

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

**Opinion No. 00- 04
June 28, 2000**

FACTS

In 1996, Plaintiff *A* commenced a commercial litigation action against several defendants, including *B*, which action is still pending as of the date of this ethics opinion. One member of law firm *X*, initially represented Plaintiff *A*.

In 1997 and 1998, another lawyer in law firm *X*, not knowing that a partner in law firm *X* was representing *A* in the action against *B*, handled several unrelated legal matters for *B*.

Based in part on the above facts, the lawyer for *B* in the commercial litigation matter moved to disqualify law firm *X* from representing *A* in the *A-B* litigation. Law firm *X* was disqualified in early 1999.

Law firm *X*, after disqualification, then sought other counsel to represent *A* in the still pending *A-B* matter. During this period of time, the summer of 1999, principals of *A* visited with several other law firms "with the hope of bringing them into the case." One of these law firms was law firm *Y* which is the firm which has requested this ethics opinion.

The conversation in the summer of 1999, between two principals of Plaintiff *A* and a lawyer in law firm *Y* was "an approximately [sic] one hour discussion and [included an] outline of [*A*'s case against *B*]." The attorney from law firm *Y* declined the representation. Law firm *Y* states in its requesting letter to the committee, "no attorney/client relationship was entered into in a formal sense." No billing was sent to *A*. The lawyer from law firm *Y* took no documents into his possession regarding the underlying lawsuit.

Ultimately *A* hired lawyer *D* to represent them in the case against *B*. According to law firm *Y*, it was necessary for lawyer *D* "to come up to speed in the [*A-B*] case, so law firm *X* (which had earlier been disqualified from the *A-B* case) agreed to reimburse *A* for the attorney fees charged by *D* to bring *D*'s law firm up to speed in the case.

There were continuing discussions between lawyer *D*, law firm *X*, and law firm *X*'s insurer, concerning these legal fees related to the *A-B* matter. Plaintiff *A* hired another lawyer, *E*, from a different law firm to "enter the matter on behalf of [*A*] to negotiate the legal fees issue with [law firm *X*] and to consider the potential of a legal negligence action."

In early 2000 lawyer *E* began direct negotiations with law firm *X* “to resolve the attorneys fees issue and to preserve a potential legal negligence action”. Lawyer *D*, although still representing *A* in the *A-B* litigation was not involved in any of the discussions between lawyer *E* and law firm *X*.

The insurance carrier for law firm *X* requested law firm *Y* to enter into negotiations with lawyer *E* to attempt to resolve the attorneys fees issue between lawyer *D* and law firm *X*. In the course of these discussions, in early 2000, lawyer *E* first learned from *A*, of the discussion in the summer of 1999, between the two principals of *A*, and the lawyer from law firm *Y* about the *A-B* litigation. The lawyer from law firm *Y* who had had the discussion with *A* in the summer of 1999, is not the same lawyer as the lawyer from law firm *Y* who has been requested to enter the matter on behalf of law firm *X*.

Lawyer *E*, on behalf of *A*, demanded that law firm *Y* withdraw from any participation in the legal fees negotiations between lawyer *E*, and law firm *X*. Law firm *Y* then handed this matter back to the insurance carrier for law firm *X* which is now continuing those discussions.

In addition to the legal fees issue, lawyer *E* has also demanded that law firm *Y* have no involvement in any legal negligence action between *A* and law firm *X* should there be one. In the words of the requesting lawyer from law firm *Y*, “any legal negligence action would be based upon the involvement of [the first lawyer from law firm *X* who had previously represented *A*], and his knowledge with respect to the strength and weakness of [the *A-B*] case.” Lawyer *E* acknowledges that whatever information known to law firm *Y* by virtue of the meeting with representatives of *A* would be information known to law firm *X* in its representation of *A* in the case giving rise to the potential legal negligence claim.

One other fact that may or may not have bearing on this opinion is that in the winter of 2000, *A* retained a third lawyer from law firm *Y* to represent *A* in a completely unrelated administrative matter. *A* waived in writing any potential conflict that it deemed applicable to that situation. This administrative matter has been resolved and closed.

