

Tips on Transacting Business with a Client

by

Thomas F. Ascher, Assistant Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (April 4, 2005)

Many of the Minnesota Rules of Professional Conduct (MRPC) are obvious and intuitive – don't lie (Rule 3.3), don't cheat (Rule 3.4), don't steal (Rule 1.15).

Others might not be so obvious. Rule 1.8(a) sets forth a number of prerequisites an attorney must follow before that attorney may enter into a business transaction with a client or acquire an ownership, possessory, security or other pecuniary interest adverse to the client. In order to avoid a potential problem with Rule 1.8(a), an attorney needs to follow the directives of Rule 1.8(a) closely and carefully.

Written notification

Rule 1.8(a)(1) states that the client must be "notified in writing by the lawyer that independent counsel should be considered," and the client must be provided "a reasonable opportunity to seek the advice of independent counsel" before the transaction is completed.

The rule requires written notification so that the importance of independent advice and counsel is not minimized. In order to make sure the advice to seek independent counsel is not treated as a mere formality, the client must be given an actual opportunity to consult with counsel. It is not sufficient to give the client written notice of the availability of independent counsel at the closing of the transaction.

Fair and reasonable

Rule 1.8(a)(2) provides that both the transaction and the terms on which the lawyer acquires the interest must be "fair and reasonable to the client," and "fully disclosed" in writing "in a manner which can be reasonably understood by the client."

Many times the client is not in a bargaining position equal to that of the attorney for any number of reasons – unequal knowledge, economic duress, stress from the legal matter itself, intentional or unintentional intimidation by the attorney, etc. For that reason, the attorney cannot simply push for the best possible deal to which he can convince the client to agree. Instead, the transaction and terms must be objectively fair and reasonable.

Charging exorbitant interest rates or overreaching by taking as security title to property far in excess of the amount owed to the attorney are examples of potentially unfair or unreasonable terms that would violate the rule.

Consent

Rule 1.8(a)(3) requires the attorney to receive the client's written consent in a document *separate from* the transaction document. This separate document must specify three things:

- whether the attorney is “representing or otherwise looking out for the client’s interests in the transaction”;
- the nature of the attorney’s conflicting interests, if any; and
- the reasonably foreseeable risks any such conflict creates for the client.

Again, this portion of the rule seeks to insure that the client fully understands the nature of the transaction and that the client is entering into the transaction freely, with actual notice of the potential ramifications.

This language also specifies the attorney’s responsibility to make sure the client understands that the attorney has a personal interest in the transaction, and thus the attorney is not protecting *the client’s* interests relative to the transaction.

The conflict might seem obvious to attorneys – so obvious that it seems unnecessary to specifically reference it in writing. To the client, however, it is not so obvious that there is an inherent conflict given the attorney’s personal involvement in the transaction, which thereby compromises his exclusive loyalty to the client. The writing requirement addresses this reality.

Proposed changes

Proposed changes to the Minnesota Rules of Professional Conduct, including Rule 1.8(a), are currently pending before the Minnesota Supreme Court, with the court’s final decision expected soon. If the court adopts the proposed changes, the rule would read as follows:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
- (1) the transaction and terms on which the lawyer acquires an interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent — in a document signed by the client separate from the transaction documents — to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

The requirements that the attorney inform the client in writing, that the client may want to consult with independent counsel and that the client be given reasonable time to do so, remain in the proposed language. Likewise, the requirement that the transaction itself be fair and reasonable remains. The requirement that the client give written consent in a separate document also remains.

Although the specific references to the attorney's responsibility to specify the lawyer's conflicting interests and the risks the client is undertaking have been removed from the rule in the proposed change, the proposal includes the requirement of "informed consent." Rule 1.0 defines that term in the proposed changes to include those concepts and essentially retains those requirements.

As with any rule or statute, be sure to consult the current version when determining the conduct necessary to comply.

Many times attorneys enter into agreements with clients in an attempt to address overdue fees in an amicable manner, allowing the representation to continue. Such attempts are reasonable, and in many instances, desirable.

There are other circumstances where an attorney's business transaction with a client is perfectly appropriate. Attorneys should consult Rule 1.8 when considering such an arrangement with a client, and they should be sure to follow the mandates of the rule precisely.