

## Conflict Admonitions 1995

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The director has annually used this column to provide a short digest of the types of misconduct which have resulted in admonitions to lawyers in the last year, in order to educate lawyers about rule violations that may lead to private discipline. Approximately 100 admonitions, issued for misconduct which is "isolated and non-serious," Rule 8(d)(2), Rules on Lawyers Professional Responsibility, were closed in 1995. As in prior years, the majority of admonitions were for neglect and failure to communicate adequately with clients.

In view of continuing requests for advisory opinions about conflicts of interest, the summary of admonitions column this year is devoted to a digest of those admonitions resulting from violations of Rule 1.7, Minnesota Rules of Professional Conduct (MRPC).<sup>Ftn 1</sup> While the ethical rules regarding conflicts are almost intuitive for a solo practitioner with a handful of clients, they are anything but intuitive for a practitioner in a large or multi-city firm with hundreds of corporate and private clients. Nonetheless, the conflicts rules of the MRPC apply to all practitioners.<sup>Ftn 2</sup>

Most conflicts questions are resolved through disqualification motions in the context of litigation, and not in the lawyer discipline system. The court's analysis in resolving such a motion might well differ from strict application of the MRPC, and involve more of a balancing of the equities. However, that is hardly reason for lawyers to relax their guard. Resolution of disqualification motions is costly to firms and clients alike. If a firm is disqualified, the likely results will be loss of revenue, client alienation, and, depending on the size or notoriety of the case, public embarrassment for the firm.

Because conflicts questions are so fact-specific, lawyers should analyze each potential conflict situation carefully. What follows are examples of violations of Rule 1.7 which could have been avoided by referral to the MRPC conflicts rules.

### ADVERSITY AND IMPUTED CONFLICT

Rule 1.7(a), MRPC, prohibits representation of a client if representation "will be directly adverse to another client" unless the lawyer "reasonably believes" representation of the second client will not adversely affect the relationship with the first client and both clients consent "after consultation." To determine whether there is a conflict, the lawyers must first determine whether there is a present attorney-client relationship with another party to the transaction or litigation. The lawyer must then determine whether the contemplated representation will be directly adverse. The subject of either representation in this analysis, unlike the analysis under Rule 1.9, MRPC, dealing with former clients, is *immaterial*.

**Direct adversity.** A lawyer represented husband and wife in various business matters for several years. He then represented the husband on a charge of driving while under the influence. Prior to the husband's sentencing, the lawyer agreed to represent the wife in a domestic abuse proceeding against the husband and in obtaining a divorce. The lawyer's representation of the wife violated Rule 1.7(a), MRPC, because it was directly adverse to the husband, whom he still represented. The fact that representation of the husband was in an unrelated matter was irrelevant to the analysis under Rule 1.7. The lawyer's representation of the wife also violated Rule 1.9, MRPC, because the lawyer had represented the husband and wife jointly on related business matters.

**Imputed conflict.** Lawyer A represented an injured passenger in an automobile accident case. The passenger later died and lawyer A became trustee for her estate. Lawyer A agreed to a settlement of the claims against the driver (Driver 1) and his carrier, and signed a general release of liability. Lawyer A, on behalf of the estate, then sued the other driver (Driver 2). Driver 2 subsequently brought Driver 1 in as a third-party defendant. Respondent, an attorney in the same firm as Lawyer A, appeared representing Driver 1. Respondent's representation of the third-party defendant while another lawyer in the firm represented the plaintiff in the same lawsuit violated Rules 1.7(a), MRPC, because Rule 1.10(a), MRPC, imputes the conflict of Lawyer A to all other lawyers in the firm.<sup>Ftn 3</sup>

## RESPONSIBILITIES TO OTHERS

Rule 1.7(b), MRPC, prohibits representation of a client if representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests," unless the lawyer "reasonably believes" the representation will not be adversely affected and the client consents "after consultation." To determine whether there is a conflict, the lawyer must sort out what other interests may be implicated, and then determine whether those interests will affect the contemplated representation. If the lawyer reasonably believes that the representation will not be affected, the lawyer may ask the prospective client for consent, after explaining the potential conflict and its implications for the representation.

**Responsibilities to third parties.** A lawyer represented a family member in collecting insurance proceeds, where the beneficiary was in dispute. The other putative beneficiary was unrepresented, but had allowed the lawyer to conclude negotiations with the insurance company. The lawyer entered into a settlement agreement with the insurance company, in which he agreed to place the funds in an interest-bearing account until a designated distribution, agreed to by the parties, was made. The lawyer instead deposited the funds into the trust account of another lawyer (the client's previous lawyer on the matter) and had that lawyer distribute the funds. The distribution differed from the settlement agreement in that attorneys fees were taken out of the escrowed funds from both beneficiaries' shares. This distribution benefited the lawyer's client, who was otherwise responsible for the fees. Distribution was made over the nonclient beneficiary's objections. In entering into the settlement agreement, the lawyer undertook the duty to the nonclient to distribute the funds pursuant to the settlement agreement.