The question, as framed by law firm *Y*, is whether law firm *Y*, although one of its attorneys spoke with principals of *A* about the *A-B* litigation in the summer of 1999, is precluded from representing law firm *X*, should there be a legal negligence action by *A* against law firm *X*, and law firm *X*’s lawyer, who had initially represented *A* in the *A-B* litigation?

DISCUSSION

At the outset, it must be noted that this Committee renders its opinions on the basis of the facts as reported to it by the requesting attorney. The following facts were reported by the

requesting attorney and are particularly significant to this analysis:

1. A member of law firm *Y* met with representatives of *A* for a period of approximately one hour during which the lawyer was provided with an outline of the case. At the conclusion of the meeting, the lawyer declined the invitation to represent *A*. The reason the lawyer rejected the case was that the lawyer recognized that a conflict did potentially exist within the law firm at the time.
2. Attorney *E* has acknowledged that whatever information known to law firm *Y* by virtue of the meeting with representatives of *A* would be information known to law firm *X* in its representation of *A* in the case giving rise to the potential legal negligence claim.

At the outset, there are at least two ethical caveats that are pertinent to the issue. The first caveat is Rule 1.10(a), N.D.R. Prof. Conduct, “Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, ...” If the first lawyer from law firm *Y* that had discussions with Plaintiff *A* in the summer of 1999 about the *A-B* litigation would be disqualified from representing law firm *X*, so also would be the requesting lawyer from law firm *Y*.

The other caveat is found in Rule 1.6, N.D.R. Prof. Conduct, “A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this rule.” Rule 1.7(a), states, “A lawyer shall not represent a client if the lawyer’s ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely represented by the lawyer’s responsibilities to another client ...” These rules of confidentiality also apply to information received from potential clients. As this committee has previously stated in SBAND Ethics Committee Opinion No. 96-04 (February 28, 1996):

... Even if no lawyer-client relationship was formed, the [public interest] law firm may have an obligation of confidentiality to the potential client under Rule 1.6, and that obligation of confidentiality may make it necessary to decline representation of the party opposing the potential client whose representation has been declined. If a lawyer’s representation of a client would be adversely affected by a duty of confidentiality to another person, N.D.R. Prof. Conduct 1.7(a) would prohibit the representation.

With these caveats, we must look at two questions:

1. Did Plaintiff *A* become a client of law firm *Y* based on Plaintiff *A*’s summer 1999 discussion with the lawyer from law firm *Y* while Plaintiff *A* was seeking representation to replace law firm *X* which had been disqualified, or was *A* only a potential client?
2. Did the lawyer from law firm *Y* receive information from *A* which would be deemed confidential and could not ethically be shared with another lawyer from law firm *Y*? (It does

not matter whether or not such information is revealed by the first lawyer from law firm Y to the second lawyer from law firm Y. The question is whether the first lawyer from law firm Y possesses confidential information that lawyer received from A. It also does not matter if the confidential information is in writing or arose merely during conversation with A).

With respect to the first question, one must first determine whether A is a former client of law firm Y. If so, Rules 1.7 and 1.9 would directly apply and law firm Y could not represent law firm X. The requesting lawyer indicates that lawyer E concedes that the first lawyer from law firm Y declined to represent A, and that no attorney/client relationship had been formed in the summer of 1999.

However, the facts establish that A was a potential client of law firm Y. This committee in SBAND Ethics Committee Opinions 96-04, *supra*, and Opinion 96-08 (May 30, 1996), addressed the implications of discussions between an attorney and a potential client. Those opinions draw extensively from two articles by well-known legal commentator, Geoffrey C. Hazard, Jr., “The Would-Be Client”, National Law Journal, January 15, 1996, at A19, A20, and “The Would-Be Client II”, January 29, 1996, at A19. Readers of this opinion are referred to these prior opinions.

