"Materially Limited" Conflicts: Learning by Example

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Most lawyers readily understand conflicts wherein they are directly adverse to another party, but they may be uncertain where their own interests or responsibilities to another person "materially limit" their representation of a client. Because lawyers owe their clients independent professional judgment, they should identify and weigh any limits of their representation.

BY WILLIAM J. WERNZ

Lawyers generally understand "directly adverse" conflicts—they and their firms may not sue or negotiate with their own clients, unless the conflict is not too serious and the clients give informed consent, confirmed in writing.[1] Lawyers understand that "directly adverse" conflicts may arise regardless of whether the subject matters of representation are related.

Lawyers often have more difficulty understanding the other type of current client conflict—that involving a "significant risk" that a lawyer's representation of one client will be "materially limited" by the lawyer's own interests or by responsibilities to another client or third party. A series of examples drawn from Minnesota and other leading authorities may help explain these conflicts.

Key Terms

Rule 1.7(a) includes several concepts and terms that are key to understanding "materially limited" conflicts and the examples to follow. Among these are:

■ **"Significant Risk."** Rule 1.7(a)(2) requires a probability calculation. The "mere possibility" of conflict does not trigger the rule, but a genuine "likelihood" does. Such calculations require ongoing attention. A lawyer might, for example, represent codefendants, employer and employee, but when it becomes apparent that—contrary to original protestations—the employee may well have committed the alleged misconduct that could be imputed to the employer, the clients' interests may have become antagonistic.[2]

■ **"Materially Limited."** Whether "the representation" is apt to be "materially limited" is the focus of Rule 1.7(a)(2). For "materially limited" conflicts, the emphasis is on how a lawyer's judgment and work product might be affected by the lawyer's interests, duties, or connections. In contrast, "directly adverse" conflicts emphasize a formal relationship of adversity to the client. A critical question is whether some purse string, heart string, or other tie "will materially interfere with the lawyer's independent professional judgment in considering alternatives or

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foreclose courses of action that reasonably should be pursued on behalf of the client."[3]

■ **"Competent and Diligent Representation."** The law of conflict waivers is a subject beyond the scope of this article, but one aspect deserves note: Even informed consent, confirmed in writing, will not be effective unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation … ."[4]

Personal Interest

Four examples will show how "a personal interest of the lawyer" may materially limit a representation.

"Me First." Attorney Glover represented a farmer, who was a widower with three adult children. Glover made a proposition that he thought one of the daughters would not refuse: He would influence the farmer to execute a will solely to the daughter's benefit, in consideration for which the favored child would give Glover a portion of the devise.[5] Because Glover's representation of the farmer was subordinated to—not just limited by—Glover's own pecuniary interest, Glover was disbarred.

"Hands Tied." A lesser example of conflict arising from self-interest arose when a lawyer stood mute at his client's motion to find that the lawyer provided ineffective assistance of counsel.[6] As the lawyer put it, his "hands have been tied a little bit," by his own reputational interest.

"My Bad." A third example of conflict from self-interest is found in standards that have recently been set for determining when a lawyer's interest in defending against a client's possible malpractice claim may unduly limit a continuing or follow-on representation of the client. These limits have been addressed both from the civil law viewpoint of the fiduciary duties of loyalty and disclosure and somewhat similar, but distinguishable, ethical duties regarding conflicts and communication. The fiduciary duty standard applies where "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by" the lawyer's own interest. The ethics standard may apply where the lawyer "knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's interests." The ethics standard has also been applied, in the form of private discipline, to a lawyer who "cajoled" a client into settlement, because the lawyer feared a possible sanction regarding discovery responses.[7]

"My Business." A lawyer who refers clients to the lawyer's business, or involves the lawyer's business in providing legal services may be limiting a representation by the lawyer's own interests. For example, lawyers have been admonished for mixing title insurance services with legal representation and title opinions with sale of the lawyer's property to a client.[8]

Responsibilities to Another Client

Perhaps the most common source of "materially limited" conflicts is a lawyer's responsibility to another client. Examples abound.

