

Know Your (Material) Limits

“Material” limitations on representing potential clients might not be immediately apparent. Lawyers have an ethical duty to think about relationships and responsibilities that could be significant enough to become conflicts of interest.

BY STACIE H. ROSENZWEIG

Ask someone not well versed in legal ethics what they know about conflicts of interest, and they probably will reply with some version of “one lawyer can’t represent opposing parties in the same case.”¹ Maybe they’ll even get to “one lawyer can’t represent a client against a former client, if they know too much.”² These are the conflicts that, at least superficially, don’t require much explaining (though they still trip up experienced lawyers on occasion).

But it’s highly likely that no matter how long you talk, the person would never mention material-limitation conflicts. (Chances are, that person would have put their earbuds back in and gone away before getting to material-limitation conflicts even if they knew about them.) Material-limitation conflicts are governed by SCR 20:1.7(a)(2), which is probably the biggest “it depends” ethics rule of them all. This sort of conflict exists 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.”

A common example of a conflict of this nature is offered in ABA Comment 8 to the rule – “when a lawyer [is] asked to represent several individuals seeking to form a joint venture.” Each individual seemingly has interests that align with the others, but that alignment may be superficial – although the people have the same goal (forming the joint venture), they might each have separate and perhaps competing interests in pursuing that goal. Advocating for one client’s wishes may pit the lawyer against the other clients and perhaps against the joint venture (which itself might or might not be a client), and it becomes a bit of “Conflicts Inception.”

These conflicts can be even harder to identify when they concern a personal interest of a lawyer – a job prospect, a friendship, or a visceral

dislike of the client or their cause.

Ugh This [Expletive] Person

I’ll make it clear from the outset: Lawyers do not need to like their clients. Being required to like clients would not be a realistic standard. If your reaction to seeing a particular name appear on caller ID again is wanting to quit practicing law, move to the Peruvian highlands, and knit alpaca sweaters, I won’t judge.

Lawyers also don’t need to agree with their clients’ causes.³ If you voted for Kodos⁴ and President Kang comes along and wants you to represent the administration in a contractual dispute over the giant death ray, you can do that.

But how much disagreement is too much? This is an “it depends” scenario. If you find yourself going out of your way to avoid talking to the client or thinking about them or otherwise doing the work you need to do, your personal interests may conflict with those of your client. Additionally, if working for President Kang means you alienate all your clients on Team Kodos, even if you’re not working for Team



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Kodos itself, your business interests may conflict with your client's interests.

You should, if possible, decline representation when you know you will be rooting for your client to lose. If the visceral dislike pops up during representation, SCR 20:1.15(a) *requires* a lawyer to withdraw (or at least move to withdraw) when continued representation will result in violation of the Rules of Professional Conduct; additionally, you may withdraw if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”⁵

Opposing Counsel is Your BFF

This is a much more pleasant situation, to be sure. There were 25,669 members of the State Bar of Wisconsin during fiscal year 2022-23,⁶ and we all seem to know each other. Some of us are friends, and sometimes, we end up working on cases opposite our friends.

That can be a lot of fun, but is it a conflict? (You know the drill by now. It depends.) American Bar Association Formal Opinion 494 (July 29, 2020) suggests that a personal relationship with opposing counsel creates an SCR 20:1.7(a)(2) conflict when the relationship is intimate (marriage, cohabitation, possibly a serious dating relationship). Lawyers should disclose the relationship to affected clients and obtain informed consent. An acquaintance relationship – for example, you serve on a committee together or attend the same house of worship – does not typically create the conflict.

Friendships that are in between are a little trickier and should be reviewed on a gradient. Formal Opinion 494 concludes that if the lawyers exchange gifts, regularly socialize, coordinate their children's activities, share a mentor-protégé relationship, or otherwise share confidences, the friendship might be sufficiently close to trigger the rule. On the other hand, Formal Opinion 494 suggests that lawyers might not need to disclose more casual relationships,

such as staying in touch with former colleagues or classmates. Don't worry about disclosing the “like” that a lawyer gave your Facebook post last week.

Interviewing With the Enemy

Lawyers are, of course, free to look for other work while they are employed – in fact we may be freer than some other professionals, because SCR 20:5.6(a) prohibits us from entering into agreements that restrict our right to practice following termination of the partnership or employment relationship (other than for retirement).

But what happens when a lawyer applies for a job with an opposing party or law firm? Wisconsin Formal Ethics Opinion EF-19-01 explores this conflict: “The lawyer who is seeking employment from an opposing firm or party clearly has an incentive to please the opposing party or firm and this creates a significant risk of materially limiting the lawyer's ability to represent the client.”

The “it depends” part of this analysis focuses on how far the lawyer got in the job search and what sort of work the job-seeking lawyer did and is doing for the client. Sending a generic resumé to several law firms or receiving an unsolicited call from a potential employer or a headhunter representing that employer should not result in a conflict; accepting an interview or sending a targeted job application or expression of interest will trigger one, however.

To give rise to a conflict, the lawyer's involvement in the matter “must be material and active.” The lawyer need not be in charge of the representation, but whether the lawyer has client contact or contact with the opposing party or opposing counsel or is working on the substance of the matter are all considerations.

At this point, if the job-seeking lawyer wants to pursue the position, they have a few options, all awkward. If they can do so without harming the interests of the client, they can ask other lawyers in their firm to take over the matter or can seek

withdrawal from it.⁷ Or, the lawyer can disclose the conflict to the affected client and obtain written informed consent.⁸

Whew. All of these “it depends” conflicts. You may be asking yourself, “How is a well-adjusted lawyer supposed to have feelings and opinions and relationships and clients all at the same time? There are conflicts all the way down!”

The good news is that these conflicts are typically waivable, so long as you reasonably believe you can provide competent and diligent representation to all affected clients, and each affected client gives written informed consent.⁹ This is, of course, a fact-intensive analysis – “it depends.”

Even better, conflicts stemming from purely personal interests do not impute to a firm,¹⁰ so absent other concerns, your colleagues may handle representation and you can go on hanging out with your bestie or attending that “miniature American flags for others” protest without all that extra paperwork. **WL**

ENDNOTES

¹SCR 20:1.7.

²SCR 20:1.9.

³SCR 20:1.2(b).

⁴*The Simpsons: Treehouse of Horror VII* (Fox television broadcast Oct. 27, 1996).

⁵SCR 20:1.16(b)(4).

⁶See *The Lawyer Regulation System: FY 2022-23 Annual Report* 11, <https://www.wicourts.gov/courts/offices/docs/annual-report.pdf> (last visited Dec. 4, 2023).

⁷SCR 20:1.16(b)(1).

⁸SCR 20:1.7(b).

⁹*Id.*

¹⁰SCR 20:1.10(a)(1). **WL**

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