

STATE BAR ASSOCIATION OF NORTH DAKOTA  
ETHICS COMMITTEE  
OPINION NUMBER 00-01  
January 26, 2000

The Ethics Committee has been requested to issue an opinion as to whether the requesting attorney has a conflict of interest under the following facts:

**FACTS**

The Requesting Attorney has represented both Husband and Wife on various domestic matters during their marriage to one another. Specifically, the Requesting Attorney represented the Wife in obtaining a Restraining Order against an acquaintance of her former husband. The Requesting Attorney has also represented the Wife in conjunction with child support and custody issues arising from her divorce from the same former husband. The Requesting Attorney has also represented the Husband in matters relating to spousal support from an earlier marriage.

Wife has initiated a divorce action against Husband. Husband has retained the Requesting Attorney to represent him in that divorce action. The Requesting Attorney states that no information was ever obtained from Wife which could now be used to Wife's disadvantage in the pending divorce action.

Wife's attorney has raised an ethical issue with respect to the Requesting Attorney's representation of Husband in the divorce.

**APPLICABLE RULES**

Rule 1.6 of the North Dakota Rules of Professional Conduct provides that, with limited exceptions, a lawyer shall not reveal, nor use to the disadvantage of a client, information relating to representation of that client.

Rule 1.9 of the North Dakota Rules of Professional Conduct specifically addresses the potential of conflicts of interest arising from prior representation. It states:

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

- (a) Represent another person in the same matter in which that person's interests are materially adverse to the interests of the former client; or
- (b) Represent another person in 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; or
- (c) Use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as Rule 1.6 would require or permit with respect to a client.

### **DISCUSSION**

For purposes of this opinion, the Committee accepts the Requesting Attorney's statement that there was no ongoing representation of either spouse immediately prior to the commencement of the divorce action and that, therefore, Wife is a former client as contemplated in Rule 1.9.

It is clear that the interests of the Husband and Wife in the pending divorce litigation are adverse to one another. Thus, the issue is whether the Requesting Attorney's representation of Wife in prior Protection Order, child support and child custody matters are "substantially related" to the pending divorce case. Similarly, whether the Requesting Attorney is in a position to use information acquired through the former representation to the disadvantage of Wife in the divorce case.

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation in the particular context of the case being considered. In determining their application, a lawyer must consider the substantive and procedural law from which the issue arises. Therefore, it is instructive to briefly consider the substantive law of divorce, to the extent that it may dictate a lawyer's professional conduct.

In divorce matters, virtually all aspects of a person's life are relevant to one or more issues. In dividing property, allocating debt, and awarding spousal support, the court considers the ages of the parties; the parties' earning abilities; the conduct of the parties during the marriage; the parties' station in life; the parties' health and physical condition; the necessities of the parties and their circumstances, financial and otherwise; the efforts and attitudes of the parties towards accumulation of property; and such other matters as the Court may determine are material. Moilan v. Moilan, 1999 ND 103, ¶ 10, ¶ 18, 598 N.W.2d 81. In matters of child custody and visitation, the Court considers the disposition of a parent to provide love and guidance; the disposition of a parent to provide for the material needs of a child; the moral fitness of the parents; the mental and physical health of the parents; a parent's relationships with third parties; whether a parent has been abusive; and any other factors that the court deems relevant. In summary, there is very little that goes on in one's life that could not become relevant in a divorce proceeding. N.D.C.C. § 14-09-06.2. For that reason, communications between a lawyer and client in domestic matters are frequently wide ranging and address sensitive matters.

In the above context, is a divorce case "substantially related" to prior domestic matters involving a different adversary but of a nature which could reasonably be expected to have resulted in confidential communications between attorney and client which could be relevant in the divorce case? Similarly, is it reasonable to believe that information disclosed by a client in a protection order, child support or custody proceeding would have relevance in the client's subsequent divorce case? In the opinion of the Committee the answer to both questions is "yes."

A review of advisory opinions and cases from other jurisdictions does not disclose an objective standard by which one can easily determine whether cases are "substantially related." The analysis has been upon a case by case basis. While one might argue that it should be left to the attorney to determine whether he or she has obtained confidential information in the course

of the previous representation that could be used against the former client, the Committee believes it would be difficult under the Rules of Professional Conduct for a lawyer to represent one spouse in a divorce case when he or she has represented the other spouse in family law matters, whether or not they involve the current spouse, without the former client's consent. Irrespective of the attorney's good faith, it is likely that the potential to utilize information obtained during the prior proceedings will arise and place the attorney in a position in which his or her obligation to protect a former client's confidences conflicts with the obligation to represent the current client zealously pursuant to Rule 1.3 of the Rules of Professional Conduct.

### **CONCLUSION**

Because the former client has objected, the Committee concludes that the Requesting Attorney should not accept the representation. To do so would be a conflict of interest.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This Rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Jay Fiedler and was approved by a vote of \_\_\_\_ by the Committee on January \_\_\_\_, 2000.

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Mark Hanson, Chair