

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 01-04**

The Ethics Committee received a request dated April 20, 2001, for an opinion regarding the representation of an associate attorney's family member.

Applicable North Dakota Rules of Professional Conduct

- Rule 1.7 Conflict of Interest General Rule
- Rule 1.10 Imputed Disqualification: General Rule
- Rule 3.7 Lawyer as Witness
- Rule 5.1 Responsibility for an Associated Lawyer's Compliance with Rules

FACTS

Jane Doe retained Attorney A to represent her in divorce proceedings. Attorney A employs Attorney B, who is Jane Doe's son-in-law. Jane had retained Attorney A's law firm largely due to her son-in-law's employment there and a belief she would be billed kindly by Attorney A.

Jane's soon to be ex-husband, John Doe, is represented by Attorney C. Attorney C has objected to Attorney A's representation of Jane, contending Attorney A has a conflict of interest because Attorney B "will undoubtedly" be a witness in the case. Attorney A's firm has never represented John Doe. Attorney A sees no necessity for Attorney B to testify in the instant case. Attorney A has erected a loose "Chinese Wall" and "insulated" Attorney B from any representative involvement in the case so Attorney B will not work on the case in any way.

QUESTIONS PRESENTED

1. Is Attorney A barred from representing Jane Doe because Attorney A employs Attorney B, who may be a witness in the case?

2. If an attorney in a law firm is insulated from representation of a client does that avoid disqualification?

DISCUSSION

Is Attorney A barred from representing Jane Doe because Attorney A employs Attorney B, who may be a witness in the case?

North Dakota Rules of Professional Conduct 3.7(b) provides that “[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by a conflict of interest.” The comment to this rule provides in part:

Whether the combination of roles involves improper conflict of interest with respect to the client is determined by the application of the rules concerning conflict of interest, most importantly, Rules 1.7, 1.8, and 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer’s firm, the representation is improper. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of a conflict of interest, Rule 1.10 disqualifies the firm also.

Rule 1.7 (c) provides that “[a] lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer’s responsibilities to another client or a third person, unless: the lawyer reasonably believes the representation will not be adversely affected, and the client consents after consultation.” In addition, Rule 1.7 (d) provides that “[e]xcept as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.”

Ethics Opinions No. L0-90-07 and No. 93-13 addressed the issue of whether a member of a firm who would be called as a witness disqualified the entire firm.

Opinion 93-13 concluded that the attorney may continue representation so long as a conflict of interest did not exist, citing Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993). However, the opinion provided that the attorney, not the committee, must determine whether a

conflict exists. The facts of the instant case are similar to those posed in Opinion Number 93-13, except in the instant case a member of the firm is also related by marriage to the client, as well as being a potential witness. In Wentworth, a motion was made to disqualify the plaintiff's law firm on the grounds that a member of the firm would be called as a witness at trial. The defense alleged that the attorney's testimony would create a conflict of interest requiring imputed disqualification of the entire firm under the North Dakota Rules of Professional Conduct. The court ruled that, "[a] conflict of interest arises when an attorney's testimony would prejudicially contradict or undermine his client's factual assertions," and further affirmed that disqualification was not warranted in that situation.

Opinion L0-90-07 reached a similar conclusion as Opinion 93-13. In the earlier opinion, the Committee advised that one lawyer in the firm may act as an advocate while another lawyer will be testifying as a witness at trial; however, the Committee cautioned that such an arrangement is allowed only if there are no conflicts of interest identified under the rules. The Committee advised that the determination of whether a conflict of interest exists is one that must be made by the attorney, as the Committee "does not have sufficient information to make any conclusions." The Committee, however, identified potential conflicts that may arise, the following of which may be pertinent to the instant case and should be considered by Attorney A:

3. Possible conflict with third parties;
4. Possibility that cross-examination of the testifying attorney may reveal information which is adverse to the interests of the client; and
5. Other conflicts in which a thorough review of the fact situation would reveal.

This Committee concurs with the opinions rendered in the two previous opinions.

Under Rule 3.7, Attorney A may represent Jane Doe as long as he is not precluded from doing so by a conflict of interest. Determining whether a conflict exists is the attorney's

responsibility. This committee cannot offer guidance because Attorney A has not identified a potential conflict. If it is determined that Attorney B cannot act as both advocate and witness by reason of a conflict of interest, Attorney A and the rest of his firm are also disqualified by Rule 1.10. Rule 1.10 provides, "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, except as provided by Rule 1.11 or Rule 1.12." Rules 1.11 (successive government and private employment) and 1.12 (former judge, arbitrator, adjudicative officers and law clerks) do not apply to this situation. The comment to Rule 1.10 further illustrates that, "...[A] firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

Rule 1.7 provides that a lawyer shall not represent a client if the representation might be adversely affected by the lawyer's responsibilities to a third person or by the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. Further, the lawyer must not use information gained from representation of the client to the client's disadvantage unless the client consents after consultation. The comment to Rule 1.7 provides, "...with respect to the lawyer's responsibilities to other clients or to third persons...the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client consent when the lawyer reasonably concludes that the client should not agree to the representation under the circumstances." If Attorney A determines that representation of Jane Doe will not be adversely affected because the law firm has no responsibilities to John Doe and there is no issue as to Attorney B's own interests as a family member, there is no need to secure Jane

Doe's consent to representation.

