclosure to maintain good relations with clients, even though the relationship not only may not hurt but may benefit the client because of the potential for a collegial relationship.

The ABA opinion is an important one, however, because it addresses common situations such as mine with the client who later balked at my cordiality with my law school classmate. At its core, the opinion requires lawyers to evaluate whether their relationships with other attorneys are intimate, or fall within the continuum from friendship to acquaintance. Regardless, it remains a best practice for lawyers to disclose close friendships or even those that could raise questions by clients, even if they do not rise to the level of a conflict.

Clients understand that lawyers do not practice in a vacuum and will often have relationships with opposing counsel. I find that in most cases, being a friend or acquaintance with opposing counsel can eliminate many of the conflicts that arise between counsel and thereby benefit the client.

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 494 **July 29, 2020**

Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel

Model Rule 1.7(a)(2) prohibits a lawyer from representing a client without informed consent if there is a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. A personal interest conflict may arise out of a lawyer's relationship with opposing counsel. Lawyers must examine the nature of the relationship to determine if it creates a Rule 1.7(a)(2) conflict and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client who must then give informed consent, confirmed in writing.

To assist lawyers in applying Rule 1.7(a)(2), this opinion identifies three categories of personal relationships that might 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 to, or an exclusive intimate relationship. These relationships must be disclosed to clients, and the lawyers ordinarily may not represent opposing clients in the matter, unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined carefully. Close friendships with opposing counsel should be disclosed to clients, and, where required as described in this opinion, their informed consent obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor must clients' informed consent be obtained. Regardless of whether disclosure is required, however, the lawyer may choose to disclose the relationship to maintain good client relations.[1]

I. Introduction

The ABA Model Rules of Professional Conduct address conflicts arising when lawyers "closely related by blood or marriage" represent "different clients in the same matter or in substantially related matters." This guidance appears in Comment [11] to Model Rule 1.7, which reads:

> 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. . . . . [A] lawyer related to another lawyer, e.g*., as parent, child, sibling or spouse*, ordinarily may not represent a client in a

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

> matter where that lawyer is representing another party, unless each client gives informed consent. . . .[2]

The Model Rules do not address other types of personal relationships with opposing counsel.[3] But these other personal relationships may also create conflicts of interest. Because changing living patterns suggest that more people are living in households and arrangements that do not correspond to traditional categories,[4] this opinion offers guidance on conflicts that may arise from personal relationships with opposing counsel that fall within the Rules but are not specifically addressed by the Comments. In explaining these obligations, this opinion relies heavily on ABA Formal Opinion 488, issued in September 2019, which addresses judges' personal relationships with lawyers or parties that may require disqualification or disclosure."[5]

Section II below sets out the framework for analysis and identifies three categories of potential relationships between opposing counsel, drawing on the analysis in ABA Formal Opinion

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[2] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 11 (2020) (emphasis added) [hereinafter MODEL RULES].

[3] By contrast, there is significant authority, from the ABA and elsewhere, addressing business relationships with opposing counsel. For opinions on a lawyer's obligations when negotiating or seeking employment with the opposing firm. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 96-400 (1996); N.C. State Bar Formal Op. 3 (2016); D.C. Bar Op. 367 (2014); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 1991-1 (1991); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Advisory Op. 2007-300 (2007); Ky. Bar Ass'n Formal Op. E-399 (1998). There is also significant authority addressing a lawyer's obligations when the lawyer represents or has represented opposing counsel in an unrelated matter. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 97-406 (1997) ("lawyers cannot simultaneously have a lawyer-client relationship and represent third party clients whose interest are adverse if a reasonable lawyer would conclude that his relationship as a lawyer for or client of opposing counsel may materially limit and would adversely affect the lawyer's representation of his 'third-party' client"; opinion discusses when disclosure and consent will permit the representation; "imputation analysis differs for the representing lawyer and the represented lawyer"); Utah State Bar Ethics Advisory Comm. Op. 14-05 (2014) (both affected clients may consent to conflict caused by one's lawyer representing opposing counsel in unrelated malpractice or discipline case); Conn. Bar Ass'n Informal Op. 2012-10 (2012) (personal injury lawyer and insurance defense counsel who are opponents in many cases and one represents the other in unrelated litigation must determine if the representation would materially limit the representation of each lawyer's clients and, if so, must obtain the affected clients' informed consent, confirmed in writing); Me. Prof'l Ethics Comm'n Opinion 205 (2011) (lawyer who is representing opposing counsel in an unrelated matter must determine if there is a significant risk of materially limiting his ability to represent either client and may seek informed consent to continued representation of each client if the lawyer reasonably believes the lawyer can give competent diligent representation to each); N.J. Advisory Comm. on Prof'l Ethics Op. 679 (1995) (conflict of interest caused by lawyer's representation of opposing counsel in unrelated matter may be waived with informed consent); Iowa State Bar Ass'n Ethics & Practice Guidelines Comm. Advisory Op. 92-28 (1993) (lawyer may represent a frequent opposing counsel in an unrelated matter); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 579 (1987) (lawyer may represent opposing counsel in unrelated litigation with client's informed consent if no effect on their independent professional judgment); Ill. State Bar Ass'n Advisory Op. 724 (1981) (no conflict for opposing counsel where one previously represented the other).

