

Too Closely Held for Comfort

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Most lawyers have little trouble figuring out who their clients are. In family, criminal, personal injury or estate planning law, the client is clearly an individual. Large corporations or public entities often have a clear organizational structure that delegates decision-making authority and defines the entity's goals. In representing closely held corporations, however, the line often blurs between the interests of the organization and of its principals, providing a breeding ground for conflicts of interest.

The facts of a recent disqualification case from Nebraska, *Detter v. Schreiber*, [Ftn 1](#) demonstrate how easily a lawyer can be drawn into a web of conflicting interests.

In the Nebraska case, two veterinarians formed a corporation for their practice. They divided the stock 50-50; Dr. Schreiber signed promissory notes for his shares, payable to Dr. Detter. After making payments for several years, Dr. Schreiber contacted his personal attorney, Young, to prepare a shareholder agreement to govern and restrict the disposition of corporate stock. Young's representation of Dr. Schreiber on personal matters predated the formation of the veterinary practice, but the shareholder agreement was his first involvement in Dr. Schreiber's business.

To prepare the agreement, Young met with Dr. Detter on one occasion for an hour and a half and then had no further contact with Dr. Detter. Around this same time, Young also prepared a lease for the corporation. Aside from his single meeting with Dr. Detter, all of Young's contacts were with his longtime client, Dr. Schreiber. The parties never executed the shareholder agreement. [Ftn 2](#)

Readers with good horse sense can predict what happened next. Dr. Schreiber defaulted on his promissory note payments and Dr. Detter sued him. When Dr.

Schreiber retained Young to represent him, Dr. Detter squawked and moved to disqualify Young. Dr. Detter asserted that he was a former client of Young's, by virtue of his meeting with Young and Dr. Detter's belief that the proposed shareholder agreement was for the benefit of both shareholders. [Ftn 3](#)

Both Nebraska and Minnesota use a broad, tort-based definition of a client: a person who seeks or receives legal advice and reasonably relies on it. [Ftn 4](#)

Given Young's longtime alliance with Dr. Schreiber, it probably didn't occur to Young that he could have created an attorney-client relationship with a person he probably viewed as an adverse party. Nevertheless, an attorney in Young's situation should always clarify, to himself and to the other party, whom he represents and inform the other party that they may want to seek their own counsel. [Ftn 5](#) Because Young failed to make those disclosures, and despite Dr. Detter's likely awareness of Young's fealty to Dr. Schreiber, the Nebraska courts found that Dr. Detter reasonably believed that Young was representing him at the time of their meeting. [Ftn 6](#)

Once Dr. Detter established that he was a former client, the cows had left the barn. Several avenues of analysis lead to the conclusion that there was an impermissible conflict of interest. Rule 1.9, Minnesota Rules of Professional Conduct, prohibits a lawyer from representing a client whose interests are materially adverse to a former client in a substantially related matter or from using confidential information to the disadvantage of the former client. In this case, the lawsuit to enforce the promissory note substantially related to the proposed shareholder agreement. Furthermore, Dr. Detter had shared confidential information with Young such as his thoughts and feelings regarding the proposed shareholder agreement and his financial plans and needs.[Ftn 7](#)

The Minnesota common law test for disqualification is even more difficult to circumvent. Given a substantial relationship between the current and former client matters, the law creates an irrebuttable presumption that the attorney received confidences from the former client.[Ftn 8](#) Thus, the common law turns almost entirely on the relationship of the matters. After establishing that relationship, only a balancing of the competing equities, such as a litigant's right to the counsel of their choice, can preserve the representation.[Ftn 9](#)

No such equities existed in the *Detter* case and the court affirmed Young's disqualification.[Ftn 10](#) The Nebraska court noted that a lawyer could put together small transactions in which the amounts involved are not large enough to justify the expense required for each interested party to have individual representation. However, when the transaction is handled, it should be handled with extreme caution and with a clear and explicit understanding concerning whom the lawyer represents. In the absence of such an understanding, the attorney should represent no party to the transaction if thereafter a dispute arises among the parties relative to it.[Ftn 11](#)

The facts of *Detter* are common both to ethics complaints and to requests by Minnesota attorneys for advisory opinions. Representing closely held corporations generates conflicts because their operations are often informal and the lawyer has a tighter personal or business relationship with one partner over the other. As a result, lawyers who want to keep their cases from going to the dogs must take greater care in identifying who their clients are, clearly defining the scope of their representation, and protecting the confidences of those clients.

1 259 Neb. 381 ___ N.W.2d ___ (2000).

2 Id.

3 Id.

4 See *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980). Accord, *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997).

5 See Rule 4.3(a) and (b), MRPC.

6 *Detter*, 259 Neb. at 389. But see *TJD Dissolution Corp. v. Savoie Supply Co. Inc.*, 460 N.W.2d 59, 62 (Minn. Ct. App. 1990) (unreasonable for individual to assume attorney was representing him when interests of individual differed from interests of his brothers, who controlled the corporation, individual knew attorney had represented corporation for several years and owed allegiance to corporation, and individual advised at least once by attorney to seek other counsel).

7 *Detter*, 259 Neb. at 384.

8 *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 731 (Minn. 1983).

9 Id.

10 *Detter*, 259 Neb. at 389-90. Nebraska is one of a handful of states that retains the Code of Professional Responsibility, the predecessor to the Rules of Professional Conduct. Hence, the Nebraska Supreme Court rendered its decision under Ethical Considerations 5-14 and 5-18 and Nebraska common law.

11 *Detter*, 259 Neb. at 388, quoting *In re Brownstein*, 602 P.2d 655 (Or. 1979).