

DIRECT ADVERSITY CONFLICTS

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Conflict of interest: The term is used frequently today in public discourse as well as by lawyers and consumers of legal services. To most people, it no doubt indicates something bad, something to be avoided. In the context of the practice of law, the term is occasionally used loosely in situations that may not in fact be conflicts of interest under the Minnesota Rules of Professional Conduct (MRPC). Unfortunately, it also seems that when confronted with a genuine conflict of interest situation, some lawyers are surprised to learn what is in fact prohibited.

The term's historical meaning and usage is frequently attributed to the New Testament biblical reference that a person cannot simultaneously "serve two masters." Ftn 1 One of the "masters" being served can be the lawyer's own self-interest, especially a financial interest. That certainly underpins many of the specific conflict-of-interest rules that apply to lawyers. Ftn 2 In other situations, the "two masters" may be two clients whose interests are in conflict. This can mean that the interests of a current client that are in conflict with the interests of a former client, Ftn 3 or it can mean that the interests of two current clients are in conflict. Sometimes, two current clients' interests are not directly adverse, but rather there is "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer." Ftn 4 Absent properly obtained consent, most such conflicts are violations of the Rules of Professional Conduct.

Direct Adversity

Direct adversity can occur in situations where an attorney is representing, or is considering representing, two separate clients who have directly adverse interests. Such conflicts seem as though they ought to be the easiest to detect. Overwhelmingly, the outcome of such conflicts is going to be that the lawyer will not be able to, or continue to, represent one or either of the clients. Thus the failure to identify and avoid direct adversity conflicts of interest can cause harm to one or more clients, in addition to

having serious financial impact on the lawyer. Yet, on occasion, even experienced lawyers miss the obvious.

Rule 1.7(a), MRPC, states that (subject to certain exceptions), a lawyer “shall not represent a client if the representation involves a concurrent conflict of interest.” Subsection (a)(1) then states that a concurrent conflict of interest exists if “the representation of one client will be *directly adverse* to another client.” (Emphasis added.) The comment to the rule expands on the concept, adding that “absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.”^{Ftn 5} Direct adversity is not limited to litigation and also occurs in transactional matters, such as when a lawyer is asked to represent the seller of a business in negotiations with a buyer who is represented by the lawyer in an unrelated transaction.^{Ftn 6}

How should these direct-adversity principles be applied in real practice? Perhaps the simplest example is that it is improper for a lawyer to sue one current client on behalf of another current client represented by the lawyer in the same matter. This is one of few situations where a conflict cannot be waived. Rule 1.7(b)(2) permits many conflicts of interest to be waived by the parties after informed consent confirmed in writing, *except* when the representation involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation” That it is inappropriate to represent both sides in the same case may seem to be a principle of the “Duh!” variety, but keep in mind that because of the imputation of conflicts of interest between lawyers in the same firm,^{Ftn 7} “represented by the lawyer” may in fact mean another lawyer in the firm—and if the firm is large enough, that other lawyer may not be physically in the same office or the same state.

By far the more common situation involving direct adversity between current clients includes unrelated matters. It is no less a violation of Rule 1.7(a), MRPC, to be adverse to one current client on behalf of a second current client when the representations are completely unrelated. Suppose you represent a business in lease negotiations for a new manufacturing facility; you may not then undertake a personal injury matter on behalf of an individual client against that business client (whose truck driver caused an accident during work hours that injured your client). Here too, that it might be different lawyers in a firm or even different departments in a large firm handling the two matters has no impact on the application of the rule. Representation is still prohibited. What may change in this scenario, since it does not involve claims in the same matter, is that the lawyer can seek a waiver of the conflict of interest from the clients if she reasonably believes she will be able to provide competent and diligent

representation to each client, and by strictly complying with the requirements for obtaining informed consent confirmed in writing.Ftn 8

One difficulty in recognizing direct adversity conflicts is properly identifying who is the lawyer's client. Particularly with corporations or government entities, how narrowly can a lawyer define her client? For example, a lawyer who represents a corporation does not automatically represent a constituent or affiliated organization, such as a parent company's subsidiary. Thus, representation adverse to a current client's subsidiary generally may be accepted absent a preexisting agreement not to do so.Ftn 9 Simply *defining* the client as X Corporation's sales department (as opposed to X Corporation as a whole), will not allow representation adverse to other of the company's departments, however.

Some jurisdictions have attempted to temper the effects of direct adversity conflicts of interest in a limited number of circumstances. The District of Columbia's version of Rule 1.7 contains an exception for what are called "thrust upon" conflicts of interest: situations in which a lawyer or law firm represents two clients in unrelated matters where there is no adversity, then direct adversity arises after the representation commences that was not foreseeable at the outset and is not otherwise waived. In these unique situations, a D.C. lawyer need not withdraw. Minnesota's Rule 1.7 has not embraced this position.

Consequences

The consequences of a conflict of interest for representing a client with interests directly adverse to another client are not only the risk of discipline, nor even having to deal with a complaint to the Office of Lawyers Professional Responsibility. Disqualification in pending litigation, or civil claims of malpractice or breach of fiduciary duty also are very real possibilities. Such civil remedies may occur even if a lawyer enters into the conflict inadvertently, for example, accepting an adverse representation as a result of a faulty conflicts check system within the firm that failed to identify the client.

Detecting and avoiding conflicts is required, even if the conflict later is determined to be waivable. In general, conflicts of interest involving direct adversity to another client should be comparatively easy to spot. A thorough conflicts check system is vital. Failure to recognize such conflicts, however, can lead to complaints, disqualification motions, or civil actions.

Notes

1 Matthew 6:24: “No one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despise the other.” (English Standard Version.)

2 For example, several of the conflict-of-interest prohibitions contained in Rule 1.8, MRPC, involve an attorney’s own self-interest.

3 Rule 1.9, MRPC.

4 Rule 1.7(a)(2), MRPC.

5 Rule 1.7, MRPC, Comment [6].

6 Rule 1.7, MRPC, Comment [7].

7 Rule 1.10(a), MRPC.

8 Rule 1.7(b)(1) and (4), MRPC. Definitions of “informed consent” and “confirmed in writing” are contained in Rule 1.0(f) and (b), MRPC.

9 Rule 1.7, MRPC, Comment [34].