[4] For example, according to U.S. Census Bureau data from November 2018,"[t]he median age at first marriage in the United States has continued to rise in recent years." The number of young adults living with an unmarried partner has also increased. For example, "[a]mong young adults 18 to 24, cohabitation is now more prevalent than living with a spouse." *See* U.S. CENSUS BUREAU RELEASES 2018 FAMILIES AND LIVING ARRANGEMENTS TABLES, https://www.census.gov/newsroom/press-releases/2018/families.html (Nov. 14, 2018).

[5] ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 488 (2019) [hereinafter ABA Formal Op. 488].

488. The categories here are: (i) "intimate relationships," (ii) "friendships," and (iii) "acquaintances."[6] This opinion explains the relevant considerations in these circumstances.

II. Analysis

Model Rule 1.7(a)(2) provides that in the absence of informed consent confirmed in writing a lawyer may not represent a client if "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." Comment [11] explains that when opposing counsel are 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."[7] The Committee concludes that these risks also arise when there are close personal or intimate relationships between lawyers who represent opposing clients. How lawyers should analyze these relationships for purposes of Rule 1.7(a)(2) is discussed below in Sections A, B, and C. There are general principles, however, that apply to all of them.

First, not all personal relationships with opposing counsel create a conflict that would require client informed consent or even disclosure. Some relationships with opposing counsel are so casual that they would not affect a lawyer's independent professional judgment. For other relationships, a lawyer's duty of communication under Rule 1.4 might obligate the lawyer to disclose a relationship, even if the lawyer believes that the relationship would not create a conflict under Rule 1.7. For still other relationships, a conflict based on personal relationships with opposing counsel exists and may be waived if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation to [the client]" and the lawyer obtains the affected client's informed consent, confirmed in writing.[8]

The reasonableness of the lawyer's belief will depend on the circumstances. "Reasonable" is defined in Model Rule 1.0(h).[9] For instance, a lawyer's independent judgment is likely to be

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[6] *See id.* at 1, 2, 4-6. Some different considerations affect judicial disclosure and disqualification, e.g. judges must appear to be impartial as well as be impartial in fact, but the categories and considerations set forth in Formal Opinion 488 are useful for lawyers when analyzing their personal relationships with opposing counsel, as described in this opinion.

[7] By contrast, some jurisdiction's rules explicitly address the types of personal relationships discussed in this opinion. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 1.7(c)(2) (2018) (addressing "intimate personal relationship"); IOWA RULES OF PROF'L CONDUCT R. 1.8(i) (2012) (including cohabiting lawyers and lawyers in any "romantic capacity"); OR. RULES OF PROF'L CONDUCT R. 1.7 (2020) (including "domestic partner"); VA. RULES OF PROF'L CONDUCT R. 1.8(i) (2020) (including a lawyer "intimately involved with another lawyer"); WASH. RULES OF PROF'L CONDUCT R. 1.8(k)(1) (2015) (including "intimate relationship with another lawyer"); and W. VA. RULES OF PROF'L CONDUCT R. 1.7 cmt. [11] addressing "sharing living quarters with another lawyer").

[8] MODEL RULES R. 1.7(b)(1). If a lawyer believes that informed consent of a client due to the lawyer's relationship with opposing counsel is required, the lawyer should confer with opposing counsel. If opposing counsel disagrees that informed consent is required, the lawyer should consider whether the issue should be raised with the court if the matter is in litigation, and whether the lawyer has an obligation pursuant to Model Rule 8.3(a) to report opposing counsel. Model Rule 8.3(a) reads: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

[9] Model Rule 1.0(h) reads: "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." *See also* Model Rule 1.0(i) which reads: "'Reasonable

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.

