

OPINION

Stormy and the lawyers: Ethics 101

By Thomas F. Maffei



The Stormy Daniels-Donald Trump story has political pundits abuzz with charges and countercharges. Who is telling the truth? Is

Daniels looking for another pay day? Should the president be a moral leader? Does the public care about the way Trump acts in his personal life and, if not, should they?

These are all interesting questions. No doubt they will continue to be part of the public dialogue for years to come. But — thanks to Michael Cohen — there are also some interesting questions in this story about what it means to be a lawyer.

What is the lawyer's role in representing a client? Is a lawyer just a "hired gun," or is he or she required to exercise independent judgment? Can a lawyer go rogue and decide what's best for a client without getting input and agreement from the client? Should a lawyer become personally involved in a client's problems?

The facts are unusual, only partly because they involve the president of the United States. According to reports, the president had an affair with Daniels, a porn star, in 2006. In an effort to keep the affair quiet leading up to the 2016 presidential election, Trump's longtime personal attorney, Cohen, apparently entered into an agreement with Daniels, purportedly on behalf of Trump. The agreement required Daniels to keep the affair secret in return for a \$130,000 payment.

The settlement agreement is a remarkable document. The parties are not identified by their real names; only pseudonyms. In it, Daniels, who is referred to as Peggy Peterson ("PP"), agreed that its terms could be enforced in arbitration and that the arbitrator could issue injunctive relief *ex parte*. Everyone assumes that Trump is the other contracting party, aka David

Thomas F. Maffei is of counsel at Sherin and Lodgen in Boston, where he advises lawyers and law firms on legal ethics issues and teaches professional responsibility at Boston College Law School.



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Dennison ("DD"), but neither DD nor Donald Trump actually signed the agreement.

The \$130,000 payment was made. Cohen says the payment came from his personal funds and that he took out a home equity loan to finance it. Cohen has also stated that Trump did not know of or authorize the payment, which Trump has confirmed.

Perhaps the settlement agreement is a brilliant stroke of lawyering. But it also could be too clever by half. I'm betting on the latter, particularly if Trump was truly unaware of the settlement.

That's because of two of the bedrock principles underlying the ethics rules governing lawyers. One of the principles is that the client's interest is paramount over other interests, including the lawyer's personal interest. Another is that a lawyer is merely an agent and not a decision-maker when it comes to the objectives of the representation. The American Bar Association's Model Rules of Professional Conduct confirm these principles.

Rule 1.2(a) says that the decision to settle a case, like the decision to plead guilty in a criminal case, is expressly reserved to the client. Also, Rule 1.4 (a)(1) requires a lawyer "to promptly inform the client of any decision or circumstance with respect to

which the client's informed consent is required" by the rules. It goes without saying that a decision by a lawyer to enter into a settlement agreement on behalf of a client with an opposing party and to pay \$130,000 to settle the claim is such a "decision or circumstance" requiring the client's knowledge and assent.

Moreover, Rule 1.7(a)(2) provides that there is a conflict of interest when a lawyer puts a client at risk because of the "personal interest of the lawyer." Here, there is no doubt that because of Cohen's alleged decision to go rogue and settle the case on his own, the client, Trump, has become embroiled in litigation and media frenzy.

If Trump was concerned about any claims by Stormy Daniels, the way Cohen dealt with those claims does not seem to have served his client well. If Trump had no idea that Cohen was spending \$130,000 of his own money to help his client, perhaps Cohen was catering to his own interest, which itself created a conflict of interest. The only way to have dealt with the conflict was to tell the client and obtain his assent.

There is also an issue concerning whether Cohen's action in settling with Daniels by paying her \$130,000 of his own money crossed the traditional bright line between lawyer and client that ensures that

the lawyer maintains detached and gives his or her client competent, independent legal advice.

Perhaps, the \$130,000 was a loan to Trump. If so, Cohen was required to meet the requirements of Rule 1.8(a) dealing with business transactions between lawyers and clients, one of which is written consent, which, of course, requires notice to the client. Or maybe the \$130,000 payment was a gift and that, apparently, has campaign finance implications.

Finally, it is possible that Trump knew about the settlement agreement, including the \$130,000 payment. He denies any knowledge, and Cohen says he never told his client about the settlement. But if it turns out that Trump knew about the deal and either accepted a \$130,000 gift or agreed to reimburse Cohen, the lawyer ethics issue will focus more on whether Cohen overreached in the way the agreement was done.

There is no doubt that the duty to be "zealous" permits a lawyer to drive a hard bargain and seek the most for his or her client. As long as an opposing party is represented by independent counsel, there is almost no limit on what the parties can agree to.

In this case, the provision in the agreement allowing one party to seek an order against the other without giving notice and an opportunity to be heard is unusual. While there may be a public policy objection to such a provision, the policies underlying our adversary system would seem to uphold such a provision so long as the party who agreed to it was not under a disability or duress and was represented by independent counsel, who made the appropriate disclosures to his or her client.

Whether Daniels' counsel was truly "independent" is, like the rest of this story, far from clear. It was recently reported that Cohen had referred a case to Daniels' lawyer shortly after the settlement agreement was done.

Perhaps the recent FBI raid on Cohen's office will tell us more. But that's for another day. **MLW**