

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 01 - 06

The SBAND Ethics Committee received a request for an opinion on whether a SBAND member has a conflict of interest in representing a client in a lawsuit in which a former client is the opposing party.

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 Clients

ASSUMED FACTS

Attorney Z, along with other members of Attorney Z's law firm, provided general legal services to Client A in the late 1980's or early 1990's. Those services involved forming a corporation, drafting wills and what Attorney Z describes as "general legal work" that consisted of preparing legal, transactional-type documents. Since that legal work was performed, Client A has moved out of state, but has continued to own real estate in North Dakota.

In June of 2000, a life insurance agent purporting to be a representative of Client A called Attorney Z's firm regarding the drafting of a life insurance trust, powers of attorney and other documents for Client A. At the time of that contact, there were no active or pending matters being handled by Attorney Z or the members of his firm on behalf of Client A. Neither Attorney Z nor any members of his firm heard anything from Client A or anyone else with instructions to proceed with the life insurance trust, powers of attorney or other documents discussed with the

insurance agent during the June 2000 conversation. No documents were prepared by Attorney Z or any member of his firm in response to the June 2000 communication with the insurance agent.

In May of 2001, Client A's father commenced an action against Client B in North Dakota Small Claims Court. Client B was an existing client of Attorney Z. The claim involves real estate that had been placed in a trust in which Client A is the trustee. Client A has no ownership interest in the real estate.

Attorney Z filed a Motion on behalf of Client B to Dismiss the small claims court action, arguing that the claim exceeds the \$5,000.00 jurisdictional limits and that the father was not the real party in interest. After the Motion to Dismiss was filed, Client A, in his capacity as trustee, was substituted as the plaintiff in the small claims court action. The Motion to Dismiss was granted. Client A, however, continues to pursue the claim as trustee. Attorney Z understands that the claim will be filed in North Dakota State District Court.

QUESTION PRESENTED

Does Attorney Z have a conflict of interest in continuing to represent Client B in the claim in which Client A, an individual formerly represented by Attorney Z and/or other members of his firm, is the opposing party?

DISCUSSION

North Dakota Rule of Professional Conduct 1.9 provides as follows:

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

- (a) Represent another person in the same matter in which that person's interests 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 respect to a client.

Paragraph (a) of Rule 1.9 explains when a conflict of interest prohibits a lawyer from representing a client in a matter involving a former client. Paragraph (b) explains when a conflict of interest involving a former client can be cured with consent. Paragraph (c) reminds us that if a lawyer can represent a client in a matter against a former client, the former client's confidential information must be protected in compliance with Rule 1.6

1. **Does Paragraph (a) Of Rule 1.9 Prohibit Attorney Z's Continued Representation Of Client B?**

The first question in applying Rule 1.9 is whether, under paragraph (a), the lawyer is representing another person in the "same matter" for which the lawyer represented the former client. Rule 1.7(e), N.D.R. Pro.C., provides that "as used in Rules 1.7 through 1.12, the term 'matter' includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party." The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. (See Comment, Rule 1.9) For example, a lawyer cannot seek to rescind on behalf of a new client a contract drafted on behalf of the former client. Id.

The Committee understands that the pending claim involves real estate that was not the subject of any legal documents prepared by Attorney Z or the members of his firm on behalf of Client A prior to the May 2001 litigation. Therefore, the pending claim and the prior legal services provided Client A do not involve the "same" matter. Paragraph (a) of Rule 1.9 does not prohibit Attorney Z from representing Client B in the pending claim brought by Client A.

