ETHICS

By Margaret Christensen and Vienna Bottomley

UNDERSTANDING CONFLICTS OF INTEREST ARISING FROM A MATERIAL LIMITATION ON REPRESENTATION

It is no great revelation that Indiana Rule of Professional Conduct 1.7(a)(1) prevents attorneys from representing multiple clients directly adverse to one another, meaning, litigants on the opposite side of the "v," or parties with competing interests to a contract negotiation. The more interesting conflict discussion arises under Rule 1.7(a)(2), which prohibits representations where "there is a significant risk that the representation of one or more clients would be materially limited" by other obligations or personal interests. The terms "significant risk" and "materially limited" are inevitably fact sensitive, and the prudent

attorney should err on the side of obtaining informed consent any time information related to one representation might be useful or detrimental to another client's legal objectives.

DIRECT ADVERSITY

Sometimes a conflict of interest should be apparent from the outset of a representation, but attorneys must make reasonable efforts to understand the identity of clients, known adverse parties, and adverse witnesses at the outset of a case. These include a situation in which a lawyer advocates in one matter "against a person the lawyer represents in some other matter," even if the two matters are "wholly unrelated." Rule 1.7, Cmt. [6]. For instance, in *Matter of Lantz*, 442 N.E.2d 989 (Ind. 1982), an attorney prosecuted a criminal defendant in his capacity as a part-time prosecutor, while at the same time representing the criminal defendant in an unrelated civil matter. The Indiana Supreme Court concluded Lantz's "dual and diametrically opposed duties to the State and to his client compromised his independent professional judgment." In such a situation, the attorney should have known he could not represent the state as a prosecutor, even though the criminal and civil matters involving his client were entirely unrelated.

In contrast to *Lantz* the respondent in *Matter of Daley*, 116 N.E.3d 457 (Ind. 2019) (Mem.), was disciplined for violating Rule 1.7(a) after he entered separate representations of two criminal co-defendants with opposing interests. Daley had been appointed to serve as Co-Defendant A's public defender. *Id.* Co-Defendant A informed Daley another defendant (Co-Defendant B) was involved, and Co-Defendant A wanted to serve as a witness adverse to Co-Defendant B. *Id.* Daley, however, failed to read the probable cause affidavit or make any other efforts to determine Co-Defendant B's identity. *Id.* He later, unknowingly, agreed to privately represent Co-Defendant B and did not learn he was representing both co-defendants until a pretrial conference in Co-Defendant B's case. *Id.* Although Daley "immediately sought to withdraw his representation" of both co-defendants, the court publicly reprimanded him for his misconduct. *Id.*

Daley reinforces the concept that it is an attorney's obligation to investigate the facts of any new representation to identify all potentially adverse parties and witnesses. The best practice is to include the names of adverse, potentially adverse, and related entities in a conflict database (or spreadsheet), for easy searchability. Identifying conflicts is an ongoing obligation, and an attorney's conflicts database should be updated as new facts and circumstances arise. For instance, service of non-party discovery is an adverse action, and lawyers should search their client database before serving non-party discovery to avoid inadvertently serving discovery to a current client without seeking proper consent.

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MATERIAL LIMITATION

"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." Rule 1.7, Cmt [8]. Most Indiana cases addressing material limitations consider instances in which an attorney's own interest caused the limitation. *See, e.g., In re McKinney,* 948 N.E.2d 1154 (Ind. 2011); *In re Ryan*, 824 N.E.2d 687 (Ind. 2005); *In re Tsoutsouris*, 748 N.E.2d 856 (Ind. 2001); *In re Humphrey,* 725 N.E.2d 70 (Ind. 2000); *Matter of Hoffman*¸700 N.E.2d 1138 (Ind. 1998); *Matter of Hawkins*, 695 N.E.2d 109 (Ind. 1998); *Matter of Taylor*, 693 N.E.2d 526 (Ind. 1998); *Matter of Reed,* 599 N.E.2d 601 (Ind. 1992).

Many courts frame the issue around the attorney's duty of loyalty and consider whether an attorney would be tempted to diminish the vigor of one representation to promote the interests of another client. *See, e.g., State ex rel. Verizon West Virginia, Inc. v. Matish*, 740 S.E.2d 84, 93 (W. Va. 2013) ("An attorney should not put himself in a position where, even unconsciously, he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an **obvious clash** with those of another.") (emphasis added); *Pekin v. Scagliotti,* 2013 WL 2697583, *5 (Cal. Ct. App. 2013) ("the purpose of the rules against representing conflicting interests is not only to prevent dishonest conduct, but also to avoid placing the honest practitioner in a position where he may be required to choose between conflicting duties or attempt to reconcile conflicting interests."); *Seresky v. Warden*, 31 Conn. L. Rptr. 228, 2001 WL 1868842, *5 (Conn. Super. Ct. 2001) ("[l]oyalty to a client is impaired when an attorney is burdened with conflicting interests or responsibilities that prevent a lawyer from considering,

recommending, or carrying out an appropriate course of action for the client.").

Consider an attorney who learns confidential information while representing Client A that could be used to further Client B's legal objectives. That attorney is materially limited because she cannot use the information on Client B's behalf unless she violates her duty of confidentiality to Client A. Another frequent situation is representation of two seemingly aligned parties to litigation or a transactional negotiation. While the clients' interests may be aligned at the outset, as facts and circumstances develop, their interests may diverge. Any time a lawyer cannot recommend a course of action or use information in her possession to further a client's legal objectives, the lawyer is materially limited.

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While it is possible in *every representation* that client objectives will evolve or new facts will arise, not every representation requires consent to material limitation at the outset. Comment [8] helpfully explains,

> 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 a client.**

(emphasis added). Accordingly, it lies within a lawyer's own province to determine whether a representation is materially limited, as the lawyer is in the best position to assess whether a "difference in interests will eventuate" and how it may impact the lawyer's independent professional judgment. Importantly, Comment [8] also guides that it is not a conflict barring representation if a lawyer would be prevented from pursuing an **unreasonable** course of action, such as flinging false accusations at third parties to exonerate the client's own conduct.

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The Southern District of Indiana also has acknowledged Rule 1.7(a)(2) does not impose a *per se* rule. "It instead requires a close look at the nature of the conflicting interests, the issues in the underlying litigation, and the risk that the attorney's relationship with the insurer will materially limit his representation of the insured." *Armstrong Cleaners, Inc. v. Erie Ins. Exchange*, 364 F. Supp.2d 797, 816 (S.D. Ind. 2005). "That evaluation of risk must be done in advance, before the court or the parties can know for certain the course of the underlying litigation." *Id.* Indiana lawyers can take solace knowing that as long as they act with reasonable diligence to update their conflict searches, they should not be disciplined for changing circumstances that result in a conflict. This is consistent with the Preamble to the Rules of Professional Conduct, which acknowledges that a lawyer "often has to act upon uncertain or incomplete evidence of the situation." *See* Preamble, [19].

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Navigating conflicts of interest between potentially adverse parties is a significant, but necessary, administrative undertaking for all attorneys. Proactive and diligent tracking of new clients and updating a conflict database as adversity arises is the best course for minimizing liability for a Rule 1.7 violation. Of course, clients may consent to directly adverse representations or material limitations on representation subject to the requirements of Rule 1.7(b). Obtaining consent to potential conflicts is the best practice to minimize interruption of ongoing matters and angry clients.

PRACTICE TIPS

- Learn the names of all parties and material witnesses at the outset of representation
- Maintain a robust database of all clients, adverse parties, and potentially adverse parties
- Update and check your conflict database when amending a pleading to add new parties or when serving non-party discovery RG

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