Attorney A asserts Attorney B can in no way be considered a necessary witness under Rule 3.7, and, therefore, Attorney A cannot be disqualified. The North Dakota Supreme Court interpreted Rule 3.7 regarding an attorney acting as a necessary witness at trial in Thompson v. Getz, 455 N.W.2d 580 (N.D. 1990). The court decided that Rule 3.7(a) "disqualifies an attorney only when the attorney is 'likely to be a necessary witness.'" Id. at 587-88. The court stressed the following:

"This standard requires the opposing party to bear a higher burden on a disqualification motion, permits the court to delay ruling until it can be determined that no other witness could testify, and obviates disqualification if the lawyer's testimony is merely cumulative." ABA/BNA Lawyers' Manual on Professional Conduct 61:507 (1984). Even when it has been adequately shown that an attorney will be a "necessary witness," Rule 3.7(a) envisions a balancing of the interests at stake in resolving the disqualification question. The Comment to Rule 3.7 states: "[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client."

Id. at 588.

Ethics Opinion Number 93-13 recognized the Supreme Court's reasoning in Wentworth, which "held that when an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the lawyer will give evidence material to the determination of the issues being litigated, that such evidence is not obtainable elsewhere, and that the lawyer's testimony is or may be prejudicial to his client."

Based upon the limited facts provided by Attorney A, this committee cannot determine whether Attorney B's testimony is necessary. However, Thompson, Wentworth, and Ethics Opinion

93-13 may be helpful to Attorney A in making such a determination.

Attorney A also asserts that Rule 3.7 does not apply because the prohibition relates to an attorney serving as “an advocate at trial” who also may become a witness. ABA Informal Opinion 89-1529 considered this issue and concluded that while an attorney is prohibited from serving in the dual roles of advocate and witness at trial, an attorney is not prohibited from serving as an advocate before the attorney has testified. “The Committee continues to be of the opinion that the primary test to be applied is whether the lawyer-witness’s testimony involves a contested issue in the proceeding at which the lawyer proposes to serve as advocate.” The ABA Opinion sets forth the following reasons to allow an attorney-witness to advocate during the pre-trial stage: 1) settlement may avoid the necessity to testify; 2) other evidence may be available in place of the attorney’s testimony; and 3) the client may wish to forego his attorney’s testimony, preferring to have the attorney continue as an advocate. The Committee, however, suggested some limitations on pre-trial attorney-witness representation. The Committee advised against an attorney representing the client at the attorney’s own pre-trial deposition and advised against an attorney arguing a motion in which the attorney’s pre-trial testimony is material to the contested matter. Ethics opinions from other jurisdictions agree with ABA Informal Opinion 89-1529. See Michigan Ethics Opinion RI-281 and Pennsylvania Ethics Opinion 96-15.

Attorney A, however, must be mindful of Rule 5.1(a), which provides, “A lawyer in a 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 these rules.” The comments to this rule addresses “the duty of a lawyer who knows of a violation of these Rules ...to avoid or mitigate the effect of the violation.” It presupposes that the lawyer knows or reasonably should know that the conduct is a

violation of the rules and the lawyer has “a duty to correct the resulting misapprehension.” As stated earlier, if Attorney A feels his representation is in violation of these Rules, he should withdraw as Jane Doe’s counsel.

If an attorney in a law firm is insulated from representation of a client does that avoid disqualification?

Attorney A asserts that attorney B will not work on his mother-in-law’s case, and further, that Attorney B will be insulated from the case by a “Chinese Wall.” The North Dakota Supreme Court addressed this issue and Rule 1.10 in Heringer v. Haskel, 536 N.W.2d 362 (N.D. 1995). Heringer, involved three law partners, Smith, Horner, and Bakke. Client Heringer consulted Horner about a lawsuit against Puklich. Heringer and Horner met for several hours and Horner took extensive notes. Id. at 364. Horner’s notes, containing confidential information, were placed into a file, which was stored either behind a secretary’s desk or in the firm’s file storage room. All attorneys in the firm had access to files stored behind the secretary’s desk or in the file storage room. The three attorneys occasionally discussed their cases with each other. Id.

