

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 01-01**

The Ethics Committee received a request dated January 29, 2001, for an opinion regarding the assertion by a plaintiff adversary in litigation that an attorney defending litigation had a conflict of interest which required his recusal from the lawsuit.

Applicable North Dakota Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

Rule 1.7 Conflict of Interest: General Rule

Rule 1.9 Conflict of Interest: Former Client

Ethics Presentation

Issue One: Jane Doe retained Attorney A to represent her in a wrongful conversion action against her mother, Carol Doe, and her mother's boyfriend, Pete Roe. Jane Doe had been severely injured by criminal conduct and through an outpouring of public support a sizeable amount of cash was donated by the public to defray medical and other living expenses for Jane Doe. Her mother, Carol Doe and Carol's boyfriend assumed the responsibility over the escrowed funds while Jane Doe convalesced. Essentially the complaint alleged that Carol Doe and Pete Roe having assumed a fiduciary responsibility, wrongfully converted the funds to themselves.

Jane Doe hires her Attorney, A, to start the lawsuit. When served with the complaint Carol Doe and her boyfriend, Richard Roe, hired Attorney B to defend them. Upon learning of that fact, Attorney A writes to Attorney B and tells him that his client, Jane Doe, was asserting a conflict of interest.

Critical to the underlying undisputed facts is the fact that Jane Doe's father has a part to play in the initiation of the action by Jane Doe against her mother. Wayne Doe (former husband to Carol and father to Jane Doe) is consulting with Attorney A on this conflicts issue. Wayne Doe asserts (through his daughter's counsel, Attorney A) that Attorney B had represented Carol Doe in their divorce action (opposing Wayne Doe) and would have necessarily had to have consulted with their daughter, Jane, (then a juvenile) since there were significant custody issues. The divorce between Carol Doe and Wayne Doe was granted in June of 1990 when Jane Doe was approximately 8 years old.

It is generally asserted (by Wayne Doe through Attorney A) that Attorney B would have had inside "family" and possibly "financial" information about Jane Doe through her mother that would justify disqualification in this case and that Attorney B presumably would have had "private conversations" with Jane Doe in the context of that custody battle and thus would have "inside information about [Jane] that a

noninvolved attorney would not have.” That “information” is not described or identified. Wayne Doe is not a party to the lawsuit wherein the disqualification of Attorney B is sought.

Relevant to the ethics discussion is the uncontroverted fact that Jane Doe was born January 9, 1982. Custody of Jane Doe was originally awarded to her mother, Carol Doe, which never changed. The law firm of Attorney A (who now calls the conflict in the conversion litigation) represented Wayne Doe in the divorce action and the law firm of Attorney B represented Carol Doe (the parent who was awarded custody of Jane Doe) in the divorce and custody action.

Issue Two: There is a second conflict issue raised by Attorney A against Attorney B. Apparently Jane Doe had worked as a minor at the Scheels Sports Store. She was terminated for reasons not revealed and Attorney B was called by Jane’s mother, Carol Doe, for questions regarding the termination. This happened before the injuries were sustained by Jane Doe and the matter has nothing to do with the claim of wrongful conversion. It is not asserted by Attorney A and Attorney B denies that he agreed to represent Jane Doe with respect to that termination and it appears uncontroverted that he did not undertake any representation of Jane Doe or her mother for that matter regarding this employment termination. No bills were sent by Attorney B and thus no attorneys fees paid.

**Response of Attorney B to Request of Attorney A to Withdraw
from Representation of Carol Doe and boyfriend Richard Roe**

Issue One Attorney B responded to Attorney A indicating that he has never represented Jane Doe. He pointed out that Jane Doe was not a “party” to her parents custody battle back in 1990 and thus he entered no appearance on the child’s behalf. Jane Doe was a witness. Attorney A’s law firm represented the husband, Wayne Doe. Whatever information Attorney B had would be equal to what Attorney A would be presumed to have had which Attorney B says was public record as the divorce proceedings came to an end. Whatever financial information Attorney B received in the context of the divorce battle came from his client, Carol Doe, and became public in that action.

Issue Two When Jane Doe was terminated from her employment, Attorney B says that he spoke to Jane’s mother, Carol Doe, about the circumstances of termination. Jane Doe was present during the conversation. She was under the age of 18 at the time. Attorney B states that he spoke to the mother as the custodial parent. No action was commenced. No billings were sent by Attorney B to Carol Doe or her daughter, Jane Doe.

Attorney B invited Attorney A to supplement his request for withdrawal with detailed information supporting disqualification. Attorney B then wrote to the Ethics Committee for an opinion whether he could continue to represent Carol Doe and Richard Roe in the action brought by Attorney A on behalf of Jane Doe.

QUESTIONS PRESENTED

Can Attorney B continue to represent Carol Doe and her boyfriend, Richard Roe, in the wrongful conversion action brought by Carol's daughter, Jane Doe?

DISCUSSION

At the offset it should be re-emphasized that this Committee renders its opinions on the basis of the facts as reported to it by the requesting attorney. There has been no independent review of the underlying divorce action between Carol Doe and Wayne Doe.

Notwithstanding, it is an accepted fact that the two attorneys and their respective law firms did represent the two sides in the divorce action. Attorney B represents that to be true and Attorney A does not contest that characterization. The complaint served by Attorney A establishes by allegation the date of the divorce, the date of resolution of the divorce, the issue of custody of Jane Doe and the date of birth of Jane Doe. The answer served by Attorney B on behalf of Carol Doe admits those allegations.

The complaint for unlawful conversion from which Attorney A seeks to force Attorney B's withdrawal is dated December 23, 2000. The answer of Attorney B to the complaint is dated January 16, 2001. The severe injury to Jane Doe occurred May 31, 1999. It is during the summer of 1999 that the wrongful conversion was alleged to have taken place.