Second, in determining whether a personal interest conflict exists, the lawyer should consider the lawyer's role in the matter. A lawyer who is sole or lead counsel in a matter is more likely to have a disqualifying conflict than a lawyer who has a subordinate or tangential role, such as researching discrete issues or drafting sections of papers to be filed, where that lawyer has little or no direct decision-making authority in the matter and minimal contact with the opposing counsel.[10]

Third, even when the lawyer has obtained informed consent confirmed in writing from the affected client, the lawyer must not reveal information relating to the representation unless permitted by one of the exceptions in Model Rule 1.6(b). Additionally, such a lawyer must take reasonable measures to assure that no confidential information is inadvertently disclosed to the opposing counsel with whom the lawyer has the personal relationship.[11] Inadvertent disclosure could occur, for example, if papers relating to the representation are left in view or telephone conversations are overheard.

Fourth, if a lawyer undertakes representation in which the lawyer has a personal relationship with opposing counsel and later determines that the lawyer will no longer be able to provide competent and diligent representation to the client because of the personal relationship, the lawyer must withdraw from the representation.[12]

Finally, personal interest conflicts ordinarily are not imputed. As Rule 1.10(a)(1) provides:

> 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, unless (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant

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belief' or 'reasonably believes' when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."

[10] Subordinate lawyers may have to consult with supervisory lawyers in order to withdraw or move to withdraw. A subordinate lawyer, or any other lawyer who is not lead counsel, should disclose the relationship to a supervisor and seek advice on how to proceed in the circumstances, consistent with this opinion. *See also* MODEL RULES R. 5.1 & 5.2.

[11] *See* MODEL RULE R. 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." *See also* MODEL RULE R. 1.6 cmt. [18].

[12] *See, e.g.*, MODEL RULE R. 1.16(a), which provides in relevant part, "[a] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct . . . ". This obligation to withdraw may arise if a personal relationship develops during the course of a representation.

risk of materially limiting the representation of the client by the remaining lawyers in the firm.

For close family relationships, Rule 1.7, cmt. [11] explains: "[t]he disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated."[13] Similarly, a conflict arising when a lawyer seeks employment with an opposing law firm is not ordinarily imputed.[14] The Committee concludes, as have other ethics committees, that conflicts arising out of the types of personal relationships discussed in this opinion also are not ordinarily imputed under Rule 1.10.[15] Imputation would be appropriate, for example, when other lawyers at either firm also have personal relationships with the opposing counsel or where the personal relationships involve managing partners. In such circumstances, the broader ties to the opposing counsel's firm may influence the lawyer's independent judgment.

A. Intimate Relationships

Lawyers who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purposes. The same is true for couples who are engaged to be married or in exclusive intimate relationships. 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, assuming the lawyers reasonably believe that they will be able to provide competent and diligent representation to each client.[16]

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[13] MODEL RULE R. 1.7 cmt. [11].

[14] ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 96-400, at 8 (1996). For situations where the negotiating lawyer's conflict might be imputed, *see id*. at note 12. *See also* D.C. Bar Ethics Op. 367 (2014).

[15] *See, e.g.*, State Bar of Ariz. Advisory Op. 01-12 (2001) (finding that a conflict created by "romantic relationship" between a public defender and a police officer is not imputed to the entire public defender's office); State Bar of Mich. Op. R-3 (1989) (regarding lawyer spouses (or their firms) representing opposing clients; no imputation unless the lawyer spouses or the lawyers litigating the cases have a personal interest in the outcome of the litigation); N.C. State Bar Formal Op. 2019-3 (2019) (stating that where there is an "ongoing" and "sexually intimate relationship" between a public defender and a prosecutor there is no imputation "so long as the conflict 'does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm [or office]'").

