

Conflict of Interest: Do You Know One When You See One?

By Sharon K. Weedin

Conflicts are complicated. Taking on Supreme Court Rule 4-1.7 (Conflict of Interest: Current Clients) and Rule 4-1.8 (Conflict of Interest: Prohibited Transactions), to say nothing of Rules 4-1.9 (Conflicts of Interest and Former Clients) and 4-1.18 (Conflicts of Interest and Prospective Clients), in a short article is daunting. The text of the rules is bad enough; the columns and columns of Comments accompanying the rules only add to the reader's anxiety.

Rather than attempt an academic analysis of what may hypothetically constitute a conflict of interest, this article will instead review some disciplinary decisions and let the Supreme Court of Missouri provide us with factual scenarios that have been found to constitute sanctionable conflicts of interest. Sanctions will not be discussed, because in most cases the Court had more than conflict violations to consider in reaching a sanction determination. No attempt has been made to categorize or group the cases – the goal is simply to set forth the bare facts, as related in the published decision, that were found to constitute a sanctionable conflict of interest.

In re Mills, 539 S.W.2d 447 (Mo. banc 1976). The attorney served as guardian of a veteran who had been determined incompetent. The attorney acquired, through a trade, a lot on which a mobile home rested. He did not record the deed reflecting the barter transaction. The attorney/guardian thereafter filed a petition in Probate Court seeking an order authorizing him to buy the real estate for his ward, without revealing he was the owner and seller of the property. He prepared a deed that reflected the property was being conveyed by the people from whom he had acquired the property, and those individuals signed the deed. The deed reflected that the property was being conveyed to respondent as guardian of the veteran.

The attorney engaged in self-dealing, in violation of DR5-104(A), the predecessor to Rule 4-1.8(a). The Court stated that whether the lawyer made a profit on the transaction was of no significance. The attorney used his

fiduciary position to sell property he wanted to dispose of. He could not deal at arm's length with the ward because of the fiduciary relationship and because the ward was incapable of consenting to the purchase.

In re Miller, 568 S.W.2d 246 (Mo. banc 1978) (per curiam). A longstanding friend of the attorney had a stroke. Before becoming incompetent following the stroke, the friend executed a general power of attorney to the attorney. The attorney, for eight years while the friend was mentally incompetent, used the client's funds as a source of credit for himself. He also sold some real estate owned by the client to his wife, who thereafter made no principal or interest payments. The attorney was guilty of an inherent conflict of interest.

In re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992). Attorney represented the husband in a dissolution of marriage. His client was involved in a "close relationship" with a woman named Debra. Client and Debra asked respondent to figure out a way that client could transfer \$40,000 to Debra without client's adult children becoming aware of it. Though he at first resisted the entreaties, attorney eventually agreed to help. He prepared a petition wherein he purported to represent Debra in a suit against client. He also prepared a consent to judgment whereby Client agreed to pay Debra \$40,000. The attorney called a judge in a nearby county where no one knew client or Debra and asked whether the judge would object to the filing of a "friendly suit," and the judge voiced no objection. The suit was filed, and the court entered a judgment in favor of Debra and against client for \$40,000. Client's adult children subsequently initiated conservatorship proceedings for client. A conservator was appointed.

In concluding that the attorney engaged in a conflict of interest, the Court noted that a lawyer may represent conflicting interests only where the lawyer can adequately represent the interests of all parties and obtain the express consent of all concerned after full disclosure of the facts. (For a more recent analysis of concurrent conflicts of

interest, see *State ex rel. Horn v. Ray*, 325 S.W.3d 500 (Mo. App. 2010)). Consent cannot be given by one the lawyer should reasonably know lacks the capacity to consent. The lawyer must examine the client's ability to receive and analyze information about the conflict and its consequences. The client's vulnerability must be taken into account.

Here, the attorney should have refused to represent Debra in the faux litigation. The evidence showed that client was "obsessed" with Debra, that he had lost a job because of her, and had been under the care of psychiatrists. The client's capacity to consent was questionable, and the attorney violated the conflicts rule.

In re Howard, 912 S.W.2d 61 (Mo. banc 1995). The attorney was representing client in a child support matter. The client recorded a telephone call during which the attorney suggested to the client that she come to his office for a few drinks and a little loving. He then told her two days before the oral argument of her case in the Supreme Court that she either had to pay him or have sex with him. The attorney suggested that a different client accompany him on out of town trips. He also grabbed her in his office and tried to embrace and kiss her. The Court found that the attorney's unwanted sexual advances undermined the attorney/client relationship and violated the conflict of interest rule. Note that Rule 4-1.8(j) now expressly prohibits most sexual relationships between attorney and client.