"Pulling a Punch." The desire not to offend or become too adverse to another client may cause the lawyer to provide a less-than-zealous representation. "Pulling a punch" may include, for example, "a 'soft,' or deferential, cross-examination."[9] Even if the attorney obtains a conflict waiver, the other client may expect deference. The author once heard, "When we waived conflicts for this negotiation, we never expected a lawyer from the firm would pound the table to us!"

"Human Nature." A lawyer's natural concern for lucrative relationships may limit the lawyer's zeal or diligence in a matter to the detriment of the representation. The Minnesota Supreme Court reasoned that ordinarily defense counsel represents the insured and not the insurer, because, "Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client—the one who is paying his fee and from whom he hopes to receive future business—the insurance company."[10] Expecting more from lawyers, the court followed the lead of Katherine Hepburn, who famously explained to Humphrey Bogart—in "African Queen," as she poured out the last of his gin—"Human nature, Mr. Allnut, is what we were put on this earth to rise above."

"He Likes Me Better." A lawyer who treats one client's interests as subservient to another client's interests may have a materially limited conflict. For example Varriano, a lawyer, represented MP. The police found drugs at the home of GK, MP's mother. Varriano moved to suppress, arguing that because MP resided at GK's home, MP reasonably expected privacy. GK told Varriano she would testify in support of the motion, but she testified to the contrary. Varriano then contacted GK, asked her to sign an affidavit that she testified falsely, and told her that she might be charged with perjury but he would represent her. GK signed the affidavit; Varriano filed it; GK was charged with perjury; Varriano represented GK; and GK was convicted. Varriano's subordination of GK's interests to those of MP warranted public discipline.[11]

"Variation on *Varriano*." A forerunner of Varriano was reprimanded for offering to plead one client guilty to felony charges if the prosecutor would dismiss similar charges against an equally culpable client, all without benefit of conflict disclosures or waivers.[12]

"One Client—Two Hats." A client who has both personal interests and fiduciary duties in a matter presents potential conflicts for a lawyer. Lawyers who further the personal interests of clients and thereby aid the breach of client fiduciary duties may be disciplined, *e.g.*, for assisting a conservator in avoiding foreclosure on personally owned land by selling to the conservatorship, although the land was a far from suitable investment.[13] Notwithstanding such abuses, the suggestion that representations of fiduciaries who also have personal interests are generally "ill-advised" goes too far.[14] For example, good lawyers often represent a surviving spouse who is both beneficiary and nominated Personal Representative.

"Two Masters." A famous maxim *sounds* descriptive of materially limited conflicts, "No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."[15] However, in some situations, with proper disclosures, lawyers *may* properly serve two or more masters, *i.e.*, joint clients.[16] Some types of joint representations are common. Examples include spouses in estate planning, codefendants where one fully indemnifies the other,

and selling shareholders who agree on terms. On the other hand, some types of proposed joint representations call for special caution or, depending on the circumstances, should be declined. These include joint criminal defendants, principals in start-up companies, and driver-passenger representations.[17]

Responsibilities to Third Person

"Sure, I'll Handle the Money." Lawyers acting in nonlawyer capacities such as fiduciaries, board members, or escrow agents may take on duties to nonclients. In conflicts analysis, it is assumed that lawyers will fulfill these responsibilities. These nonlawyer duties may conflict with responsibilities to clients. For example, several lawyers have received private admonitions for disbursing funds to clients in breach of duties arising under agreements by which the lawyers acted as escrow agents.[18] Similar problems can arise when a lawyer agrees to protect a medical provider's interest in receiving payment from a settlement or award for services rendered.[19] A lawyer's duty to advise a corporation independently may be limited, in some circumstances, by the lawyer's service as a director.[20]

"Don't Ask—Can't Tell." Lawyers' ethics and fiduciary duties require that they communicate to clients information that is material to a representation.[21] Lawyers also have duties of confidentiality, however, both to clients and to others. If the duties of disclosure and confidentiality conflict as to a material matter, the lawyer's client representation may be materially limited. Several formal opinions of the ABA Standing Committee on Ethics and Professional Responsibility address information-based conflicts. Among these are conflicts as to prospective clients and nonclients who were parties, with clients, to joint defense agreements.[22] If the conflict is too severe, the conflict cannot be waived, especially where the client is unsophisticated or inexperienced.