[16] Comment [11] to Rule 1.7 provides in relevant part: "[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." (Emphasis added.) Opinions from several jurisdictions agree that intimate and cohabiting relationships should be treated like spousal ones. *See, e.g.*, State Bar of Ariz. Advisory Op. 01-10 (2001) (stating that attorney in Legal Defender's Office who is cohabiting with an attorney in the County Attorney's Office may work opposite each other on the same case only if: (i) both attorneys believe that the representation will not be materially limited by their relationship and (ii) both obtain informed consent by the clients; "[t]he conflict created by the cohabiting relationship is not imputed to other members of the offices"); State Bar of Mich. Op. R-3 (1989) (finding cohabiting lawyers must follow the same rule as lawyer spouses; they may not represent clients who are adverse unless the clients are informed of the relationship and give their consent to the representation; dating lawyers representing adverse parties also have obligations: they should "disclose the relationship to the clients if their relationship is sufficiently close that it could raise questions in the minds of the clients as to whether their interests would be zealously served"; "[l]awyers should err on the side of caution and should disclose such relationships or decline representation . . . if there is any possibility that the clients would consider the existence of the lawyers' dating relationship to be detrimental to the lawyer-client relationship."); N.C. State Bar Formal Op. 2019-3 (2019) (noting that assistant district attorney and criminal defense lawyer in an intimate relationship may not be adversaries in a case unless they disclose the relationship to and obtain written informed consent from the affected clients and the appropriate governmental official).

Opposing counsel who are in some type of intimate relationship, but are not exclusive, engaged to be married or cohabiting, must carefully consider whether the relationship creates a significant risk that the representation of either client will be materially limited by the lawyers' personal relationships.[17] The prudent course would be to disclose to the affected clients and obtain their informed consent.[18]

B. Friendships

Friendships may be the most difficult category to navigate. On the one hand, an adversary may be a dear and longtime friend or someone with whom the lawyer regularly socializes. On the other hand, an adversary may be considered a "friend" even though contact is occasional, brief, or superficial. As noted in ABA Formal Opinion 488:

> 'Friendship' implies a degree of affinity greater than being acquainted with a person . . . the term connotes some degree of mutual affection. Yet, not all friendships are the same; some may be professional, while others may be social. Some friends are closer than others.[19]

Failure to disclose intimate relationships and secure adequate consents can result in discipline, disqualification or other significant consequences. A conviction may be reversed. *See* People v. Jackson, 213 Cal. Rptr. 521, 522 (3d Dist. Ct. App. 1985) (reversing conviction; defense counsel failed to inform defendant of his "dating" relationship with the prosecutor; the two "appeared as counsel in directly adverse roles representing defendant and the People respectively at the preliminary examination, at the pretrial settlement conferences, and at trial"); Commonwealth v. Stote, 922 N.E.2d 768, 778 (Mass. 2010) (Marshall, C.J.) (denying reversal after evidentiary hearing, and noting, "[w]e remind members of the bar of their professional obligation under rule 1.7(b) [analogous to M.R. 1.7(a)(2) and (b)(1)&(4)] to disclose to their clients any intimate personal relationship that might impair their ability to provide untrammeled and unimpaired assistance of counsel."). Fees may be forfeited. *See* DeBolt v. Parker, 560 A.2d 1323 (N.J. 1988) (finding lawyer spouses represented adverse interests; fees allowed but only after finding adequate disclosure and consent under then NJ RPC 1.8(i): "[a] lawyer related to another lawyer as parent child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship").

[17] *See, e.g.*, State Bar of Mich. Op. R-3 (1989) (opposing counsel who are dating but not cohabiting or engaged must determine whether the relationship is sufficiently close to require disclosure to and informed consent of affected clients); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 660 (1993) ("a couple who date frequently" may not appear opposite one another in a criminal case; "a dating relationship between adversaries is inconsistent with the independence of professional judgement required by [the New York Rules]"; "whether other lawyers [in defense counsel's firm] will be disqualified depends on the facts and circumstances"). *See also* ABA Formal Op. 488, *supra* note 5, at 6-7 (discussing judges' close personal relationships).

[18] This opinion does not address personal relationships involving previous marriages or cohabitations, engagements, and exclusive dating arrangements that have ended. Adversaries in such situations, however, must also determine pursuant to Rule 1.7(a)(2) whether there is "a significant risk that the representation of one or more clients will be materially limited" by the lawyer's prior relationship with opposing counsel and act accordingly. *See also* ABA Formal Opinion 488, *supra* note 5, at 6 (stating that "close personal relationships" include "an amicable divorce" and being a "godparent" of a lawyer's or party's child). This opinion also does not address when an existing relationship between opposing counsel ends during the course of the representation. The lawyer whose relationship ends while the representation continues must analyze whether the lawyer's new circumstances create a significant risk that the representation of the client will be materially limited by the change in the relationship and, if so, whether the lawyer must disclose the new circumstances to the affected client and obtain the client's informed consent to continued representation. A factor to be considered would be whether the breakup is amicable or hostile.