The first question to be addressed is whether Jane Doe was a "client" of Attorney B in the context of the divorce action in 1990 wherein it is uncontroverted that Attorney B represented Carol Doe and the District Court ultimately awarded custody of Jane Doe (then a minor) to her mother.

The implication being offered by Attorney A is that Jane Doe was a "client" and thus the language of Rule 1.9, N. D. R. Prof. Conduct, is brought into focus.

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

(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.

That same rule provides that the lawyer who had formerly represented a client cannot 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."

In a broader sense, Rule 1.6, N. D. R. Prof. Conduct, provides that a “lawyer shall not reveal, or use to the disadvantage of a client, information relating to the representation of the client unless required or permitted to do so by this rule.”

In this case, the matter for which Carol Doe has retained Attorney B is substantially dissimilar to the reasons that Carol Doe retained Attorney B in 1990 (a divorce action). The fact that Jane Doe was a minor and whose principle participation in the divorce action was for the purpose of determining custody, no attorney/client relationship was created between Attorney B and Jane Doe. In that the two matters are substantially dissimilar (the divorce action versus the wrongful conversion litigation) the language of Rule 1.9 would not come into play even if it were assumed that some attorney/client relationship was created by virtue of circumstance.

The more relevant question is what type of confidential information could have been obtained by virtue of Attorney B’s representation of Carol Doe, the mother of Jane Doe in the context of the divorce action which would be applicable to the wrongful conversion action initiated by Jane Doe against her mother some nine or ten years after the divorce of her parents. The confines of the legal theories being offered by Jane Doe in her conversion action are precise and are significantly different than those issues framed by virtue of a divorce action.

Wayne Doe is not a party to the wrongful conversion action and, since at the time the conversion action was initiated, Jane Doe was an adult, Wayne Doe neither had, nor could he assert, control over the personal legal affairs of his daughter, Jane Doe. Under the circumstances, it does not appear that the law firm of Attorney B would have obtained any confidential information in handling the divorce matter relating to Jane Doe which would be applicable to litigation commenced ten years after the divorce action.

The second issue raised by Attorney A relates to a visit which was purportedly made by Carol Doe to Attorney B's law office sometime in 1999, but before Jane Doe was severely injured. Attorney B has responded by asserting that no attorney/client relationship was formed because he did not accept Carol Doe as a client. No billings were sent and no fees were received.

The North Dakota Rules of Professional Conduct, notwithstanding, do apply to information received from potential clients. As this committee recently re-enforced in SBAND Ethics Committee Opinion No. 96-04 (February 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 the representation of the party opposing the potential client whose representation has been declined. If the 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.

The character of the inquiry by Carol Doe to Attorney B concerning the actions of Scheels Sports in terminating her daughter become relevant to this discussion. The specific circumstances surrounding the termination is unknown. No one seems to contest the assertion that no attorney/client relationship was actually formed and no fees were paid. There is no indication that any action was taken by Attorney B on behalf of Carol Doe or her daughter against Scheels Sports Store. Without knowing the information exchanged, it is virtually impossible to decide one way or another whether confidential information relevant to the subsequent wrongful conversion action was gained through this earlier contact.

The more important issue at this point is whether the mere assertion by Attorney A that some contact took place between Carol Doe on behalf of her daughter and Attorney B with regard to an employment issue is sufficient to raise a conflict of interest as envisioned by Rule 1.7. Since no information can be defined and no attorney/client relationship appears on the facts to have been formed between Jane Doe and Attorney B regarding this earlier employment matter, no conflict of interest can be presumed or inferred from these uncontroverted facts.

The committee is mindful of the discussion contained within Ethics Committee Opinion No. 00-04 (June 28, 2000) relating to implication of a discussion between an attorney and a potential client.

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 ultimate findings of fact." Here the committee has been provided with a specific recitation of underlying facts by the requesting attorney and no contradictory facts are being offered by opposing counsel who has suggested the conflict of interest but has not defined the confidential information which he believes would have been exchanged in two different time frames. This opinion, therefore, assumes the accuracy of the facts as presented by the presenting attorney.

Conclusion

Conclusion One: The first issue presented relates to an underlying divorce action involving the parents of Jane Doe. In that it is uncontroverted that Jane Doe was a minor at the time and the matter would have been resolved some eight years prior to the initiation of a wrongful conversion action and in light of the reality that Jane Doe was ten years of age at the time the divorce action was prosecuted, the committee concludes based on the facts presented to it that Attorney B would not violate the North Dakota Rules of Professional Conduct if he were to continue the representation of Carol Doe and her boyfriend in an action brought against the two of them by Jane Doe for wrongful conversion.

Conclusion Two: With respect to the second issue, once again, based upon the facts presented by Attorney B upon the presumption that no attorney/client was formed between Carol Doe and Attorney B regarding any employment issues relating to Jane Doe in her employment with Scheels Sports Store and mindful of the observations of Opinion No. 00-04 (June 28, 2000), the committee concludes that Attorney B would not violate the North Dakota Rules of Professional Conduct if he were to continue the representation of Carol Doe and her boyfriend in the wrongful conversion action.

This opinion is provided pursuant to North Dakota Rules for 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 opinion of the association is not subject to sanction for violation of the North Dakota Rules for Professional Conduct as to the conduct that is the subject of opinion or advisory letter.”

This opinion was drafted by James S. Hill and was adopted unanimously by the committee on May 24, 2001.

A handwritten signature in black ink, appearing to read 'Mark R. Hanson', is written over a horizontal line.

Mark R. Hanson, Chair
State Bar Association of North Dakota
Ethics Committee