

Q&A



LAWYER LIABILITY AND ETHICS

On Conflicts of Interest and Conspiracy to Commit Murder



Joseph Brophy

It is sometimes challenging to come up with topics for this column. However, when the failure to adhere to ER 1.9 (duties to former clients) derails a high-profile first-degree murder trial on the first day of jury selection, it is not one of those times.

A fact pattern this wild comes unsurprisingly from Florida. It is a common tale. Boy meets Girl. Boy and Girl fall in love. Boy and Girl get married and have children. Boy and Girl get divorced and have a bitter child custody dispute. To resolve this dispute, Girl's brother (Client 1) and mother (Client 2) (i.e., Boy's brother/mother-in-law) pay two members of the Latin Kings gang to murder Boy, which they do.

This plan resolved the child custody dispute between Boy and Girl. But it also had unintended consequences. Law enforcement figured out that one of the hitmen was romantically involved with a woman who coincidentally worked for and dated the murder victim's brother-in-law (Client 1). Cops tend to not believe in coincidences. Electronic surveillance developed strong evidence that Client 1 (brother-in-law) and Client 2 (mother-in-law) conspired to have Boy (son-in-law) murdered.

Client 1 and Client 2 hired Lawyer to represent their interests over several years as the authorities arrested and convicted both hitmen, and Client 1's ex-girlfriend, who was the go between for Clients and the hitmen. Then the authorities arrested Client 1. On November 6, 2023, a jury convicted Client 1 of conspiracy to commit first-degree murder. Lawyer represented Client 1 in that trial.

Client 2 (Client 1's mother and co-conspirator), having seen what the jury thought of her son's trial defense, did what anyone would do in this situation – she purchased a one-way ticket to Vietnam, which does not have an extradition treaty with the United States. Alas, the Leon County Sheriff was quicker on the draw and on November 14, 2023 arrested Client 2 on the jetway, mere feet from freedom. Client 2 then retained Lawyer, fresh off representing Client 1 in his murder trial arising out of the same conspiracy.

It is at this point that everyone – the defense, prosecution and perhaps even the court – fumbled the ball. ER 1.9(a) provides that a lawyer who has formerly represented a client in a matter must not afterwards: (1) “represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client,” unless the former client gives informed consent in writing; or (2) “use infor-

mation relating to the representation to the disadvantage of the former client.” A related rule is that a lawyer's previous relationship with a client who has become a witness for the government, and plans to testify against the attorney's current client, presents “a dilemma of divided loyalty.” Some say that is a fancy term for “unwaivable conflict.”

Although the defense, prosecution and the court knew that: (1) Lawyer represented Client 1; (2) Client 1 was appealing his conviction and maintaining his innocence; and (3) one of Client 2's best defenses in her murder trial was to argue that she had no idea Client 1 conspired with his ex-girlfriend to have Client 2's son-in-law murdered – no one ever asked to see a written conflict waiver from Client 1 that would allow Lawyer to represent Client 2 in her murder trial. This oversight would come back to bite all parties involved.

Ten months passed after Client 2's arrest. The prosecution and defense prepared for trial. Pretrial motions were filed, argued, and ruled on. The prosecution listed Client 1 as a rebuttal witness, to be called depending on the substance of Client 2's testimony. Trial was set to begin on September 17, 2024. On September 16, 2024, Client 1, who had been transported from prison in South Dakota to Leon County, Florida to testify at trial, filed a motion objecting to having Lawyer (his trial counsel) cross examine him in Client 2's trial.

When the court, after receiving Client 1's motion and on the morning jury selection began, asked Lawyer whether he had a written conflict waiver from Client 1, the answer was – no. Lawyer said he obtained a verbal conflict waiver almost a year earlier from Client 1, but did not have a written conflict waiver. That is roughly the same as having no conflict waiver. Lawyer told the court that the plan was to “wall off” from Lawyer the member of the defense team that would perform the cross-examination of Client 1 if he was called at trial, so that Client 1 would not be cross-examined using information Lawyer learned during his representation of Client 1.

The court was not persuaded. Lawyer resigned as Client 2's lawyer, and the trial was continued indefinitely. In early October, the court disqualified the rest of Client 2's defense team. Now Client 2, over her objection, will have to find new counsel.

What was the interest so strong that it overrode the normally sacrosanct right of a party to be represented by the counsel of her choice? First, the lack of a written conflict waiver from Client 1 meant Lawyer had an unwaived conflict regarding his representation of Client 2. Second, under the 6th Amendment right to counsel, Client 2 was entitled to have conflict free counsel cross examine witnesses in her murder trial. The trial court did not believe that an appellate court would affirm a verdict in a murder case where Lawyer had a duty of loyalty to a material witness for the prosecution.

Third, it was not enough that Client 2 waived the 6th Amendment conflict to keep Lawyer as her counsel. Courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. Sometimes, the appearance of impropriety in a criminal proceeding is enough to disqualify criminal defense counsel regardless of what the criminal defendant wants. Whether the

trial court properly weighed these competing interests by disqualifying the entire defense team over the defendant's (Client 2) objections will likely be resolved by the Florida Court of Appeals.

Every lawyer in this case – the prosecution, defense, and the judge – was highly competent. And yet for a year none of them made certain that a conflict that the court described as “as plain as my nose” was appropriately dealt with, or queried whether the conflict was perhaps unwaivable, as they spent significant resources preparing for trial. This is a cautionary tale on the importance of informed, written consent to waiving any conflict of interest between current or former clients – an issue so important that it can derail a first-degree murder trial on the morning of jury selection and prevent a criminal defendant from having the counsel of her choice. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod Waterfall in Phoenix. His practice focuses on professional responsibility, lawyer discipline, and complex civil litigation. He can be reached at jab@jkwlawyers.com.

**STAY SOCIAL
WITH THE
MCBA**

LIKE US ON
FACEBOOK.COM/
MARICOPABAR

**FOLLOW
US ON**
TWITTER @MARICOPABAR

DISCOVER REAL ESTATE TREASURES!

Let R.O.I. help you find the value in real estate assets.

Commercial & Residential Brokerage

Real Estate Special Commissioner

Neutral Real Estate Broker

Valuation | Property Management



602.319.1326
roiproperties.com

