



Obligations to Third Persons (Part 1)

ER 1.7 (Conflict of Interest: Current Clients) of Arizona's Rules of Professional Conduct¹ is the first rule we turn to when contemplating whether a relationship constitutes a prohibited conflict of interest. ER 1.7(a)(1) covers situations where a lawyer has one client in a representation that is directly adverse to another of the lawyer's clients; e.g., representing both the buyer and the seller in a real estate transaction. This is generally considered not to be a good idea. ER 1.7(a)(2) covers other situations, sometimes referred to as "material-limitation conflicts." These focus not so much on directly adverse situations, but on the extent to which a representation will be or may be limited because of interests that arguably affect the lawyer's exercise of independent professional judgment. They cover situations involving (1) the lawyer's current clients, (2) her former clients, (3) third persons, and (4) the lawyer's own personal interests. Many of these are specifically covered in ER 1.8 (Conflict of Interest: Current Clients: Specific Rules) and ER 1.9 (Duties to Former Clients).

Let's start with the most mysterious of the group—the "third person" to whom the lawyer owes legally recognized responsibilities that may limit her ability to represent someone else who actually is a client. Recognize first that the "third person" will not be another current client or a former client: The category describes a person or entity with whom the lawyer has never entered into an attorney-client relationship. Let's look at some examples.

A case from Arkansas² would be a good start. There, a lawyer had been on the board of governors of a local hospital. Neither he nor any member of his firm had ever established a client-lawyer relationship with the hospital. About a year after his term had ended, one of his partners sued the hospital's insurance company on behalf of a client, alleging that the hospital and certain of its employees had been negligent and that the partner's client had been damaged as a result. Arkansas has the same imputation rules as Arizona, which provide generally that if one lawyer in a firm is disqualified from representing a client, all of the other lawyers in the firm are disqualified also.³ The court upheld the trial court's ruling disqualifying the plaintiff's lawyer because of the lingering fiduciary duties the lawyer's partner, the former board member, had to the hospital and, by extension, to the hospital's insurer. The court found that as a member of the hospital board, the lawyer had received confidential information about the hospital's operations that materially limited him and his firm from representing an adversary because the information was material to the case and the lawyers were not allowed to use it in the case or disclose it to their clients with-

out breaching the lawyer's fiduciary duties to the hospital as a former board member.

The hospital was neither a current client of the hospital, nor was it a former client. It was entitled to protection anyway as a "third person" from having a lawyer who was once a fiduciary appearing by imputation on the other side of a lawsuit.

Closer to home, an Arizona court held that the lawyer for a guardian would be directly liable to the guardian's ward if the lawyer failed to discover his client's defalcations or, having discovered them, failed to take appropriate action to protect the ward.⁴ The court cited factors such as whether the transaction was intended to benefit the plaintiff (i.e., the non-client "third party"), the foreseeability of harm to him and the closeness of the connection between the lawyer's conduct and the injuries suffered. Arizona courts have subsequently extended this duty toward a surviving spouse by a

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lawyer who had an attorney-client relationship with one of the devisees, the decedent's girlfriend, and who had had himself appointed in addition as the lawyer for the estate's special administrator.⁵ The court found that the lawyer had conflicting interests between his duties of undivided loyalty to the girlfriend and his duty of fairness and impartiality to the surviving spouse as the lawyer for the special administrator. Comment [8] to ER 1.7 identifies a joint venture as presenting a similar problem and points out that representing one of the joint venturers could conflict with the duty of loyalty the lawyer would have to the other non-client joint venturers. This

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suggests that *Fickett* has application beyond the probate and estate field. Other cases in other jurisdictions have extended the *Fickett* rule to cases involving partnerships and close corporations,⁶ and it would be wise to keep these relationships in mind when you decide to represent a person or an entity that has fiduciary duties to others who may be affected by the representation.

The upshot of all of this is that in Arizona, the lawyer representing certain types of fiduciaries undertakes additional duties to the intended beneficiary of the fiduciary relationship when she engages that fiduciary as a client. Thus, if the lawyer determines that the interests of the fiduciary–client and the beneficiary have diverged, she has a potential conflict of interest under ER 1.7(a)(2) and must react accordingly. ^{AZ}

NEXT MONTH: Part 2 on Third Persons.

endnotes

1. Rule 42, ARIZ.R.S.CT.
2. *Berry v. Saline Memorial Hospital*, 907 S.W. 2d 736 (Ark. 1995).
3. ER 1.10(a).
4. *Fickett v. Superior Court*, 558 P.2d 988 (Ariz. Ct. App. 1976).
5. *In re Shano*, 869 P.2d 1203 (Ariz. Ct. App. 1994).
6. *Derivative Liabilities a Danger*, ARIZ. ATT'Y, June 2005, at 10.