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FEATURED TOPIC

PERSONAL RELATIONSHIPS & PROFESSIONAL RESPONSIBILITY

In some respects, one might say that one type of personal relationship is at the heart of the Model Rules of Professional Responsibility: the fiduciary relationship between the lawyer and her client. But the fiduciary relationship is a relationship entered into within what we would normally call a business context, one in which the lawyer performs a professional service for which she is compensated. Generally, when we speak of personal relationships, we mean relationships that are not based upon compensation but, instead, a familial or emotional bond. Several of the provisions in the Model Rules either directly or indirectly deal with this genre of personal relationship.

The first Rule that explicitly deals with personal relationships is Rule 1.8 (c):

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

This rule prohibits a lawyer from soliciting a "substantial gift" from a client unless the lawyer is a "related person," i.e. related by a family bond. Interestingly, the Rule explicitly permits a solicitation by a lawyer who is within two "degrees" (i.e., parent or grandparent, spouse, child or grandchild) and then goes on to include a lawyer who "maintains a close familial relationship" within this group. Neither the Rule nor the Comments to the Rule define the phrase "maintains a close relationship to the client." But one can easily imagine a situation in which a client employs his favorite niece as his legal counsel and that the two have a close relationship wholly apart from that of a lawyer-client. In such a case, it might well be reasonable for the favorite niece to ask her uncle for a gift, and the Rule appropriately would not bar this. However, as stated in the Rule, a lawyer who falls within this category of maintaining a close familial relationship with a client will be required, if challenged, to prove the nature of the relationship. This could be a difficult and costly requirement to the lawyer, particularly if there is family discord.

The next provision that directly mentions personal relationships is Rule 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.

This Rule prohibits, on conflict of interest principles, two lawyers within a single familial degree (parent, child, sibling or spouse) from representing directly adverse parties without client consultation and consent. There is no Comment to this Rule. Presumably, this rule is a specific subrule of Rule 1.7(a)(2), which deals with conflicts caused by material limitations on a lawyer' ability to competently represent a client. The point is: conflicts arise when there is either a danger that a lawyer's actions would cause a client to question her loyalty or when the lawyer's actions create a possibility of putting the lawyer's obligation to maintain client confidences at risk. When two lawyers representing directly adverse parties are closely related, there is always the possibility that a client may fear that her lawyer's loyalty to her may be compromised by the close family relationship. Similarly, a client might also fear that the lawyers might exchange confidential information because of their close relationship. Hence, imposing conflict of interest rules in this situation makes sense.

What may be questioned is why Rule 1.8(i) is narrower than 1.8(c). Why does it not contain the same additional provision as Rule 1.8(c) that extends to lawyers who do not fit within a single degree of family relationship but nevertheless "maintain a close family relationship." Is there less danger that a grandfather and granddaughter representing directly adverse parties might have a conflict than exists with a father and daughter representing opposing sides?

Rule 1.8(k) deals with what most would say is the most intimate of all personal relationships. It states:

> A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Comments 17 and 18 explain the reasoning behind this prohibition quite clearly:

> [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by

> privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.
>
> [18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

But one final misconception is worth debunking. A number of lawyers believe that, if a lawyer has sex with a client and they then get married, Rule 1.8(k) does not apply. They are mistaken. It may simply result in delayed disciplinary action for a violation. Not all marriages last nor are all divorces amicable. The last thing a lawyer wants raised in the midst of an acrimonious divorce is a disciplinary charge for violating Rule 1.8(k).

Personal relationships are also relevant to Rule 3.4(f), which addresses the relationship between the client and potential witnesses. Rule 3.4(f) states that a "lawyer shall not":

> request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Here, there is no specification of the degree of relation between the client and the potential witness. Presumably any familial relationship will suffice to qualify under this Rule.

