

No Substitute For Undertaking A Thorough Conflicts Check

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Sometimes it can be doing the simplest things, or not doing the simplest things, that can get a lawyer into professional responsibility trouble.

For example, the Director recently issued an admonition to a lawyer who represented the employee of a former client in a litigation matter against the former client, a matter substantially related to the original matter in which the lawyer had represented him. The lawyer did not carefully check for conflicts before taking the second representation; in fact, he didn't bother to do a conflicts check until the former client filed a complaint with the Director.

In June 1995 the client retained the lawyer to represent the client in a workers' compensation claim against the client's employer. The client signed a retainer agreement and discussed the matter with the lawyer. However, the client eventually resolved the matter with minimal assistance from the lawyer.

The client then retained a different attorney to represent the client in an action against the former employer in an action for wrongful discharge. The wrongful discharge matter arose out of the same facts as, and was substantially related to, the workers' compensation matter.

More than two years after the client had hired the lawyer for the workers' compensation matter, in November 1997, the lawyer wrote to the client's attorney in the wrongful discharge matter and informed that attorney that the lawyer had substituted as counsel for the former employer in the wrongful discharge matter. The lawyer did not inform the client of, or obtain the client's consent to, his representation of the employer. When the client's new counsel objected to the lawyer's representation of the former employer, the lawyer stated that there was no conflict of interest and did not intend to withdraw. The client then filed a complaint with the Director's Office.

At that time the lawyer reviewed his files, determined that he had represented the client previously, and withdrew as counsel for the former employer.

The Rule

The lawyer received an admonition for violating Rule 1.9(a), Minnesota Rules of Professional Conduct (MRPC). This Rule provides:

"A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are

materially adverse to the interests of the former client unless the former client consents after consultation."

In 1997 the lawyer began representing the former employer in a matter substantially related to the workers' compensation matter in which the lawyer had previously represented the client. The lawyer did not consult with the client before commencing representation of the former employer, and the client did not consent to the representation.

As the district ethics committee investigator noted, "[t]his entire matter could have been avoided had [the lawyer] checked his notes prior to accepting employment with [the former employer] against his former client."

Because the lawyer failed to review his files and records to ensure no conflict existed, he represented the former employer against his former client in violation of Rule 1.9(a), MRPC. That the lawyer eventually withdrew from the matter did not convert a Rule violation into no violation. See *In re MDK*, 534 N.W.2d 271 (Minn. 1995).

The Admonishment

The lawyer has been practicing for more than 20 years. There was no evidence that the lawyer engaged in similar misconduct in other matters. There was no claim that the lawyer's failure to identify the conflict of interest prior to his representation of the former employer or upon notification by the client's current counsel harmed the client. Therefore, the lawyer was issued an admonition for isolated and non-serious behavior. Rule 8(d)(2), Rules on Lawyers Professional Responsibility.

In short, have a system to check for conflicts, try to ensure it is a good system, and always check for conflicts before beginning representation of a new client or before beginning representation of an existing client on a new matter. Following these simple suggestions may save troubles later.