

## If It Looks and Smells Like a Conflict, It's Probably a Conflict

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The largest number of telephone advisory opinions issued by this Office each year is in the area of conflicts. When is it permissible to represent a client adverse to a former or current client? The answer may be very fact specific, and this Office urges lawyers to call the advisory opinion service before undertaking questionable representation.

### **Rule 1.9(a), MRPC.**

The rule most often coming into play in advisory opinion inquiries is Rule 1.9, Minnesota Rules of Professional Conduct (MRPC), which deals with conflicts with a former client. This rule prohibits representation of a second client against a former client in the same or a substantially related matter, unless the former client consents "after consultation."

To determine whether there is a conflict, the lawyer must first ascertain whether there is a former attorney-client relationship with another party to the transaction or litigation and then determine whether the contemplated representation involves the same or a substantially related matter and whether the representation will be materially adverse to the former client. The subject of the prior representation and of the contemplated litigation are important in determining whether there is a conflict in the former client situation. Also, consult Rule 1.10, MRPC, concerning when to impute conflicts among firm members and what issues are raised when lawyers switch firms.

A subject of frequent inquiry concerns representation of one spouse in a dissolution of marriage action after the attorney in question has drafted estate plans or wills for both spouses, or has represented both spouses in a business venture. Representation of one spouse in a dissolution of marriage action is clearly adverse to the other spouse, who is a former client by reason of the estate planning or business representation.

The question under Rule 1.9(a), MRPC, is whether the matters are substantially related. If the prior representation was close in time, the lawyer probably should decline representation. If the prior representation occurred so long ago that the financial and personal information gained in that matter is stale, there is no substantial relationship. The lawyer should ask himself or herself whether the adverse spouse would reasonably feel a breach of loyalty due to the lawyer now representing one spouse in the dissolution. If so, decline the representation or risk a motion for disqualification or a complaint to this Office.

### **Rule 1.7(a), MRPC.**

This rule prohibits representation of a second client against a current client, regardless of the subject of the representation. To determine whether there is a conflict, the lawyer must check to see whether he or she represents another party to the transaction or litigation and then decide whether the contemplated representation will be adverse to the current client. The subjects of the prior representation and of the contemplated litigation are not important in determining whether there is a conflict in the current client situation.

Another frequently asked advisory opinion question is whether a lawyer can represent both parties to a dissolution of marriage action. In the March 1980 *Bench and Bar* the Director answered this question under the old Code of Professional Responsibility, opining that it has never been permissible to represent both parties in the same proceeding where the parties have actual conflicting interests, regardless of the statute which allows filing of a joint petition for dissolution.

The adoption of the Rules of Professional Conduct in September 1985 did not change the result. Representation of both parties to a dissolution of marriage action violates Rule 1.7(a), MRPC.

Further, the parties cannot waive the conflict. Waiver requires adequate consultation, and probably the disclosure of confidences and secrets gained from the other party, in violation of Rule 1.6, MRPC. Representation of both parties without separate consultation with each, so as to avoid gaining confidences and secrets, results in inadequate communication with, and inadequate representation of, both parties in violation of Rules 1.1 and 1.4(b), MRPC.