Finally, Rule 7.3(a) explicitly refers to personal relationships:

> A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

The purpose of Rule 7.3(a) is described in Comment 2:

> There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

Presumably, the exception to the general rule of 7.3(a) for family, close friends, or former clients is that individuals who fall into these categories know the lawyer well and will not be "overwhelmed" by a solicitation. Again, however, it is interesting that the Rule does not specify degrees of familial relationship nor what is meant by a "close personal relationship." Would a distant cousin be any less in danger of being overwhelmed than a complete stranger? It is possible that the broad exception in the rule is simply the product of the drafters' hesitation to interfere in family relationships or speculate as to what degree of relationship would be likely to cause problems. Unlike Rule 1.8(c), for example, where one might reasonably assume that close relations between individuals within two familial degrees of each other would be problematic for conflicts purposes, what degree of relationship would be too remote to be free from the potential of lawyer overreaching would just be too difficult to determine as a general rule.

Although the rules discussed above all make explicit reference to personal relationships, Rule 1.7(a)(2) does not. Nevertheless, when determining whether a lawyer may be materially limited in his ability to competently represent a client because of personal interests, relationships may well play a critical role. As a result, the American Bar Association Committee on Ethics and Professional responsibility recently issued Formal Opinion 494 to bring clarity to this issue. Whether it achieves this purpose, we discuss in the adjoining column on "New Authority."

NEW AUTHORITY

ABA FORMAL OPINION 494: CONFLICTS ARISING OUT OF PERSONAL RELATIONSHIPS WITH OPPOSING COUNSEL

Rule 1.7(a)(2) of the Model Rules of Professional Responsibility, Rule 1.7(a)(2) of the Kansas Rules of Professional Conduct, and Rule 4-1.7(a)(2) of the Missouri Rules of Professional Conduct deal with what are generally called "indirect current conflicts of interest." The Rules state:

> 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:
> …
> (2) there is a substantial 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.

One of the grounds listed in Rule 1.7(a)(2) for deciding that a conflict may exist is a "material limitation" on a lawyer's representation of a client will exist because of a lawyer's "personal interest." Comment 11 to Rule 1.7 goes on to clarify this rule when the "material limitation" arises from a family relationship:

> [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.

Neither the Rule nor the Comment further clarify what, if any, other personal relationships may create a material limitation upon a lawyer's representation of a client under Rule 1.7(a)(2). Because of this lack of clarity and "[b]ecause changing living patterns suggest that more people are living in households and arrangements that do not correspond to traditional categories," the ABA Committee on Ethics and Professional Responsibility has issued Opinion 494 offering

guidance on conflicts that may fall within the scope of Rule 1.7(a)(2) but are not specifically addressed by the Comments.

This new Opinion from the ABA follows upon last year's Formal Opinion 488, which discussed the personal relationships with lawyers that might cause a judge to recuse herself or disclose the relationship before taking a case. Based on the framework established in Opinion 488, Opinion 494 sets forth three categories of personal relationships that are relevant under Rule 1.7(a)(2): (1) intimate relationships, (2) friendships, and (3) acquaintances.

Opinion 494 does not define an intimate relationship but the context indicates that married couples, engaged couples, couples who cohabitate, and couples who are in romantic relationships are all in intimate relationships for purposes of Rule 1.7(a)(2). The Opinion specifically recognizes that couples may be deemed to have an intimate relationship even if the relationship is not exclusive because it may nonetheless create a "significant risk that the representation of either client will be materially limited by the lawyers' personal relationship."

If lawyers are, indeed, involved in a personal relationship and Rule 1.7(a)(2) applies, Opinion 494 gives a four-part analysis of how to apply the Rule. First, the lawyers must determine whether the personal relationship would create a conflict. An intimate relationship, as it is defined above, would generally create the possibility of a material limitation because most lawyers would "reasonably believe" that such a relationship did so. The Opinion sets out examples of situations in which a lawyer, because of a personal relationship, could not reasonably believe that she could adequately carry out a representation. For example, if the lawyers' relationship would cause one to "refrain from filing a well-founded motion for sanctions against opposing counsel," a conflict is present—and likely not waivable.

