Conflicts of Interest in Family Law Matters

BY MARCY TENCH STOVALL

Conflicts of interest can arise in any practice area, but the personal nature of family law litigation makes it all the more important for lawyers to be careful to avoid taking on representation where a conflict of interest claim could trigger a motion for disqualification or breach of fiduciary duty claim.

The rules that govern lawyer conduct with respect to conflicts of interest arise out of a fundamental attorney obligation: the duty of loyalty. For practitioners in family law, as for all lawyers, that duty dictates that the lawyer's primary concern in any representation is to protect and further the best interests of the client. If there are other interests at play that pose a risk of adversely affecting the lawyer's ability to advocate for the client's best interest and/or give advice untainted by other considerations, there is a conflict of interest. And in the absence of consent or where the conflict is not consentable, a conflict of interest means that the lawyer may not take on the representation.

Rule 1.7 and the Prohibition on Direct Adversity

The most basic conflict of interest rule is that a lawyer may not represent a client who is directly adverse to another client, per the American Bar Association (ABA) Model Rules of Professional Conduct Rule 1.7(a)(1). To take the most obvious example of how the prohibition applies in family law: a lawyer may not represent both spouses in a marital dissolution action. That will be true even if the parties come to the lawyer together, saying that they have already worked out financial and custody issues between them and just need assistance formalizing the agreement and putting everything into writing. In such a situation a lawyer is likely to be unable to competently and diligently advise *both* parties.

Imagine, for example, that the lawyer sees that one or more terms of the parties' proposed agreement is unfairly detrimental to the interests of one spouse or that the agreement somehow takes advantage of one spouse's misunderstanding of the parties' respective rights. In that situation, the lawyer could not properly provide clarifying advice to the potentially disadvantaged spouse because such advice would likely be contrary to the interests of the *other* spouse (the one who would gain an advantage). But if the lawyer were to fail to give such advice, she would be exposed to a claim by the disadvantaged spouse that the inherent conflict of interest resulted not just in legal malpractice, but a breach of fiduciary duty, a much thornier claim to defend.

Rule 1.7's prohibition of direct adversity also means that a lawyer may not represent one spouse if the other spouse is a client of the lawyer in another matter, even if the other matter is *unrelated* to the dissolution action. And the same is true even if it is another firm lawyer who represents the adverse spouse in the unrelated matter. That is because under Rule 1.10 (Imputation of Conflicts of Interest: General Rule), the conflict of one lawyer at a firm will be imputed to all other lawyers at the same firm.

Where a conflict arises out of a law firm's representation of adverse parties in unrelated matters, such representation may be undertaken where both affected clients provide informed consent, confirmed in writing. But it may be wiser to forgo such representation. In the emotionally fraught circumstances common to so many family law matters, even to ask for consent may cause either or both of the affected clients to doubt the lawyer and the law firm's loyalty. As explained in the Comment on Rule 1.7: "the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue the 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."

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Rule 1.9: Representation Adverse to a Former Client

In addition to ensuring that a prospective representation raises no conflicts with respect to a current client of the lawyer or her firm, lawyers must also consider whether there is a conflict under Rule 1.9 (Duties to Former Clients). Rule 1.9 does not create a blanket prohibition on representation adverse to a former client. Rather, under Rule 1.9, a lawyer is prohibited from undertaking representation adverse to a former client only if the new matter is "the same" as, or "substantially related" to, the matter in the prior representation. Where there is a claim of a former client conflict of interest—typically raised in the former client's motion to disqualify a former attorney from representing an opposing spouse—the dispute will usually turn on whether the former matter is "substantially related" to the current divorce proceedings. The Commentary to Rule 1.9 provides this gloss: "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." A leading resource for interpreting the Model Rules summarizes the development of the "substantial relationship" analysis as follows: "Today, most courts and other authorities hold that the substantial relationship test is not a formalistic inquiry into degrees of closeness, but is in large measure a judgment as to whether former clients are at risk that their confidences will be turned against them." Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, *The Law of Lawyering*, (4th Ed. 2018-2 Supp.) § 14.07.

In marital dissolution matters, the question of whether there is a former client conflict commonly arises in the situation where a lawyer has previously jointly represented a married couple in their estate planning or in one or more real estate transactions, and later one of the spouses seeks the lawyer's representation in the couple's marital dissolution action. There are conflicting views about whether such "family lawyer" representation is "substantially related" when the couple subsequently divorces. In a 2005 opinion, the Oregon State Bar took the position that in most circumstances the joint estate planning representation does not present a conflict of interest with respect to subsequent representation of one of the spouses in a dissolution action. Oregon State Bar, No. 2005-148, *Conflicts of Interest, Former Clients: Representing One Spouse in Dissolution after Joint Estate Planning* (revised as of 2016). In that situation "it does not appear that Lawyer would be in possession of information relating to the representation of Husband that would not already be known to Wife or to which Wife would not otherwise have access," as is generally the case where there is a joint representation. By contrast, in a 2001 opinion, the New Hampshire Bar Association Ethics Committee, while not answering the question directly, offered a more cautious view: "It is likely that the potential to utilize information obtained during the prior matter will arise and place the lawyer in a position in which his or her obligation to protect a former client's confidences conflicts with the obligation to represent the current client." New Hampshire Bar Association Ethics Committee, Practical Ethics Article, *Conflict of Interest in Family Law Matters* (2001).

