Obligations to Third Persons (Part 2)

In a previous column,[1] we looked at the kinds of conflicts of interest that are not the ones we normally think of as lawyers, such as having obligations or duties to both sides in the same transaction or lawsuit. In that column, we discussed what are known as "material-limitation conflicts"—situations in which there is a significant risk that the representation of a client will be "materially limited" by the lawyer's responsibilities to another current client, a former client, a third person, or by a personal interest of the lawyer.

When the prospective client does not end up entering into a client-lawyer relationship with the lawyer, there are still lingering responsibilities imposed on the lawyer.

All of this is set forth in ER 1.7(a)(2) of Arizona's Rules of Professional Conduct, one of the primary conflict of interest provisions in our ethics rules.[2] In that column, we talked about a lawyer's responsibilities as a former member of a board of directors at a local hospital, and the responsibilities of a lawyer representing a fiduciary.

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Another example of a third party contemplated by ER 1.7(a)(2) would be what we call "the prospective client." A prospective client is defined in ER 1.18 (Duties to Prospective Client) as any person who discusses with a lawyer the possibility of forming a client–lawyer relationship with respect to a matter.[3] When the prospective client, for one reason or another, does not end up entering into a client–lawyer relationship with the lawyer, there are still lingering responsibilities imposed on the lawyer that may interfere with his responsibilities to another person who actually is or may later become a client.

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Thus, a lawyer who has interviewed a prospective client about the possibility of becoming her lawyer may not, when no client–lawyer relationship ensues, use or reveal information learned during the consultation and is not allowed to represent a client with interests adverse to those of the prospective client if the lawyer received information from the prospective client that could be "significantly harmful" to that person in the matter.

Not taking on a client with adverse interests after you've received significantly harmful information from an adversary who saw you once as a prospective client is understandable without having to look at the ethics rules. But what if there is other information that you learned during the interview that you are not allowed to "use or reveal" as provided in ER 1.18(b), but which you would have an obligation under ER 1.4 (Communications) to disclose to a client in an unrelated matter and who is not in an adversarial position with the prospective client? ER 1.4 is the rule that requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. If what you are prevented from disclosing by ER 1.18(b) is something that may "materially limit" your ability to represent that client, you may have a conflict of interest that will prevent you from representing her unless the conflict is waived in accordance with the provisions of ER 1.7(b).

It has been suggested that although the situation may be "awkward," in most cases it will be merely academic: The lawyer could keep confidential the information learned during the interview and still competently and faithfully continue to represent the existing client.[4]

The last relationship we examine here is that of the person whom the lawyer has referred to another lawyer, who has agreed to divide the fee with the referring lawyer. Under ER 1.5(e), a "division" of a fee between lawyers not in the same firm is allowed if, among other requirements, "each lawyer receiving any portion of the fee assumes joint responsibility for the representation." This means that the referring lawyer, who presumably never established a client–lawyer relationship with the person referred, assumes a "responsibility" to that person that may fall within the scope and intent of ER 1.7(a)(2). In the version of the Model Rules of Professional Conduct originally promulgated by the ABA, Comment [7] to Model Rule ER 1.5 stated in part that joint responsibility for the representation "entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." But when the Arizona Supreme Court adopted the Model Rules revisions in 2003, this provision was not included in the Comments to ER 1.5.

So could you represent a creditor of the person you referred to another lawyer for a referral fee? If the case was settled confidentially, could you disclose the terms of the settlement with your creditor client? This could well be a responsibility to a "third person" who was never a client or a former client, and it might create a material-limitation conflict contemplated by ER 1.7(a)(2) for the unsuspecting lawyer. Accordingly, it might be a good idea to enter, into a conflicts database, the names of the person a lawyer refers to other counsel in consideration of a referral fee.

endnotes

1. *Obligations to Third Persons (Part 1)*, ARIZ. ATT'Y, May 2012, at 8.
2. Rule 42, ARIZ.R.S.CT.
3. *See generally, The Prospective Client*, ARIZ. ATT'Y, March 2006, at 8.
4. For a discussion of the problem, with solutions, *see* GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING § 21A.6 (3rd ed., 2005-1 Supp.), as well as ABA Formal Op. 90-358 (Protection of Information Imparted by Prospective Client) (Sept. 13, 1990), published before adoption of ER 1.18 and its screening provisions.