

When it comes to conflicts, not all interests are created equal

by

**Craig D. Klausing, Senior Assistant Director
Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (November 6, 2006)

Conflict of interest questions can be some of the thorniest issues lawyers deal with. Many of the more challenging advisory opinions requested of the Director's Office involve conflict of interest questions. Perhaps it is because these questions are often difficult to sort out that lawyers occasionally miss conflicts, or as this article will discuss, sometimes see conflicts where none exist.

Nonlawyers in particular, but lawyers as well, get tripped up on the distinction between having a conflict of interest versus having a "special" interest in a matter. Anytime a lawyer has an interest in a matter beyond the normal professional interest, the lawyer is wise to proceed carefully. However, unlike conflicts of interest, some types of interests don't prohibit a lawyer from proceeding with the representation or require the lawyer to obtain waivers from the client.

Expert friend

An example of a lawyer having such an interest in a matter could be as follows. Lawyer Smith represents the husband in a dissolution action. Husband and wife have an extensive art collection. One of the issues in the dissolution is the valuation of the collection. Smith happens to have a close acquaintance who is an expert in this area. Smith's client agrees to retain Smith's friend to evaluate the collection and, if necessary, provide expert testimony regarding its value.

Later, opposing counsel and his client learn of the relationship between Smith and the art expert and they object. Opposing counsel calls Smith and demands that she withdraw from the representation because of this "conflict of interest." Smith can't use her friend as the expert, argues opposing counsel. The friend will not provide an accurate evaluation of the collection because of his relationship with Smith and hence there is a conflict.

Smith recognizes that this situation is out of the ordinary, but doesn't believe that she has a conflict of interest. Smith then poses the question to the Director's Office.

At least under the limited facts presented here, the answer to the question is no, Smith does not have a conflict of interest under the Minnesota Rules of Professional Conduct (MRPC). What many lay people, and some lawyers, seem to forget when evaluating conflicts is the most basic element, the conflict. They perceive any interest the lawyer may have beyond the normal professional interest as a conflict of interest.

However, that is not the case. Rule 1.7 of the MRPC deals with conflicts of interest and provides that a

lawyer shall not represent a client if the representation involves a “concurrent conflict of interest.” A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client, or, there is a significant risk that the representation 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.

In other words, what is required is an interest that limits the lawyer’s ability to represent the client. Again, on the facts we have here, there is no such limitation on Smith’s ability to represent her client.

Obviously, there is not a direct conflict of interest because Smith is not representing her friend in the case, and even if she were his interests are not directly adverse. More to the point though, there is nothing about Smith’s representation of her client that will be materially limited because of her personal interest in the matter, i.e. her relationship to the expert. It is in her client’s interest to accurately determine the value of the art work. It is in the expert’s interest to provide such an assessment. The client and the expert are working toward a common goal. To the extent the client’s interests and the expert’s interests are aligned, there is not a conflict.

Other issues

While this special interest does not create a conflict, it may create another issue for Smith. For example, the expert’s credibility may be challenged because of his relationship to Smith.

The opposing counsel may argue that in addition to being suspect because he is a hired gun, the expert’s testimony is biased or even less credible because of his relationship with Smith. Rule 1.4(b) of the MRPC provides that “a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Given Smith’s relationship to the expert and the possibility that that relationship might serve as the basis for challenging the expert’s opinion, Smith ought to discuss that possibility with her client. Such a discussion would be necessary for the client to make an informed decision about the representation.

Further, while there is no conflict at the moment, it is entirely possible that a conflict could develop. For example, after receiving the evaluation by the expert Smith may determine that there are fundamental problems with the expert’s work that would require her to challenge the work. At that time Smith could well have a conflict of interest.

Any lawyer facing a potential conflict of interest question is well advised to contact the Director’s Office for an advisory opinion. Nonetheless, in analyzing these issues it is important to recognize that some special interest in a matter does not by itself mean a conflict of interest.