The analysis of whether matters are "substantially related" for purposes of Rule 1.9 will necessarily turn on how the judge in any particular case views the underlying facts and particular circumstances of the case at issue. This can lead to considerable variation. For example, the Oregon State Bar's conclusion that joint estate planning generally did not preclude subsequent representation rested in part on the premise that, in a joint representation, information is generally presumed to be shared and where that is the case, "no information-specific former-client conflict would exist."

Moreover, in a marital dissolution action, it is generally the case that the parties are required to make full disclosure of their income, assets, and other financial matters. The fact that financial information is discoverable in matrimonial cases should dictate *against* disqualification. This was the position a Connecticut trial court took in denying a disqualification motion in a dissolution action: "any disclosures to the attorney in the previous [real estate] matters were about the real estate itself or the parties' respective sources of income-both topics subject to full disclosure in the present matrimonial action." *Jensen v. Jensen*, 2001 WL 1028897, at *2 (Conn. Super. Ct. 2001). But in a more recent decision, another Connecticut judge went in the opposite direction, granting a motion to disqualify the "family attorney" from representing the husband in a divorce action, apparently concluding that disqualification was necessary to protect the wife's confidential financial information. *Lavey v. Lavey*, 2020 WL 13907706, at *6 (Conn. Super. Ct. 2020).

Serving as a Neutral Creates a Conflict of Interest

Once a lawyer has served as an arbitrator, mediator, or third party neutral in the course of a divorce proceeding, Rule 1.12(a) prohibits the lawyer from afterwards representing a party to the same proceeding. The concern with such representation is not one of client loyalty or protection of client confidences. As explained in the Rule 1.12 Comment, the prohibition follows from the fact that even though lawyers serving as third party neutrals do not have an obligation to protect client confidences, as Rule 1.6 requires, "they typically owe the parties an obligation under law or codes of ethics governing third-party neutrals."

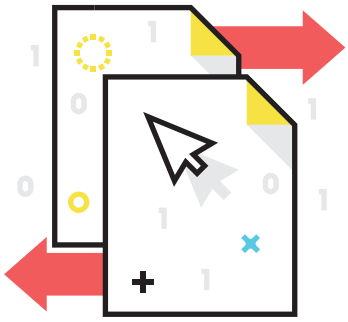
Rule 1.12(a) provides, however, that if all of the parties consent to a former neutral's representation of a party, and the consent is confirmed in writing, the former neutral may properly represent a party spouse. And where one lawyer at a

firm is disqualified from representing a party because of service as a third-party neutral in a proceeding, another lawyer at the same firm may subsequently represent one of the spouses so long as the "disqualified lawyer is timely screened from participation in the matter." Rule 1.12(c)(1). *See also* Rule 1.0(l) and Comment (definition of "screened"). Such a situation does not require consent of an opposing spouse, but does require written notice to the other spouse "and any appropriate tribunal to enable them to ascertain compliance with the provisions of [the] Rule."

The conflict of interest rules in the Model Rules do not expressly apply to an attorney who serves as guardian ad litem (GAL). But in many states, the code of conduct applicable to GALs dictates that a lawyer should decline an appointment as GAL in a matter if the lawyer, or someone at her firm, acted as counsel to, or has a prior relationship with, any of the parties, witnesses, or others connected with the family. *See e.g.* Commonwealth of Massachusetts, Standards for Category F Guardian ad Litem Investigators (in effect as of January 24, 2005), § 1.3.A ("If the GAL has any prior or existing direct or indirect relationships with parties, their families, their attorneys, material witnesses, or someone else connected with the family, the GAL must consider whether the GAL's impartiality is compromised as a result of these relationships"; situations in which a "GAL *shall* decline the appointment," include where "[t]he GAL or the GAL's law firm previously advised or acted as counsel for a party, child, or other person closely aligned to a party, including but not limited to a party's spouse, non-marital partner, or a material witness." (emphasis added)). Some states may permit service as a GAL under such circumstances, provided all parties are fully informed and waive any conflict. *See e.g.,* Indiana State Office of GAL/CASA, Code of Ethics for GAL in Civil Family Law Cases (updated as of March 28, 2025), ¶ 11 ("to avoid any actual or apparent conflicts of interest . . . GAL shall not serve on a case when GAL has been personally involved with a family or with the circumstances surrounding the case unless there is full disclosure of the potential conflict to all parties and any perceived or actual conflict is waived.").