Horner did little work on Heringer’s case over the next 18 months. Another attorney, Boeckel, contacted Horner stating an interest in pursuing the claim for Heringer. Horner transferred the file to Boeckel and left the firm four months later. When Boeckel contacted Puklich about Heringer’s claim, Puklich retained Bakke to represent him. Hovland had since joined the firm, which was renamed “Smith, Bakke & Hovland.” Boeckel petitioned the court to disqualify the firm due to a conflict of interest created by Horner’s earlier involvement with his client, Heringer. Id.

The Supreme Court reasoned that “the determination whether a firm is disqualified under Rule 1.10(c) is dependent upon the particular facts of the case, and the firm whose disqualification is sought bears the burden of proof. . . . Any doubt must be resolved in favor of disqualification.” Id. at

365. (citations omitted). “Disqualification under Rule 1.10(c) requires a three-step analysis: (1) Are the new client's interests materially adverse to the old client's interests? (2) Is the matter the same or substantially related to the prior representation? (3) Does any lawyer remaining in the firm have material information?” Id. The first two requirements were present in Heringer. Heringer and Puklich had adverse interests and Bakke sought to defend Puklich in the very same litigation discussed by Horner and Heringer. “The critical element at issue is whether Bakke or other lawyers in the Smith firm have confidential, material information.” Id.

The Supreme Court looked to various jurisdictions interpreting Rule 1.10. The conclusion drawn from those jurisdictions was that a law partner's access to confidential information justifies disqualification of the partner because the partner is imputed with all knowledge in the firm's files, and such access to confidential information is imputed to other attorneys in the firm. Id. 366 (citations omitted).

In Heringer, the Court found that Bakke had general access to Heringer's confidential information in his file for more than 19 months and that the three attorneys in the firm discussed pending cases. Id. at 366. “[S]uch access equates with knowledge of the client's confidential information. Because Bakke has access to the confidential information, he is deemed to have material information under Rule 1.10(c)(3).” Id. The Court rejected Bakke's argument that this amounted to an “appearance of impropriety,” and such a standard had been abandoned by the Rules of Professional Conduct. The Court opined that “the ‘appearance of impropriety’ standard has not been wholly abandoned in spirit” because the public's perception of a conflict of interest, particularly from the facts in Heringer, must be considered.

“[W]e believe the ‘person on the street’ would view a law firm ‘switching sides’ in the middle of a dispute to be highly objectionable. A layperson typically will not bother with the finer points of access versus knowledge, or attempts to shield

attorneys within the same firm from confidential information. Rather, the layperson's view is simple: the firm represented one side of the lawsuit and now wants to represent the other side. In this instance, the simplistic view is also the correct one. In order to preserve public confidence in the legal profession, and to insure the confidentiality and integrity of client information, the firm must not be allowed to "switch sides" when attorneys remaining in the firm had access to the former client's file."

Id. at 367.

The Heringer Court noted that North Dakota does not have large law firms with dozens of attorneys working in different buildings or cities under circumstances where it may be common for attorneys to not discuss cases or have general access to all of the firm's files. "This case, however, involves a three-person law firm which admittedly had no policy or other safeguards to restrict access to files and information among the attorneys. Furthermore, as is what we believe to be the common experience in North Dakota law firms, it was not uncommon for these attorneys to discuss their cases with each other. Under these circumstances, it is reasonable and justified to infer that each attorney had access to, and therefore knowledge of, all confidential information of the firm's clients"

Id.

If there was a conflict of interest issue involving Attorney B, Attorney A's argument that Attorney B has been insulated from any representative involvement on Jane Doe's case would not succeed under the Heringer ruling.

CONCLUSION

The Committee cannot render an opinion on whether Attorney A is barred from representing Jane Doe because Attorney A employs Attorney B, who is a probable witness and closely related to the client. This determination rests with Attorney A. If Attorney A determines that neither he nor Attorney B has a conflict of interest, given the facts presented, Attorney A may represent Jane Doe.

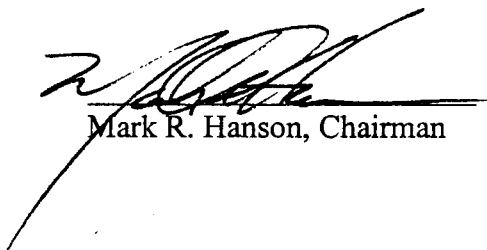
This Committee is of the opinion "insulating" Attorney B or erecting a loose "Chinese Wall"

would be of no effect under the Heringer ruling if Attorney B had a conflict of interest, prohibiting Attorney A's representation of Jane Doe.

This opinion is provided pursuant to North Dakota Rules of Lawyer Discipline 1.2 (B), which states:

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 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 Susan L. Ellison and was unanimously approved by the Ethics Committee on July 5, 2001.



Mark R. Hanson, Chairman