

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

Opinion No. 00 - 02

The requesting law firm seeks the Committee's guidance on issues relating to inactive files which came into the law firm's possession when it purchased the practice of another law firm.

FACTS

The selling law firm had consisted of two attorneys. After one of the attorneys died, the other attorney chose to change the focus of his work, and there was a purchase agreement negotiated. The purchase agreement covered all "open, active, and closed files, client lists, indexes, and work in progress," with the exception of the family and personal files of the selling firm and files relating to the area on which the remaining attorney in the selling firm chose to focus his work.

Closed files were handled in the following manner. The selling firm sent letters to all clients whose closed files were transferred to the purchasing firm. The letters notified the clients whose closed files were transferred that they were free to choose their own attorney, and that they were free to pick up their files and the documents in their files. The purchasing firm agreed to keep the closed files for at least ten years. The purchasing firm assumed no responsibility for work which had been performed, or which the selling firm had failed to perform, on any of the closed files. The purchase agreement further provided that, in the event the purchasing firm re-opened any of the closed files, it would be responsible for any work it performed on those files.

The purchasing firm has not incorporated the closed files into its ongoing conflicts checking system, unless a former client of the selling firm asks the purchasing firm for representation. If a client requests that the purchasing firm do work related to one of the closed files, the closed file is used for that purpose. Apart from those situations, the purchasing firm makes no use of the closed files.

The purchasing firm has now been asked to represent a surviving spouse to review that spouse's rights under a will, a prenuptial agreement, and a post-nuptial agreement. All of the documents at issue were drafted by the selling firm, and the files of the selling firm relating to the documents are among those now in the possession of the purchasing firm; none of the attorneys or employees of the purchasing firm has examined the contents of the closed files which the purchasing firm possesses.

The requesting firm asks this Committee's opinion on whether it can represent the surviving spouse under these circumstances. The representation might involve challenging the validity of the documents drafted by the selling firm. The requesting firm also asks whether the analysis would be different if the selling firm's files identified both spouses as clients, rather than just the deceased spouse. The requesting firm asks if it

can avoid any "claim of conflict" by delivering the closed files to the attorney for the estate of the deceased spouse, without reviewing any of the information contained in those closed files.

Finally, the requesting firm asks for the Committee's guidance on whether it has a duty to inventory the closed files, and cross reference them to its existing files to identify any disqualifying conflicts.

DISCUSSION

There are no rules directly addressing the questions posed. The rules do not define what a lawyer's files are to contain, whether files belong to the client or to the lawyer, how long files are to be retained after a client's work is completed, a process for destroying closed files, or how a lawyer is to handle closed files when the lawyer stops practicing law. The recent adoption of N.D.R. Prof. Conduct 1.17 addresses sale of a law practice, but does not specifically address how closed files of a selling law firm are to be handled. (The sale and purchase involved in this situation occurred prior to the adoption of Rule 1.17.)

The Committee believes there is significant variation among lawyers as to what documents are created and kept in a file. For example, some lawyers might keep only final documents and billing information in a file, while other lawyers might keep early drafts of the documents, notes a lawyer may have made, and any other papers related to the work which the lawyer performed on the file. Depending on the type of matter involved, and on the lawyer's work style, there may be files that do not contain any information required to be kept confidential under N.D.R. Prof. Conduct 1.6. For example, a file might contain only a copy of a finalized contract or deed, the contents of which are not confidential because the information has become "generally known." See N.D.R. Prof. Conduct 1.6(h). Or, a simple litigation file might contain only copies of documents which had been filed with a court, or supplied to an opponent during discovery, and correspondence with opposing counsel.

The purchasing firm had no lawyer/client relationship with the persons whose closed files it possesses, as to the matters involved in those closed files. Even though it had no attorney/client relationship, the purchasing firm may have access to confidential information by virtue of having access to the closed files. The Committee must consider whether access to confidential written information disqualifies the purchasing firm from representing persons whose closed files it possesses.

In a case involving disqualification of a law firm because of prior representation by a lawyer who had formerly been associated with that firm, the North Dakota Supreme Court discussed access to confidential client information as opposed to actual knowledge of confidential client information. Heringer v. Haskell, 536 N.W. 2d 362, 365-66 (N.D. 1995). In that case, the Court held that, since lawyers remaining in the law firm had general access to the client's file while the former lawyer was with the firm, that access equated with knowledge of the client's confidential information. Under the

analysis of Heringer, the purchasing firm would be considered to have actual knowledge of any written confidential information found in the closed files it purchased from the selling firm.

It is recognized that a lawyer may have a duty of confidentiality to a person who is not, and has never been, the lawyer's client. See Hazard & Hodes, *The Law of Lawyering*, §§ 1.9.110. For example, during the course of representing a financial institution, a lawyer may obtain confidential information about that institution's customers. Or, a lawyer representing a health care provider may obtain confidential information about the provider's patients. Even though the lawyer has never had a lawyer/client relationship with the bank's customers, or with the health care provider's patients, the lawyer has a fiduciary duty not to disclose the confidential information. Id. In a somewhat analogous situation, an Illinois court barred a lawyer from representing a party because of information, covered by a confidentiality agreement, which the lawyer had obtained. The lawyer had represented a member of an environmental "cost recovery committee," which was covered by a confidentiality agreement, and learned confidences of non-client members of the committee. One of those non-client members of the committee was sued by a third party in a related matter, and the lawyer was barred from representing the third party, because of the lawyer's obligations of confidentiality to the non-client member of the committee. GTE North, Inc. v. Apache Products Co., 914 F.Supp. 1575 (N.D. Ill. 1996). The Court analyzed the question under Rule 1.9, even though it described the relationship as a "fiduciary obligation" rather than as a former client relationship. Under a similar analysis, if the purchasing firm possesses information which it has a responsibility to keep confidential, the purchasing firm may not be able to undertake the representation it describes.