2. Does Paragraph (b) Prohibit Continued Representation Of Client B?

If paragraph (a) does not apply, Attorney Z's ability to represent Client B depends, under paragraph (b) of Rule 1.9, on whether: (1) the pending lawsuit is "substantially related" to the legal advice and services which Attorney Z and/or the members of his firm previously provided Client A; and, (2) whether Client B's interests are "materially adverse" to the interests of Client A. Neither Rule 1.9 nor its Comments provide a definition or detailed discussion of what is meant by a "substantially related" matter. (See, e.g. SBAND Ethics Comm. Op. 00-01, at p. 3; ABA Formal Op. 99-45; Phil. Eth. Op. 89-8). This Committee has explained that in determining whether two matters are "substantially related" a lawyer should consider the purposes of the legal representation in the particular context as well as the substantive and procedural law that applies. Id. A critical question is whether it can reasonably be said that during the former representation the lawyer might have acquired information related to the subject matter of current representation of the "new" client. ABA Formal Op. 99-45: see also SBAND Ethics Comm. Op. 00-01, at 3.

If the issues in the pending claim between Client A and Client B do not involve issues that bring into play information obtained by Attorney Z or the members of his firm during the prior representation of Client A, then the prior and current matters are not "substantially related" under Rule 1.9(b). If, however, Attorney Z determines to the contrary based on his knowledge of the facts and issues involved in those matters, Attorney Z must determine whether the interests of Client B are "materially adverse" to Client A's interests.

The Comments to Rule 1.9 explain that the principles in N.D.R. Pro.C. 1.7 aid in determining whether the interests of the present and former client are "adverse". Under Rule 1.7, a lawyer needs to consider whether her ability to "consider, recommend, or carry out a course of

action on behalf of a client" will, or might, "be adversely affected by the lawyer's responsibilities to another client, a third person or by the lawyer's own interests", including the duty of loyalty and duty not to disclose confidential information. (Id. Rule 1.7, including Comments). Therefore, in determining whether Client B's interests are materially adverse to those of Client A, Attorney Z needs to determine whether his ability to consider, recommend or carry out an appropriate course of action for Client B is affected by his duty not to use information obtained in his or his firm's prior representation of Client A. This Committee cannot determine, based on the facts presented, whether the interests of Client A in the prior matter and Client B in the current matter are "materially adverse." Attorney Z must make that decision.

If Attorney Z determines that both prongs of paragraph (b) to Rule 1.9, apply, he must receive proper consent before continuing to represent Client B in the pending claim. Such consent is effective only after consultation with Client A [through his attorney if represented] about the circumstances, including Attorney Z's intended role in behalf of Client B. (See Comment to Rule 1.9). Attorney Z may also need consent from Client B, under Rule 1.7.

Finally, Attorney Z is reminded that even if there is no conflict of interest under Rule 1.9 to the continued representation of Client B, Rule 1.6 may limit his ability to disclose information obtained during his or his firm's prior representation of Client A.

CONCLUSION

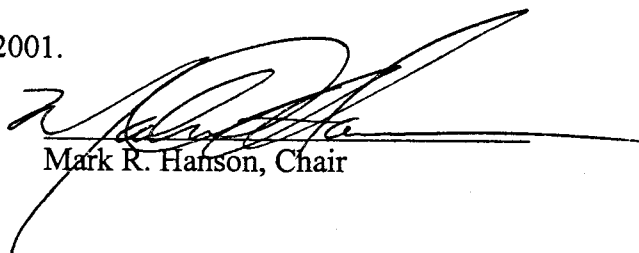
Assuming that the pending claim between Client A and Client B involves real estate that was not subject of any of the legal documents or legal representation provided by Attorney Z or the other members of his firm prior to May 2001, then the pending claim and the prior legal services provided to Client A do not involve the "same" matter. Rule 1.9(a) does not prohibit Attorney Z from representing Client B in the pending claim brought by Client A

If the pending claim does not involve issues that bring into play information obtained by Attorney Z or the members of his firm during the prior representation of Client A, then the pending claim is not "substantially related" to the prior matters. Accordingly, no conflict of interest exists under paragraph (b) to Rule 1.9. If, however, Attorney Z determines the matters are "substantially related" under Rule 1.9 (b), Attorney Z must determine whether the interests of Client B are "materially adverse" to Client A's interests. If Attorney Z so determines, he can continue to represent Client B only if he obtains proper consent.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule 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 Mark R. Hanson and was unanimously approved by the Ethics Committee on August 15, 2001.



Mark R. Hanson, Chair