In SBAND Ethics Committee 96-08, *supra*, this Committee considered the extent to which a lawyer may engage in a dialogue with a prospective client without creating a conflict which would later disqualify him or her from representing another party. In that opinion, the Committee, drawing from Charles W. Wolfram in his work entitled “Modern Legal Ethics” (1986) at page 327, noted:

Under normal circumstances, disqualification should not result from an initial consultation alone, so long as the lawyer did not extend the consultation for too long a time or discuss items of confidential information irrelevant to determining whether a conflict existed. The lawyer must also have acted in good faith and may not, for example, use the initial consultation as a subterfuge to gain confidential information for the adverse use of an existing client. In order for sufficient information to be disclosed to permit a lawyer to know whether a conflict exists, there must often be some disclosure of information that is confidential. Without such disclosure, lawyers could not effectively police and prevent conflict problems. Although authority on the point seems not to exist, it must be clear that a lawyer who in good faith acquires the information needed to do a review of possible conflicts should not be barred from representing a present client adversely to the inquiring, prospective client.

In summary, since A was a “potential client”, Rule 1.9 should not be interpreted to prohibit law firm Y from representing law firm X, so long as the information obtained by law firm Y from Plaintiff A, was limited to that necessary to determine whether representation could be undertaken. While the conversation between the two principals of A and the lawyer from law firm Y are known only by these three persons, the Committee has been advised that E agreed that whatever information was conveyed to the attorney would have been information known to law firm X and thus, would be available to any lawyer or law firm

representing law firm *X* in a legal negligence case.

This brings us to the “confidentiality” issue. If the first lawyer from law firm *Y* received confidential information from *A* relating to *A* or *B*, or to the *A-B* litigation, Rule 1.6 would prohibit the revelation of that information unless otherwise permitted by Rule 1.6. If this is the case, Rule 1.10(a) would prohibit another lawyer from law firm *Y* from representing law firm *X* in an action by *A* against law firm *X*. If confidential information was not discussed, law firm *Y* is not disqualified from representing law firm *X*.

Rule 1.6 of the North Dakota Rules of Professional Conduct generally provides that a lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client. At the same time, the Rule provides for certain limited exceptions, two of which have application here. A lawyer may use information received from a client to the disadvantage of that client if it necessary to her or her defense in a legal malpractice case, Rule 1.6(e), or where the information has become “generally known”. Rule 1.6(h). It follows that any lawyer who may be retained by law firm *X* to defend a legal negligence case brought by *A* would be entitled to know any information which law firm *X* had acquired from *A*. Since it is acknowledged that the only information which *A* provided to the lawyer from law firm *Y* was that which was already known to law firm *X*, it cannot be said that the information was “confidential” because it was information which would have been divulged to law firm *Y*, as the malpractice defense counsel, in any event.

By the procedural rules of the SBAND Ethics Committee dated December 4, 1995, “the Committee will not act as a fact finder. If the outcome of a question presented is dependent on deciding among conflicting facts, the Committee will, to the extent possible, issue an opinion which addresses the alternative findings of fact.” Here, the Committee has been provided with a specific recitation of the underlying facts by the requesting attorney. This opinion assumes the accuracy of those facts.

CONCLUSION

Under normal circumstances, disqualification should not result from an initial consultation alone, so long as the lawyer did not extend the consultation for too long a time or discuss items of confidential information irrelevant to a determination of whether a conflict existed. During that initial consultation, the prospective client will necessarily supply some detail about the matter in question so that the lawyer can determine if a conflict exists. A lawyer who in good faith acquires the information needed to do a review of possible conflicts should not be barred from future representation of an adverse party. Here, the stated facts indicate that the requesting attorney, after a relatively brief consultation, declined the case because he felt that a conflict would exist at the time. Moreover, the requesting attorney was not provided any information beyond that which he would have gained in the course of defending a legal negligence claim against law firm X.

For the reasons stated, the Committee concludes that, based upon the facts presented to it, the requesting law firm would not violate the North Dakota Rules of Professional Conduct if it were to undertake representation of law firm X in a legal negligence case brought against it.

This opinion is provided pursuant to N.D.R. Lawyer 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 David L. Petersen and Jay Fiedler, and was adopted by the majority of the Committee on June 28, 2000.

Mark R. Hanson, Chair