[19] ABA Formal Op. 488, *supra* note 5, at 4. In addition, as noted in footnote 11 of Formal Opinion 488, "[s]ocial media, which is simply a form of communication, uses terminology that is distinct from that used in this opinion. Interaction on social media does not itself indicate the type of relationships participants have with one another either

Close friendships with opposing counsel should be disclosed to each affected client and, when circumstances require as described further below, their informed consent obtained. ABA Formal Opinion 488 provides guidance here, too. The following are indicia of friendships that would require disclosure and, ordinarily, informed consent:

> [Lawyers who] exchange gifts at holidays and special occasions; regularly socialize together; regularly communicate and coordinate activities because their children are close friends and routinely spend time at each other's homes; vacation together with their families; share a mentor-protégé relationship developed while colleagues . . . [or] share confidences and intimate details of their lives.[20]

By contrast, friendships that might require disclosure to the affected clients but will not ordinarily require consent from clients include lawyers who "once practiced law together [and] may periodically meet for a meal when their busy schedules permit or, if they live in different cities, try to meet when one is in the other's hometown."[21] Similarly, adversaries who "were law school classmates or were colleagues years before [and] may stay in touch through occasional calls or correspondence, but not regularly see one another"[22] will typically not require the consent of affected clients and may not even require disclosure. Whether either consent or disclosure is required depends on the lawyer's considered judgment as to whether Model Rule 1.7(a)(2) applies and, if so, whether the lawyer reasonably believes the lawyer can competently and diligently carry out the representation notwithstanding the conflict.

In sum, 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. If 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.

C. Acquaintances

Acquaintances are relationships that do not carry the familiarity, affinity or attachment of friendships. Lawyers, like judges, "should be considered acquaintances when their interactions . . . are coincidental or relatively superficial, such as being members of the same place of worship, professional or civil organizations, or the like."[23] Lawyers who are "acquaintances" may see each other at such gatherings, even frequently, without feeling a close personal bond. They might regularly meet at bar association or other business events, present continuing education programs together, or serve on bar association committees or boards together where their relationships may be collegial but not necessarily fall into the category of a "friend" that could materially limit the lawyer's independent professional judgment on behalf of a client. Similarly, lawyers who

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generally or for purposes of this opinion. . . . The proper characterization of a person's relationship with an opposing counsel depends on the definitions and examples used in this opinion."

[20] ABA Formal Op. 488, *supra* note 5, at 4.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 4.

regularly see each other at civic or social events but do not make any particular effort to seek each other's company do not have the type of close personal friendship requiring disclosure and informed consent. Again, as described in ABA Formal Opinion 488, the following without more do not create a close personal relationship:

> [Lawyers] might both attend bar association or other professional meetings; they may have represented co-parties in litigation. . .; they may meet each other at school or other events involving their children or spouses; they may see each other when socializing with mutual friends; they may belong to the same country club or gym; they may patronize the same businesses and periodically encounter one another there; they may live in the same area or neighborhood and run into one another at neighborhood or area events, or at homeowners' meetings; or they might attend the same religious services. . . . Generally, neither . . . seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect.[24]

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.

III. Conclusion

A lawyer's personal relationship with opposing counsel may create a conflict under Model Rule 1.7(a)(2). Lawyers must examine the nature of the relationship to determine if there is a significant risk that lawyer's representation of the client will be materially limited by the lawyer's personal relationship and, if so, whether the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client and each affected, who must then give informed consent, confirmed in writing.

Using the guidelines in this opinion, lawyers should evaluate whether the relationship is a close personal or intimate relationship, a friendship, or the adversary is merely an acquaintance. Cohabiting, intimate and similar relationships with opposing counsel must be disclosed, and the lawyers ordinarily may not represent clients in the matter, unless each client gives informed consent confirmed in writing. Because friendships exist in a wide variety of contexts, friendships need to be examined closely. Close friendships with opposing counsel should be disclosed to clients and, where appropriate, as discussed in Part IIB, their informed consent, confirmed in writing, obtained. By contrast, some friendships and most relationships that fall into the category of acquaintances need not be disclosed, nor is clients' informed consent required. Regardless of whether disclosure is mandated, however, the lawyer may choose to disclose the relationship. Disclosure may even be advisable to maintain good client relations.

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[24] *Id.*