

What is a Conflict of Interest?

A former client came in to see me the other day. He was just hurt in a car accident where another car made a left turn in front of him, and he wanted me to represent him and also his family and loved ones that were passengers in his car. I had to tell him that while I would be happy to represent him, his passengers would need to hire a different attorney. He was a little unhappy with me, so I had to explain to him about conflicts of interest.

Attorneys are supposed to represent their clients competently and diligently and to the utmost of their abilities. Attorneys are not allowed to accept employment where their loyalties may be divided.

Conflicts of interest can arise in many different situations.

New York Lawyer Disciplinary Rule 5-101(a) states:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

This means, "Don't go into business with your client." Many lawyers have gotten into ethical trouble for entering into business relationships or partnerships with people they represent, and then fighting with them. This rule can also mean that a lawyer shouldn't take piece of a client's business instead of a cash fee, if it might affect his or her professional judgment.

New York Lawyer Disciplinary Rule 5-105(a) states:

A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests....

Disciplinary Rule 5-101 prohibits conflicts between the interests of a lawyer and the interests of a client. DR 5-105 prohibits a lawyer from representing more than one client if their interests conflict. This means "Don't be greedy," accept one client only, or accept only those clients who have like legal interests.

For example, one lawyer can't represent both a buyer and a seller in a real estate deal – such as the sale/purchase of a house. This may seem obvious but believe me, it's been tried.

Also, lawyers can't represent opposing parties in a lawsuit. For example, a lawyer can't represent both the party suing (the plaintiff) and the party being sued (the defendant).

The danger in the above examples is not so much that the lawyer might seek two fees, but that one client might benefit through the use of confidential information obtained from the other.

In addition to the possible misuse of confidential information, DR 5-105 seeks to avoid the possibility that a lawyer with two clients with differing or adverse interests might not fight as hard as he or she could for one against the other.

Can one client consent to an attorney representing another client with an adverse interest? The answer is, "sometimes." To circle back to my original problem – the former client who wanted me to represent him and his passengers – it would have been unwise for me to try to represent both driver and passengers. The reason being: if the driver was found even just 1% at fault for causing the accident, that would deprive his passengers of a pocket to reach their hands into. Put differently, they might get less money with only one car driver to sue, rather than two.

A court has held: A law firm's representation of both infant passenger and his mother as plaintiffs in personal injury action arising from a collision created a conflict of interest that required the firm's disqualification, although the passenger did not assert a claim against his mother; the passenger's failure to assert a claim against his mother, who was driving at time of collision, did not resolve the issue of her negligence, so as to eliminate potentially differing interests of co-plaintiffs. *Shaikh ex rel. Shaikh v. Waiters*, 2000, 185 Misc.2d 52.

Finally, and in case you were wondering, while not exactly a "conflict of interest," a lawyer cannot have sexual relations with a client unless a consensual relationship already existed between them before the attorney-client relationship commenced.

New York Regulation Section 1200.29-a states:

(b) A lawyer shall not:

- (1) require or demand sexual relations with a client or third party incident to or as a condition of any professional representation;
- (2) employ coercion, intimidation, or undue influence in entering into sexual relations with a client; or
- (3) in domestic relations matters [such as a divorce], enter into sexual relations with a client during the course of the lawyer's representation of the client.

Believe me, we wouldn't need the rule if these things didn't happen.

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