The facts presented by the purchasing firm suggest that one factor motivating its decision to accept transfer of the closed files was the future work which those clients might generate for the purchasing firm. Anticipation of future work is reflected in the purchase agreement provision that the purchasing firm would assume legal responsibility only for work done on "reactivated" files, suggesting that it anticipated at least some of the clients of the selling firm would become clients of the purchasing firm. Letters sent to the clients, advising them of the contemplated file transfer, and that they were free to pick up their files and choose their own attorney, may also have suggested that the purchasing firm would be available to represent the clients of the selling firm in the future, if they did not exercise their rights to pick up their files and choose another attorney.

When it agreed to take possession of the closed files, the purchasing firm agreed to keep those files for at least ten years. That agreement implies that the purchasing firm assumed an obligation to keep confidential information confidential, and to dispose of the closed files in an appropriate manner after ten years (or longer). It could not dispose of the closed files without examining the contents of the files, in order to properly return certain property to the client. (See SBAND Ethics Committee Opinion No. 92-11). The purchasing firm is not merely a custodian of the closed files. Because of the obligations it assumed as to the closed files, the purchasing firm has responsibilities to the persons

whose files it possesses, and those responsibilities to those third persons may disqualify the law firm, under N.D.R. Prof. Conduct 1.7 (a) or (c), from undertaking the representation of the surviving spouse.

The purchasing firm should analyze whether it can undertake a representation of a person adverse to a former client of the selling firm whose file the purchasing firm possesses in the following manner. First, the purchasing firm must determine whether there is confidential information in the closed file at issue. If not, it has no responsibility to the former client of the selling firm which would disqualify representation under Rule 1.7 (a) or (c).

If the purchasing firm possesses confidential information in the closed files, it must determine whether its responsibility to keep that information confidential may adversely affect its ability to undertake the new representation. See Rule 1.7 (c). If there may be an adverse affect, the firm can undertake the representation only if it reasonably believes there will not be an adverse affect, and if the client gives informed consent. If the purchasing firm determines that its responsibility to keep that information confidential will have an adverse affect on the representation, it cannot undertake the representation. See Rule 1.7(c).

In determining possible adverse affects, the purchasing firm might consider how the issue would be resolved if the former client of the selling firm were a former client of the purchasing firm, so that N.D.R. Prof. Conduct 1.9 applied. Even though Rule 1.9 does not have direct application to the question posed, its framework may be helpful in resolving the issue which the purchasing firm is facing. Rule 1.9 prohibits representation in the same matter, prohibits representation in a substantially related matter absent client consent, and prohibits use of confidential information to the disadvantage of the former client unless otherwise permitted by Rule 1.6. If the issue were analyzed under Rule 1.9, and if the file(s) of the now deceased spouse contain confidential written information, the requesting firm would need to obtain consent from the deceased spouses's estate in order to undertake the representation, since the surviving spouse's claim would be substantially related to the matter(s) on which the selling firm represented the deceased spouse.

The Committee identifies no basis for analyzing the issues differently if both spouses were identified as clients by the selling firm, since the obligations of confidentiality to the now-deceased spouse would remain. Absent a waiver, if permissible, the law firm could not represent both spouses because it would create a conflict. Under the analysis described above, the purchasing firm could not simply turn over the closed files to the estate's attorney, because the purchasing firm is already considered to have knowledge of the file contents.

N.D.R. Prof. Conduct 5.1(a) provides that a lawyer practicing in a law firm "shall make reasonable efforts to ensure that the firm has put into effect measures giving reasonable assurance that all lawyers in the firm conform to [the Rules of Professional Conduct]." To ensure that the purchasing law firm conforms with Rule 1.7 with respect to the closed files it received from the selling firm, the purchasing firm may wish to

inventory the closed files and cross-reference them against its current files, in order to identify any files which contain confidential information which may, or will, disqualify the purchasing firm from representing others who might seek the purchasing firm's representation in the future.

CONCLUSION

A law firm which has possession of closed files of another law firm as a result of the purchase of another law firm's practice has a duty to maintain confidentiality of any confidential information in those files. The purchasing law firm may be prohibited, under Rule 1.7, from representing a party whose position is adverse to that of a former client of the selling law firm. The purchasing law firm may wish to inventory the closed files, in order to identify any files which may contain confidential information which may disqualify the purchasing firm from undertaking other representations in the future.

This opinion is provided pursuant to N.D.R. Law. Discipline
1.2(B), which provides:

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 Alice R. Senechal, and was unanimously adopted by the Committee on March 31, 2000.

Mark R. Hanson, Chair