The lawyer's representation of his client was materially limited by his responsibilities to the nonclient under the settlement agreement, at least when the client (or the lawyer) wanted a benefit which was not allowed under the agreement, and violated Rule 1.7(b), MRPC, among others.

**Interest of law firm.** A lawyer represented a woman in two proceedings. After completion of the first matter, for which the client had not yet paid, the client signed a second retainer agreement which gave the law firm a security interest in two parcels of real property. The client also signed quit claim deeds to the

two parcels, which had a fair market value of over \$13,000. The client's bill at the time she signed the second retainer was \$2,200 and never exceeded \$5,000. The second matter was thereafter discontinued. After not receiving payment on his bill, the lawyer recorded the deeds and wrote to the client's new address stating the property would be sold if the bill was not paid in full promptly. After some discussions, the law firm deeded the properties back to the client, who sold one parcel and paid the bill.

Having the client make an outright transfer of the real estate, clearly more than was necessary to secure the legal fees, placed the firm's interest ahead of the client's and violated Rule 1.7(b), MRPC. In addition, the business transaction with the client was not fair and reasonable and violated Rule 1.8(a), MRPC.

## CONSENT

Informed consent to a conflict does not mean simply that the client has been apprised of the other representation. Nor can consent be inferred from the fact that the client has not objected to the other representation or is silent. Informed consent means that the client has knowledge of the conflict and the lawyer has adequately explained the legal and practical implications of continuing to employ the lawyer.

**INFORMED CONSENT.** A lawyer was consulted by parents concerning the death of their son in a car accident with an allegedly drunk driver. The parents advised the lawyer that they had information that the other driver had been drinking at several places, including a municipal liquor store. This information was not confirmed by the incomplete police reports. The lawyer did not advise the parents that his law firm represented the municipality in question on a regular basis and had several current matters pending. The lawyer had the parents sign a retainer agreement and his law firm began an investigation. A few days later, upon learning that the law firm represented the municipality, the parents terminated the representation. The lawyer's failure to disclose the law firm's ongoing representation of the municipality violated Rules 1.4(b) and 1.7(b), MRPC.

## LIMITS TO CONSENT

While Rule 1.7 provides that a client may consent to representation despite a conflict, there are situations where consent will not cure a conflict. "If a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances," the lawyer cannot properly *ask* for the consent, or *rely* on the consent even if the client agrees. Classic examples of conflicts not curable by consent include representation of both parties to a divorce, or both buyer and seller in a real estate transaction.

**CONSENT NOT CURATIVE.** A lawyer provided a personal guarantee to a bank for loans to corporation ABC, including providing a mortgage on his homestead, the proceeds of which were used by the bank to purchase a certificate of deposit as collateral for ABC's obligations. ABC defaulted on the loans and the bank obtained summary judgment against lawyer and other guarantors. ABC filed for bankruptcy. The president of ABC, one of the other guarantors, also filed for bankruptcy and sought to discharge his obligation to the bank under the guarantee. The bank filed to exempt its claim from discharge. The lawyer represented the president in the adversary proceeding. The bank successfully brought a motion to disqualify the lawyer. The lawyer could not represent the president, even with his consent, because lawyer could not reasonably believe in the first instance that his representation of the president would not be adversely affected when he was a guarantor on the same debt. In such a situation, client consent should not even be sought.

Lawyers should take care with each new representation to determine, *before* the representation is

undertaken, whether there may be a conflict and whether consultation with the prospective client and former or present client about the conflict is necessary. Lawyers should further recognize that not all conflicts can be cured with client consent.

As always, the staff of the Director's Office is available to provide telephone advisory opinions on conflicts and other matters at (612) 296-3952 or (800) 657-3601.

## NOTES

<sup>1</sup> *Violations of conflicts rules have rarely resulted in public discipline cases in Minnesota. But see **In re Vitko**, 519 N.W.2d 206 (Minn. 1994).*

<sup>2</sup> *Rules 1.7-1.11, MRPC.*

<sup>3</sup> *The lawyer also violated Rule 1.7(b). Respondent believed that the interests of the estate and Driver 1 were aligned, because both wanted Driver 2 to be found liable. However, because of the non-contingent fee agreement the firm had with the estate, and the insurance money allocated to pursue the claim against Driver 2, the firm had a financial interest in pursuing the litigation against Driver 2, regardless of merit. In support of that, respondent, while representing Driver 1, did not tender the general release as a defense.*