"Adam's Rib." Katherine Hepburn is again an ethics model, this time for what "ordinarily" should not be done—a lawyer appearing for a client against a party represented by the lawyer's spouse or close relative. The essence of former Rule 1.8(i) has been carried forward in Rule 1.8, cmt. 11, which cautions that such representations risk disclosure of confidential information and interference with loyalty and professional judgment.[23]

Limits by Custom or Agreement

Several types of limits on representations are not regarded as conflicting material limits, but as permissible limits. These include natural or customary limits, and limits by agreement on scope of representation.

Natural and Customary Limits. For example, a lawyer who agrees to represent a client in the purchase of a property does not thereby also agree to undertake litigation as to any disputes regarding the purchase. The fact that the lawyer would not sue the seller or lender, either because the lawyer is not a litigator or because of other relationships with the seller or lender, is not a limitation of the type contemplated by Rule 1.7(a)(2). Similarly, an agreement to opine as to the proper form of a financial instrument does not imply an opinion that the instrument is a good investment.

Limits by Agreement. Agreement, explicit or implicit, may limit the scope of representation. A lawyer retained to draft a deed that would convey a father's real estate to his son on the father's death was found to have been retained for a real estate transaction and not for tax advice, absent special agreement. The allegedly excess estate taxes caused by the conveyance into joint tenancy, rather than tenancy in common, were regarded as "the natural result of the form of ownership chosen by the decedent," notwithstanding that the lawyer was originally retained for estate planning.[24]

"Scope" Requirements—Rules 1.5(b), 1.2(c). Communication of the scope of representation is required by Rule 1.5(b). In addition to limits on representation based on custom or the nature of representation, Rule 1.2(c) allows reasonable limits on the scope of representation, with informed client consent. Some such limits may be based on factors such as budget, on the lawyer's skills or availability, and a variety of other such factors.

Limiting Representation to *Avoid* Conflicts. Limitations on scope of representation may also be used to avoid materially limited and directly adverse conflicts. For example, a lawyer and client might agree that the lawyer will render an infringement opinion only as to products or marks of parties A, B, and C, but not as to D, because D is the lawyer's client on other matters. However, if the issues relating to D are central to a good opinion, it may be that the limitation is too material to waive.

The use of scope-of-representation limitations to avoid conflicts has been recognized in ABA Formal Op. 07-447, "Ethical Considerations in Collaborative Law Practice." It may be agreed that lawyers will try to facilitate a marital termination agreement, but will bind themselves not to undertake litigation if agreement cannot be reached. The ABA reasons that "there is no foreclosing of alternatives, *i.e.*, consideration and pursuit of litigation, otherwise available to the client because the client has specifically limited the scope of the lawyer's representation to the collaborative negotiation of a settlement."

"Accommodation Clients." A controversial limit on representations is found in the concept "accommodation clients." A leading authority indicates that, with the informed consent of both clients, a lawyer may undertake representation of another client as an accommodation to the lawyer's regular client.[25] An example would be a lawyer who represents a corporation also representing employees, who are fact witnesses and have no liability exposure, solely for their depositions. Another example would be representing a defendant retailer in an infringement suit, while primarily representing the manufacturer/distributor who fully indemnifies the retailer. Because conflicts are conflicts *of interest*, and the "accommodation clients" have minimal interests in this matter, it is argued that the latter may be minimally represented.

Conclusion

Lawyers owe clients services rendered *independent* of push or pull from forces external to the work itself. On the other hand, a representation has its own limits, by nature, custom, or agreement. In addition, there are additional limits that, by agreement, are tolerable, so long as the representation is competent and diligent. Identifying and weighing these limits involves professional judgments that are formed with Minnesota and other precedents in mind. ▲

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Notes

[1] Rule 1.7(a), Minn. R. Prof. Conduct, provides, "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients 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.

[2] Rule 1.7, cmt. 8. *See Cook v. City of Columbia Heights*, 945 F. Supp. 183, 187 (D. Minn. 1996), where new arrangements were made when a conflict emerged.

[3] Rule 1.7, cmt. 8. Independent judgment is also central in Rules 2.1, 1.8(f) and 5.4.

[4] Rule 1.7(b)(1).