Second, the role of the lawyers will play in the legal matter may determine whether 1.7(a)(2) is a problem. If the lawyer is in a subordinate role, such as a junior lawyer who does research on a matter but no more, then the personal relationship of the subordinate lawyer should not lead to a "disqualifying conflict." On the other hand, if the lawyer in the personal relationship is lead counsel on the matter, then a 1.7(a)(2) waiver would likely be required.

Third, the opinion points out that, even if a lawyer obtains a client's waiver to a conflict, the confidentiality rules of Rule 1.6 still apply. In the context of an intimate relationship between opposing counsel, the maintenance of client confidentiality may be difficult if not impossible. The Opinion focuses particularly on the dangers of inadvertent disclosure when the lawyers live together, such as when "papers relating to the representation are left in view or telephone conversations are overheard."

Finally, the Opinion states that if a personal relationship between opposing counsel does become a problem, the lawyer will have to withdraw from the representation. But the disqualifying conflict will not be imputed to other lawyers in the firm under Rule 1.10.

When one looks at the Opinion's four part analysis and the discussion of intimate relationships, it becomes quite clear that many such relationships will fall afoul of Rule 1.7(a)(2). However, there are still two other categories of personal relationships that must be discussed.

The discussion of the second category of personal relationships in the Opinion 494 borrows its definition of friendship from 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.

Drawing upon Formal Opinion 488, Formal Opinion 494 instructs that 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.

While this definition of close relationships may be reasonable in the context lawyer-judge relationships and the question of whether a judge needs to disclose the relationship or recuse herself, it seems exceptionally broad as applied to whether a friendship between lawyers may create a disqualifying conflict. Particularly in small towns, lawyers often associate with each other.

Senior lawyers often mentor junior lawyers. To assume that such relationships make it impossible for a lawyer to adequately represent opposing clients is to assume that lawyers cannot separate professional from personal activities. While such an assumption may be reasonable as regards intimate relationships, it is more difficult to fathom this to be the case with friendships. Nevertheless, the Opinion takes the position that it does.

The third and final category is that of acquaintances. According to the Opinion, "[a]cquaintances 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.'" Although they may see each other regularly, they do not undertake special effort to seek each other's company. Acquaintances "do not have

the type of close personal friendship requiring disclosure and informed consent."

One should be careful not to think this language creates a "safe harbor" for lawyers. The line between an "acquaintance" and a "friendship" will often be extremely difficult to draw—particularly in real life factual circumstances not specifically enumerated in the Opinion.

In conclusion, every lawyer must read and pay attention to Formal Opinion 494. But the Opinion may not clarify much at all. Indeed, the final paragraph of the Opinion puts the burden squarely on lawyers to draw lines among types of relationships that are not easy to draw:

> 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.

TECH TIP
EMAIL SAFETY TIPS

by Matthew Beal, JD, MCSE, MCP, A+, SEC+

Email is likely the most utilized application in the modern law office. It is often used to communicate information to or about clients. As always, your ethical obligation is to prevent unauthorized access to these communications. Some basic protections will help you mitigate the potential for problems.

Avoid the "preview email" option on your email application. We often think that allowing email to be previewed is a harmless method for keeping abreast with incoming mail. But the reality is that, by previewing the email, any nefarious links within the email are activated. In most instances previewing the email allows information to be transmitted back to the sender. The information may be limited to a read receipt, however the returned information also likely validates the email address and confirms receipt and other actions taken, such as reading or deleting the email. A clever hacker can also

include virus deployment activities or cause the exportation of the clients address book detail. When an email is opened in preview it is the same as opening and reading the email itself.

Avoid emails from an unknown senders. Most email programs will match an existing email address with the corresponding name in the contacts and present the user's name as you have saved it in your address book. However, when there is not a match, the email program will often rely on the name of the sender as provided in the sender's email contact information. This means that if I send an email from Matt Beal and you have saved my contact details as Matthew Beal, your email program will likely adjust the displayed name to Matthew Beal. However, if I have never sent you an email and I send it as M. Beal it will typically be reported in your email application as sent by M. Beal. This can mask my real identity. The email address for the sender will not change.