Prospective Client Issues

Yet another situation that may give rise to a conflict is where a lawyer meets a prospective client and obtains information about the prospective client's divorce matter, but the prospective client does not go on to become a client of the lawyer's firm. The risk for the intake lawyer is that communications with the prospective client may disqualify the intake lawyer or her firm from representing a different client who, as it later turns out, is the other spouse, adverse to the prospective client who never became a client. Under Rule 1.18, "Duties to Prospective Clients," the extent of the risk will depend on the extent to which the intake lawyer received "disqualifying information" from the prospective client, that is "informa-



Tips and Best Practices

Always run a preliminary conflicts check before you meet with a prospective client or obtain any detailed information about the potential new matter.

Basic information for conflicts check:

- Full names of both spouses, including any other names either might have used in the past
- Names of former spouses of both parties
- Children's names and schools
- Place of employment of both spouses

Supplement the conflicts check to include additional information obtained, e.g. closely held entities in which one or both spouses own interests.

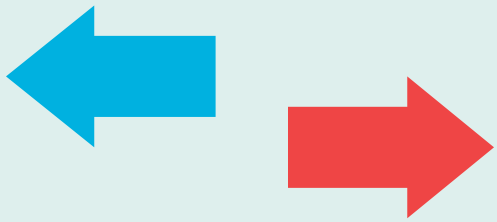
Include the names of prospective clients in your conflicts data base, even if not retained.

Provisions to consider including in engagement agreement for joint representation of spouses (while still married):

- Both parties understand that information obtained in the joint representation will not be confidential as between the jointly represented parties.
- The joint representation will not preclude the lawyer from subsequent representation of one or the other of them should they subsequently be adverse. (But keep in mind that advance consents are not always enforceable.)

Because the disqualification standard for current client conflicts is stricter than for former clients, always be sure to communicate to a client that the representation has concluded.

Keep things professional: under Rule 1.8(j), sexual relations with a client create a conflict of interest.



tion . . . that could be significantly harmful to" the prospective client.

In a 2020 Opinion, the ABA offered some examples of the type of prospective client information that could disqualify a lawyer from later taking on a new client adverse to the prospect: (1) the prospective client's views on the weaknesses of a claim, on litigation strategies, or position concerning potential settlement issues; (2) sensitive personal information; and (3) "personal accounts of relevant events." American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 492, *Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information* (June 9, 2020) (ABA Opinion 492). If an intake lawyer obtains such information from a prospective divorce matter client, Rule 1.18 will preclude the lawyer from representing the opposing spouse in that divorce proceeding.

The prospective client dilemma is a commonplace occurrence in the area of family law, and the fact that many spouses facing a dissolution action will consult with multiple attorneys before choosing one increases the pool of potential conflicts.

But where Rule 1.10 would impute disqualification to all attorneys at a firm where one is disqualified due to a current or former client representation, under Rule 1.18(d)(2), imputation of the intake lawyer's personal disqualification to other lawyers in the same firm may be avoided *if*: (1) the intake lawyer took "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client"; (2) the disqualified lawyer is timely screened from any participation in the matter; and (3) the prospective client receives written notice.

This raises the question of what are the "reasonable measures" a lawyer should take in obtaining information from a prospective client in order to avoid disqualification by imputation for other lawyers in her firm? In a 2024 follow-up to ABA Opinion 492, the ABA noted that lawyers "who seek and obtain information without limitations" do not meet the "reasonable measures" standard and observed that the "'reasonable measures' standard means that lawyers must exercise discretion throughout the initial communications." ABA Formal Opinion 510, *Avoiding the Imputation of a Conflict of Interest When a Law Firm Is Adverse to One of its Lawyer's Prospective Clients* (Mar. 20, 2024) ("ABA Opinion 510"). This means that in exercising "discretion," the intake lawyer must navigate a course between "strictly limiting the scope of conversation"—with the attendant risk that the lawyer would not obtain enough relevant information to determine whether to take on the representation—and, on the other hand, letting the "potential client talk freely about the matter"—a process "unlikely to involve reasonable measures to limit the information being provided."

The prospective client dilemma is a commonplace occurrence in the area of family law, and the fact that many spouses facing a dissolution action will consult with multiple attorneys before choosing one increases the pool of potential conflicts. The Rule 1.18 Comment provides that "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" While this mean that a person who engages in that kind conduct would not be entitled to the protections of the Rule, difficulties of proof may limit the lawyer's ability to rely on that provision in opposing a motion for disqualification.

If a lawyer has obtained disqualifying information from a prospective client, she will not be able to represent the opposing spouse, and all other lawyers in her firm will be disqualified if she has not taken reasonable measures to limit the information obtained in the initial consultation with the prospective client. In the fraught emotional context of an impending divorce action, a lawyer must take special care to keep a prospective client from spilling out unsolicited information in the initial intake conversation and limit the initial intake to only such information as is necessary to run and conflicts check. FA

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