

14-05

Opinion No. 14-05

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

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ISSUE

1. When an Attorney (A) is representing another Lawyer (L) in a legal malpractice or disciplinary action, and Lawyer L undertakes to represent a client in a matter adverse to a client of Attorney A, what are the ethical considerations?

OPINION

2. Attorney A representing a Lawyer L in a disciplinary or legal malpractice matter may face a concurrent conflict of interest if the Lawyer L (client) represents an individual who is an opposing party to a client represented by Attorney A. A concurrent conflict of interest would arise if there is a significant risk that Attorney A's representation of Lawyer L be will materially limited by her responsibilities to the client being sued by Lawyer L's client; or if there is a significant risk that Attorney A's representation of a client against Lawyer L's client will be materially limited by her representation of Lawyer L. Whether this situation poses a serious risk of materially limiting Attorney A's representation requires analyzing the factual situations presented.

3. Lawyer L may also face a concurrent conflict of interest if this dual relationship creates a significant risk that Lawyer L's representation of his client against Attorney A will be materially limited. Here, too, the factual context will be determinative.

4. Even if such a concurrent conflict of interest is created, it may be possible for all affected clients to give informed consent, confirmed in writing, to the conflict.

5. Because the risk that representation may be materially limited due to this situation will often be due to a personal conflict of interest, in many cases other lawyers in the firms of Attorney A and Lawyer L will be able to be involved in the representation without creating a conflict of interest.

BACKGROUND

6. Some Attorneys (A) undertake to represent other lawyers in legal malpractice or disciplinary actions. In most such cases, the Lawyer (L) facing discipline or a malpractice action continues to practice law. As a result Lawyer L may undertake to represent a client in a matter in which the opposing party is represented by Attorney A and/or Attorney A's firm.

7. The scenario presents questions both for Attorney A who is representing the Lawyer L in a disciplinary or malpractice action, and for Lawyer L who is representing a client in a case where his personal Attorney A is representing the opposing party.

ANALYSIS

8. Ethical rules prohibit conflicts of interest in order to protect client confidentiality and promote loyalty. Rule 1.7 of the Utah Rules of Professional Conduct governs concurrent conflicts of interests and provides:

"(a) ... 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."

The scenario described above is not one of direct adversity - neither Attorney A nor Lawyer L is representing a client who is "directly adverse to another client."

9. The question regarding Attorney A's conduct is whether there is a significant risk that Attorney A's representation of Lawyer L be will materially limited by her responsibilities to the client being sued by Lawyer L's client; or whether there is a significant risk that Attorney A's representation of a client against Lawyer L's client will be materially limited by her representation of Lawyer L. In most cases there will not be a risk that client confidentiality will be breached due to these different representations; rather loyalty will most often be the underlying concern. Whether this situation poses a serious risk of materially limiting Attorney A's representation requires analyzing the factual situations presented.

10. One can imagine a situation in which Lawyer L is charged with failing to diligently and competently undertake matters for various clients. If Attorney A encounters Lawyer L displaying that same lack of diligence and competence in the case where they are opposing

counsel, it might well result in Attorney A being unable to continue to effectively defend Lawyer L from the charges against him. At that point, Attorney A would know that a concurrent conflict of interest exists. On the other hand, if Lawyer L has been falsely charged with comingling funds, it is difficult to imagine why Attorney A will not be able to continue to effectively represent him simply because they are opposing counsel on a different case. There would be no significant risk of material limitation and no concurrent conflict of interest.

11. The scenario must also be analyzed from the perspective of Attorney A's other client. One can imagine that Attorney A's other client might feel that she is not getting Attorney A's best advocacy because Attorney A has an attorney-client relationship with opposing counsel Lawyer L. If this client loses trust in Attorney A or questions Attorney A's loyalty when she discovers Attorney A is representing Lawyer L, then this could materially limit Attorney A's representation of this client. At that point, a concurrent conflict of interest will have arisen.

12. The scenario should also be analyzed from the perspective of Lawyer L who is both Attorney A's client and Attorney A's opposing counsel. Does this dual relationship create a significant risk that Lawyer L's representation of his client against Attorney A will be materially limited? Here, too, the factual context will be determinative. If Lawyer L is in serious trouble in his disciplinary case and has come to rely and depend upon Attorney A to a high degree, it may be impossible for Lawyer L to adequately represent any client against Attorney A. On the other hand, if the disciplinary or malpractice case is minor or unfounded, Lawyer L's abilities to litigate against Attorney A may not be negatively affected. Even then, however, there is a risk that Lawyer L's client, if he discovers this representation, will lose trust in Lawyer L and question Lawyer L's loyalty. This could materially limit Lawyer L's ability to represent his client. Whether a concurrent conflict of interest arises is dependent upon the factual context.

13. Even where there is a "significant risk" that a lawyer's representation of a client "will be materially limited," Rule 1.7(b) provides that the representation may be undertaken "if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; . . . and (4) each affected client gives informed consent, confirmed in writing." Thus, even in the scenarios sketched out above where a concurrent conflict of interest has arisen, the possibility of the attorney concluding that he or she will be able to provide competent representation and obtaining the informed consent of the client exists. For example, where Lawyer L displays a lack of diligence and competence in his case against Attorney A, Attorney A could counsel her client Lawyer L about her

observations and concerns. At that point Lawyer L might admit his drug problem, provide his informed consent to on-going representation by Attorney A and agree to a goal of rehabilitation in his disciplinary case. As a result, Attorney A would be able to competently carry on that representation. Similarly, if Lawyer L's client loses trust in him when he discovers that Lawyer L is personally represented by opposing counsel Attorney A, there is the possibility of Lawyer L explaining the situation to his client and obtaining his client's informed consent to continued representation. This may also be possible when Attorney A's client loses trust when she discovers Attorney A is representing Lawyer L. However, Attorney A would need to obtain consent from her client Lawyer L in order to make disclosures to her other client and obtain that client's informed consent to on-going representation. Comments 18 and 19 to Rule 1.7 provide that "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. . . . Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when . . . one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision. . . ."

14. Rule 1.10 deals with imputation of conflicts of interest of one attorney to others in her firm. Rule 1.10 provides:

"(a) 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 upon a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm"

The potential conflicts of interest created by Attorney A representing Lawyer L in a disciplinary matter will often be personal conflicts of interest. For example, Attorney A's client may lose trust in Attorney A when she discovers that Attorney A is representing Lawyer L, opposing counsel in the client's case. But if this client were represented by another attorney at A's firm, the client would likely not question her attorney's loyalty to her. Likewise, where Lawyer L's client might lose faith when he discovers that Lawyer L is represented by opposing counsel Attorney A, if this client were represented by a different attorney at L's firm or if the opposing party were represented by a different attorney at A's firm, not L's personal attorney, the question of loyalty would likely not arise.

15. It is also relevant that Comment 22 to Rule 1.7 suggests that, in appropriate circumstances, "a lawyer may properly request a client to waive conflict that might arise in the

future." It would seem that Attorney A, in agreeing to represent Lawyer L in L's disciplinary or malpractice case, might seek a waiver of conflicts of interest should L represent a client who is adverse to a client represented by Attorney A.

16. In conclusion, when Lawyers (L) retain Attorneys (A) from other firms to represent them in disciplinary or malpractice matters, both the Lawyer-clients and their Attorney representatives should be aware of the possibility of conflicts of interest arising from cases in which counsel or their firms oppose one another.