[5] *In re Glover*, 176 Minn. 519, 223 N.W. 921 (1929).

[6] *State v. Paige*, 765 N.W.2d 134, 140-42 (Minn. App. 2009).

[7] *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609, 629 (8th Cir. 2009), *citing Restatement (Third) of the Law Governing Lawyers* §§121, 125 (addressing fiduciary duty). *See also,* Minn. Lawyers Board Op. No. 21 (2009); Betty M. Shaw, "Summary of Admonitions," 63 *Bench & Bar of Minn.* No. 3 (March 2006), p. 17.

[8] Marcia A. Johnson, "Summary of Admonitions," 50 *Bench & Bar of Minn.* No. 2 (Feb. 1993) p. 11; Patrick R. Burns, "Avoiding Conflicts in the Sale of Title Insurance to Clients," *Minnesota Lawyer*, June 2, 2008.

[9] ABA Formal Op. 92-367, "Lawyer Examining a Client as an Adverse Witness, or Conducting Third Party Discovery of the Client."

[10] *Pine Island Farmers Coop v. Erstad & Riemer, PA*, 649 N.W.2d 444 (Minn. 2002) (citation omitted).

[11] *In re Varriano*, 775 N.W.2d 282 (Minn. 2008).

[12] *In re Nilva,* File No. C7-83-866 (Minn. Feb. 15, 1984).

[13] *In re Brown*, 414 N.W.2d 410 (Minn. 1987); *In re Nelson*, 470 N.W. 2d 111 (Minn. 1991).

[14] Robin J. Crabb, "Identifying Your Client," *Minnesota Lawyer*, Apr. 6, 2009.

[15] Matthew 6:24.

[16] Rule 1.7, Cmts. 29-33.

[17] Rule 1.7, Cmt. 8; Martin A. Cole, "Handling Driver-Passenger Conflicts," *Minnesota Lawyer,* May 2, 2005.

[18] *See* Marcia A. Johnson, "Conflict Admonitions 1995," 53 *Bench & Bar of Minn.* No. 3 (March 1996), p. 12. *See also* William J. Wernz, "Summary of Admonitions," 43 *Bench & Bar of Minn.* No. 3 (March 1986), p. 11. It might be argued that representation *of the client* was not limited by breaching duty to another, but the cases are based on assumption that duty to the nonclient will or ought to be fulfilled.

[19] Craig Klausing, "Letters of Protection: Keeping Your Client's Promise," *Minnesota Lawyer*, March 19, 2001; Craig Klausing, "Another Look at Letters of Protection," *Minnesota Lawyer,* Aug. 5, 2002.

[20] Rule 1.7, cmts. 9 and 35. *See* Edward J. Cleary, "When the Lawyer Takes a Stake," 57 *Bench & Bar of Minn.*, No. 5 (May/June 2000), p. 26. *See also* ABA Formal Opinion 98-410, "Lawyer Serving as a Director of Client Corporation."

[21] Rule 1.4, Minn. R. Prof. Conduct; *STAR Centers Inc. v. Faegre & Benson LLP*, 644 N.W.2d 72 (Minn. 2002).

[22] *See* ABA Op. 95-395, "Obligations of a Lawyer Who Formerly Represented a Client in Connection With a Joint Defense Consortium"; ABA Formal Op. 90-358, "Protection of Information Imparted by Prospective Client"; ABA Op. 99-415, "Representation Adverse to Organization by Former In-House Lawyer"; and ABA Formal Op. 05-436, "Informed Consent to Future Conflicts of Interest, Withdrawal of Formal Opinion 93-372."

[23] The Hepburn movie here is "Adam's Rib," with Spencer Tracy as Hepburn's spouse/adversary. *See* Martin A. Cole, "The Ethics Rules: Lost and Found," 63 *Bench & Bar of Minn.* No. 7 (Aug. 2006), p.12. Note, however, that the article's characterization of current Rule 1.8, cmt. 11 as a "recommendation" cannot be based on the comment's language ("ordinarily may not") and the director's use of comments in prosecutorial determinations.

[24] *Marker v. Greenberg*, 313 N.W.2d 4, 6 (Minn. 1981).

[25] *Restatement(Third) of the Law Governing Lawyers* §132, Cmt. i.