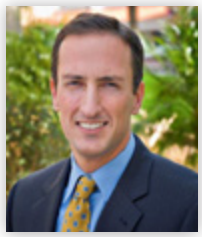
Q&A

LAWYER LIABILITY AND ETHICS

ABA Provides Guidance on Material Adversity and Former Clients



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The Rules of Professional Conduct (ER 1.9(a) and 1.18(c)) prohibit (absent a waiver) the representation of a current client with interests that are "materially adverse" to the interests of a former or prospective client on the same or a substantially related matter. However, neither Rule specifies when the representation of one client is materially adverse to another. While in some situations, material adversity is obvious—i.e., negotiating or litigating against a former or prospective client on the same or substantially related matter—that is not always the case.

For example, the question is more complicated when a former client, although not directly involved in the current litigation, may be affected in some manner by that litigation. When such a case arises, a fact-specific analysis is required to evaluate the degree to which the current representation may be harmful to the former client. "Material adverseness" does not reach situations in which the representation of a current client is simply harmful to a former client's economic or financial interests. There must be some specific tangible direct harm. In other words, without direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client's interests does not constitute "material adverseness."

The ABA recently issued Formal Opinion 497, which identifies three types of situations where the condition may arise: (1) suing or negotiating against a former client; (2) a lawyer attacking or undermining their own prior work on behalf of a former client; and (3) examining a former client.

With resect to a lawyer attacking their former work, Formal Opinion 497 cited three cases to illustrate what may constitute material adverseness to a former client who is not party to current litigation.

In the first case, a city prosecuted and settled a nuisance claim against a quarry operator arising out of traffic issues caused by trucking in and out of the quarry. The settlement allowed the city to designate what routes trucks could take in and out of the quarry. The law firm representing the city then brought a private nuisance action against the quarry operator on behalf of various individuals with property along the route designated by the city. The court disqualified the law firm because it was advocating a position that contradicted a term in the city's settlement, and the current clients (property owners) had an interest in disrupting the quarry operator's use of the city's (former client) designated routes.

In the second case, the lawyer represented an employee of a hospital administrator accused of mistreating patients and defrauding insurers. Seventeen months after those lawsuits concluded (favorably for the client/employee), the lawyer's firm sued the administrator itself for similar claims, but without any allegations of misconduct levied against the former client. Even though the lawyer was screened from the current representation, the court disqualified the law firm citing the risk of renewed allegations or inquiries into the former client's conduct because of the current litigation.

In the third case, a seat belt manufacturer hired a lawyer to evaluate potential claims by the manufacturer against NASCAR for reputational harm when NASCAR alleged that a defective seat belt caused the death of Dale Earnhardt. No litigation resulted. Thereafter, the retired founder of the manufacturer hired the lawyer to sue NASCAR on his own involving the same facts and cause of action. The manufacturer refused to pay the lawyer's entire bill from the first representation citing the lawyer's alleged violation of ER 1.9. The court found that there was no material adversity because the record did not show that the manufacturer's relationship with NASCAR was adversely affected by the founder's lawsuit.

With respect to material adversity in the context of examining a former client, the lawyer has a conflict if he must use information relating to the former representation to the disadvantage of the former client, unless that information has become "generally known." The example cited is a lawyer impeaching a client on the basis of a criminal conviction if that conviction is "generally known."

In summary, lawyers can make their former client angry with the current representation, but they are prohibited from harming or potentially harming them. And you can still represent current clients even when the representation is materially adverse to the former client as long as there is informed consent in writing given by the former client. ■

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