



Dear Ethics LawyerTM

The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I know that in the past you have answered questions about so-called “positional conflicts,” when a lawyer or the lawyer’s firm argues opposing legal arguments for different current clients at the same time, and the limited circumstances in which those can become Rule 1.7(a)(2) material limitation conflicts requiring withdrawal or clients’ consent. I have a situation that’s a bit different.

Two years ago, for a now-former client, I successfully argued the application of a state statute at the trial court level to limit the client’s liability. The case resulted in a judgment for that client, the matter is now over, and we no longer represent them. No appeal was taken, and no precedential decision resulted. Now, for a different client, I plan to argue the opposite side of that question, i.e., that the statute in question does not limit liability of one in our former client’s position. So this is in essence a question about whether I could have a “positional conflict” arising from an argument made in the past for a former client that would fall within Rule 1.7(a)(2).

A: It is theoretically possible, but not very likely. As you may recall, “positional conflicts” caused by representation of two or more current clients usually only arise when the opposing positions are taken in circumstances in which one matter could influence the outcome of the other, e.g., material opposing arguments made in the same court or jurisdiction at the same time, or where the outcome of one argument could be cited in the other in a controlling or influential manner. Here, that does not appear to be the case, given that the matter for your former client is over, and the outcome was not precedential. Under Rule 1.9, your conflict duties to your former client are generally limited to preserving the confidentiality of their confidential information and refraining from adversity to them in the same or a substantially similar matter. I assume that does not apply here. If it does, then you have a conflict under that rule, regardless of the application of Rule 1.7(a)(2). If not, a positional conflict here is unlikely.

I am not aware of a case in which arguments made for a current client that conflict with those made for a former client have been found to be a “material limitation” conflict when duties under Rule 1.9 have not also applied. Rule 1.7(a)(2) includes responsibilities to a “former client” within the list of things that can give rise to a material

limitation conflict, and the possibility is referenced in Comment 9 to the rule, but only in reference to Rule 1.9. Nonetheless, you should consider whether your successful argument in the prior case could be used to your current client's detriment simply because you made it, or for some other reason that could limit your ability to advance the opposing argument now. Under Rule 1.4, if not also under Rule 1.7(a)(2), it would be wise to disclose the facts to your current client and seek advice from ethics counsel in a close case.

Although remote, a situation could be imagined in which other considerations might apply. For example, there must be a reason that you believe an argument opposite your previous "winning" argument could be successful. There may be a perfectly appropriate reason, such as intervening authority. But, if the reason is something that implicates your personal interests, that could change the calculus. Suppose faulty legal research or analysis in the earlier matter could now be exposed, creating a risk of a malpractice claim or embarrassment for you and a risk to your former client who may have relied on the prior outcome. That exposure might be taken to give you an incentive to argue less vigorously for your current client. In that event your current client, if unsuccessful, could question the outcome regardless of your level of effort. There is no reason to believe that is the case here, but the key to avoiding material limitation conflicts is to examine the interests of the lawyer that might serve to limit the lawyer's performance or later be found to have done so.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 134 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

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