Any malicious payload that has been attached to an email will be activated upon opening or previewing the attached file. That is why one should never open or preview an attachment from an unknown sender. It is best to avoid opening or previewing unexpected attachments even when they are sent from someone you know. Because email accounts can be hacked and spoofed, it is best to confirm first. And, while certain file types may seem safer than others, this rule applies to all file types. Even a file that purports to be a PDF can be masquerading. The goal is to only open files from known sources, and only when attachments are anticipated.

Use a spam filter and anti-virus software on your computer where email is received and read. A spam filter is a tool that looks at certain parameters of the email and attempts to determine whether the email itself is valid. These programs often use a blacklist of email addresses that distribute spam. These programs will also scan the email itself and determine if it contains links that are reported to the spam filter program as spam. These programs are an important tool for preventing the receipt of email from unusual addresses containing links or attachments that can cause harm to your computer or worse.

The potential for harm from email arises regardless of the device used for obtaining your email and regardless of whether the communication originates inside or outside of the receiver's organization. These risks can be mitigated through careful use of the email application, including implementation of the foregoing measures.

ETHICS & MALPRACTICE RESEARCH TIP
LAW LIBRARIES: STILL A BEST RESOURCE

Many of us have become quite comfortable with the wealth of legal information available at our fingertips through Westlaw and LexisNexis. But there are times when these legal research resources will simply not be enough—those times when the information we need is (gasp!) outside our subscription or (double gasp!) not online at all. That's when we are especially thankful for access to wonderful law libraries that offer: (1) print and online materials many lawyers and firms don't have access to, and (2) knowledgeable law librarians who can assist in research.

Kansas is fortunate to have several large law libraries that are open to the Bar as well as a number of smaller county law libraries. The three main institutional law libraries in Kansas are the Wheat Law Library at KU, the Washburn Law Library at Washburn, and the Kansas Supreme Court Law Library in the Kansas Judicial Center. Smaller county law libraries include the Johnson County Law Library, The Michael J. Malone Law Library in Douglas County, the Jackson County Law Library, the Lyon County Library, and the Sedgwick County Law Library.

The Wheat Law Library at KU and the Washburn Law Library are the two largest dedicated law libraries in Kansas. Both have substantial collections, including excellent resources on legal ethics and malpractice law. Both law libraries also have access to a number of online data services as well as experienced and expert law librarians who can assist lawyers with difficult research questions.

The Kansas Supreme Court Library is smaller than the two law school law libraries, but it holds many court-related materials that are unavailable elsewhere. For example, printed copies of briefs filed in Kansas appellate courts can be found there—dating back years before briefs became available online (to those who can afford such access via the legal search engine subscriptions). The library also maintains statutes and session laws from all 50 states; unpublished opinions by the Kansas appellate courts; and valuable historical materials.

Although the county libraries house smaller collections than the university and Supreme Court law libraries, they do have many resources—both printed and online. Often they will have texts and access to online databases that are crucial to doing research in legal ethics and malpractice law. Because they are located across the state, these libraries should be the first stop-or telephone call-to see if they have the texts or online access you need in researching a problem. If they do not, then it may well be necessary to contact or visit the university or Supreme Court libraries for help.

BLAST FROM THE PAST
AN EXCERPT FROM *OPINIONS OF LORD BROUGHAM*

How can I, or any one conversant with the practice of the law, adequately express the benefits of having a cheap redress for petty wrongs, when we daily witness the evils of the opposite system? How often have I been able to trace bankruptcies and insolvencies to some lawsuit about ten or fifteen pounds, the costs of which have mounted up to large sums, and been the beginning of embarrassment! Nay, have we seen men in the situation described by Dean Swift, who represents Gulliver's father as ruined by gaining a Chancery suit with Costs!

February 7, 1828

From: *Opinions of Lord Brougham on Politics, Theology, Law, Science, Education, Literature, Etc., Etc.* vol. 2 (Philadelphia, 1839), p. 58.

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