In re Charron, 918 S.W.2d 257 (Mo. banc 1996). Client gave lawyer a \$20,000 promissory note for legal services the lawyer performed for the client over a number of years. The client died and lawyer became personal representative of the client's estate. The lawyer paid himself \$20,000 out of estate assets without filing a claim against the estate and without applying for appointment of an administrator ad litem. The lawyer also made additional payments totaling \$9,500 to himself for services rendered the estate without first seeking court approval.

The lawyer had a conflict of interest by the fact of being a creditor of the estate and personal representative of the estate.

In re Weier, 994 S.W.2d 554 (Mo. banc 1999). The attorney owned a considerable financial stake in a corporation. He formed a partnership of urologists, which then purchased a medical device for use by urologists.

The corporation leased the device from the partnership. The corporation entered into an operating agreement with another company to conduct the daily operation of the medical device. The attorney owned 50 percent of the operating company. The partners in the partnership were not informed of the attorney's ownership interests in the lessee corporation or the operating company.

The attorney claimed there was no conflict of interest in his failure to reveal his interests in the operating or leasing companies to the partners because he was not in an attorney/client relationship with the partners. The Court found that there was an attorney/client relationship because the attorney invited the urologists to meetings where the idea for forming the partnership and purchasing the device was presented. The attorney was introduced at the meetings as "our attorney." He drafted numerous partnership documents, including the partnership agreement, and obtained a federal ID number for the partnership. He also negotiated the purchase of the medical device.

The attorney engaged in a conflict of interest by failing to affirmatively disclose to the partners his financial interests in the various companies.

In re Snyder, 35 S.W.3d 380 (Mo. banc 2000) (per curiam). Because the attorney took a quit claim deed to a client's property to secure payment of a fee, the attorney had to comply with the heightened scrutiny imposed on a business transaction between an attorney and his client. The attorney's failure to comply with the requirements of Rule 4-1.8(a) constituted a sanctionable conflict of interest.

The attorney also represented a client in a criminal tax case. The client executed a promissory note secured by a deed of trust for up to \$35,000 on the client's house. When the attorney found out the mortgagee was going to foreclose on the house, the attorney convinced his client to file for Chapter 7 bankruptcy. After the house was sold in the bankruptcy proceeding, the attorney filed a lien for the total amount of proceeds from the sale. Appeals followed that totally depleted the bankruptcy estate.

The client's interests diverged from the attorney's when the attorney attempted to impose a lien on the proceeds from the bankruptcy sale of the client's house. The attorney's pursuit of his fees materially limited his representation of his client's interests in violation of conflicts rules.

In re Carey and Danis, 89 S.W.3d 477 (Mo. banc 2002). Attorneys assisted in the defense of product liability cases

on behalf of a client while associates at a large law firm. The attorneys left the law firm and started their own law firm. The attorneys brought a class action products liability lawsuit against the same company for which they had performed defense work while associates. The attorneys engaged in a sanctionable conflict of interest by bringing a case in a substantially related matter against a former client where the interests of the clients are materially adverse and there has been no consent.

In re Coleman, 295 S.W.3d 857 (Mo. banc 2009). Attorney added a clause to his contingent fee agreement with client stating that he had the exclusive right to determine when and for how much to settle the client's cases. A clause of that nature elevated the attorney's interests above those of the client and violated the conflict of interest rule.

Although each of the foregoing cases involved a unique set of facts, there are a couple of recurring themes. One is to be very aware of who or what may be deemed your client for conflicts purposes. The other is to be very wary of entering into a business transaction with a client. Based on case law review and my experience as a staff

counsel at OCDC, I would venture to say that the majority of conflicts cases arise because the lawyer enters into a business transaction with a client or becomes personally involved with a client. The Supreme Court of Missouri has cautioned lawyers against going down this path:

[There is an] inherent danger ... [in] becoming personally involved with the affairs of clients, self dealing with clients, and ... "taking a piece of the action." The attorney, with his superior knowledge and education, can pursue this course only at his peril. It is an area wrought with pitfalls and traps and the Court is without choice other than to hold the attorney to the highest standards under such circumstances.

In re Lowther, 611 S.W.2d 1, 2 (Mo. banc 1981).

Those are words attorneys should take to heart.

Sharon K. Weed is staff counsel for the Office of Chief Disciplinary Counsel in Jefferson City.