

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 00-10
December 6, 2000

FACTS

Lawyer A represents the Defendant in a lawsuit brought by the Plaintiff. The Plaintiff had been a client of Lawyer B. Lawyers A and B were former partners in a law firm, Law Firm Z. Lawyer B had last represented the Defendant in 1994.

Lawyer A became a member of a newly formed law firm, Law Firm Y, which firm did not include Lawyer B. When Law Firm Y was formed, the members of Law Firm Y decided not to represent the Plaintiff in future proceedings. This was because Lawyer B and Law Firm Z had experienced difficulty in collecting billings which Law Firm Z had sent to the Plaintiff. Law Firm Y had represented clients in actions against the Plaintiff since 1994.

A one time associate of the Plaintiff contacted Lawyer C about the matter between the Plaintiff and the Defendant. Lawyer C is a member of Law Firm Y. As soon as Plaintiff's name came up in the phone conversation with Plaintiff's associate, Lawyer C terminated the phone conversation. The call was terminated because of Law Firm Y's policy not to represent the Plaintiff.

In February 2000, Lawyer A concluded that he and his firm, Law Firm Y, had no conflict of interest in representing the Defendant in the suit brought by the Plaintiff. Upon making his appearance on behalf of the Defendant, the Plaintiff's lawyer raised the issue of conflict of interest on behalf of Lawyer A. Plaintiff has claimed that he, not a former associate, was the one to contact Lawyer C. The Plaintiff claimed that in that contact the specifics of the case were divulged, which gives rise to a conflict of interest. Lawyer C has

submitted an affidavit that the contact was from Plaintiff's associate. Further, Lawyer C's affidavit states that the phone conversation was not lengthy, and was terminated upon the mention of the Plaintiff's name.

ISSUE PRESENTED

The question presented is if Lawyer A, as a member of Law Firm Y, may represent the Defendant in the action brought by the Plaintiff.

DISCUSSION

The first question to address is whether or not the fact that Law Firm Z previously represented the Plaintiff results in a conflict of interest on the part of Lawyer A. Rule 1.10 N.D.R.Prof.Conduct provides that if one lawyer in a firm has a conflict of interest which would prevent the lawyer from representing a client, all members of the firm then have the conflict which prohibits them from representing the client. The Plaintiff was represented by Lawyer B, and Lawyers A and B were former partners in Law Firm Z. If Lawyer B's representation of the Plaintiff results in a conflict of interest, under Rule 1.10, no members of Law Firm Z, including Lawyer A, could represent a party with an interest adverse to that of the Plaintiff.

The Plaintiff has not been represented by Lawyer B or any member of Law Firm Z since 1994. For that reason, the Plaintiff would be a former client, and a conflict of interest related to a former client is addressed by Rule 1.9 N.D.R.Prof.Conduct. This rule states as follows:

- a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same matter in which that person's interest 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 consent to a client.

There have been no facts presented to this Committee that show that the representation of the Defendant by Lawyer A is in a same matter that was handled by Lawyer B on behalf of the Plaintiff. There have been no facts presented to this Committee that show the matter between the Plaintiff and Defendant is substantially related to any matter Lawyer B handled on behalf of the Plaintiff. Finally, there have been no facts presented to this Committee to show any information Lawyer B may have obtained in his representation of the Plaintiff, which information the Plaintiff is now claiming Lawyer A can use to his disadvantage. Since there is no violation of Rule 1.9 N.D.R.Prof.Conduct, there is no conflict of interest in the representation of the Defendant by Lawyer A and Law Firm Y as a result of the former representation of the Plaintiff by Lawyer B and Law Firm Z.

The facts presented indicate that Law Firm Y had represented parties in legal matters adverse to the Plaintiff since 1994. There is no indication that an issue as to a conflict of interest was raised by the Plaintiff in any of those other legal matters. For that reason, it is reasonable to conclude that the Plaintiff himself does not feel a conflict of interest exists because he was a former client of Lawyer B, who was a partner with Lawyer A in Law Firm Z.

The second question presented is whether the phone call to Lawyer C results in a conflict of interest on the part of Lawyer A representing the Defendant in the action involving the Plaintiff. Even if the phone call to Lawyer C did not establish a lawyer-client relationship between the Plaintiff and Lawyer C, the rules of confidentiality of Rule 1.6 N.D.R.Prof.Conduct would still apply. Those rules apply to information received from potential clients. SBAND Ethics Committee Opinion No. 00-04 (June 28, 2000). Lawyer A

and Lawyer C are members of the same law firm, Law Firm Y. If Lawyer C had a conflict of interest because of that phone conversation and the disclosure of confidential information, then that conflict would extend to all members of Law Firm Y, including Lawyer A. Rule 1.10 N.D.R.Prof.Conduct.

A factual question exists concerning the phone call. It is Lawyer C's recollection that the call was made by a former associate of the Plaintiff. It appears to be the Plaintiff's recollection that the Plaintiff himself placed the call, and it was not made by an associate of the Plaintiff. The procedural rules of the SBAND Ethics Committee dated December 4, 1995, said that, "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." This Committee will not weigh the potential dispute between the contact made with Lawyer C since this Committee is not the fact finder.

Despite this possible dispute in the facts, however, the information provided to this Committee is undisputed that the phone call was made, and upon Lawyer C becoming aware that the Plaintiff was involved, the phone conversation was terminated.

This Committee recently addressed the issue of whether a conflict of interest occurs from contact of a prospective client. In SBAND Ethics Committee No. 00-04, the Committee said the following:

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 p. 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.

This Committee concluded in SBAND Ethics Committee No. 00-04 that disqualification would not result from an initial consultation alone, as long as the lawyer did not extend the consultation for too long a period of time or discuss confidential information irrelevant to determine whether a conflict existed.

The facts presented are that upon Lawyer C becoming aware that the Plaintiff was involved in this litigation, the call was terminated. It was consistent with the policy adopted by Law Firm Y that the Plaintiff would not be represented by Law Firm Y, which policy had been in place since 1994. In addition, Law Firm Y had been involved in other matters in which the clients of Law Firm Y had a position adverse to that of the Plaintiff in those cases.

CONCLUSION

It is the conclusion of this Committee that Lawyer A does not have a conflict of interest because the Plaintiff was a former client of Law Firm Z, which was a law firm in which Lawyer A was a partner. It is the further opinion of this Committee that Law Firm Y does not have a conflict of interest resulting from the

phone conversation which Lawyer C had with the Plaintiff. Therefore, Lawyer A, as a member of Law Firm Y, has no conflict of interest in representing the Defendant in the action brought by the Plaintiff.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which provides:

A lawyer who acts in 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 N.D.R.Prof.Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by J. Thomas Traynor, Jr., and was adopted unanimously by the Committee on December 6, 2000.

_____/S/_____
Mark R. Hanson, Chair