

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION No. 05-02

MARCH 9, 2005

The Committee has received, by letter dated January 14, 2005, a request to determine whether a proposed relationship with out-of-state lawyers is permissible and whether referrals to an attorney-owned law related enterprise is permissible.

FACTS

The Requesting Attorney operates a law practice as a solo practitioner with emphasis in estate planning. Clients are charged a flat fee for the Requesting Attorney's services. The Requesting Attorney also operates a separate business. That business provides tax, investment, and insurance services. Requesting Attorney has obtained the necessary insurance and securities licenses to operate the business and is subject to those industries ethical codes. The business and the law practice do not have separate offices, although the Requesting Attorney uses different letterhead for his law practice. Estate planning services are provided to the separate businesses clients upon request of the client. The Requesting Attorney charges a separate fee for legal work and the fee is not shared.

The Requesting Attorney is acquainted with two lawyers who practice in similar areas of law, although they practice in another state. These out-of-state lawyers are not licensed to practice law in North Dakota. The Requesting Attorney and the out-of-state lawyers have been discussing collaborating in two ways.

The first proposed collaboration involves the Requesting Attorney contracting with the out-of-state lawyers to provide services. These services would primarily be

consulting work about estate planning strategies, document review, and in some cases document drafting. The contracted work performed by the out-of-state lawyers would not be specific to North Dakota, but instead would concern general principles of federal taxation and estate planning. The Requesting Attorney will make the first decision concerning strategies and documents created by the out-of-state lawyers and will review and revise the strategies and documents to the extent necessary to comply with North Dakota Law. The Requesting Attorney will be fully responsible to the client(s). In exchange for these services, the Requesting Attorney would pay the out-of-state lawyers on an hourly or project basis. The client would not pay the out-of-state lawyer's, nor have any contact with them. The out-of-state lawyers' fee would be paid directly out of the flat fee charged by the Requesting Attorney. Requesting Attorney does not expect to receive any compensation from the out-of-state lawyers.

The second proposed collaboration involves the separate business owned by the Requesting Attorney. The out-of-state lawyers may refer "investment clients" to the Requesting Attorney's business "where appropriate" and under "limited circumstances." Requesting Attorney would consider this collaboration "separate and distinct" from the first proposed collaboration, and does not expect any referrals to the business in exchange for the fees paid under the first collaboration. Requesting Attorney will not pay a referral fee to the out-of-state lawyers when investment clients are referred to the separate business.

DISCUSSION

First Proposed Collaboration

The Committee's opinion is that the proposed relationship between Requesting Attorney and the out-of-state lawyers as detailed by Requesting Attorney would not contemplate a fee split. First, the Requesting Attorney's clients will not pay a fee to the out-of-state lawyers. Second, the Requesting Attorney will be responsible to pay for any consultation work done by the out-of-state lawyers regardless of whether the Requesting Attorney is paid by the client. This may result in the Requesting Attorney paying for services that exceed the flat fee charged to the client. In this way, the first proposed collaboration is similar to retaining an expert to advise Requesting Attorney.

However, the Committee is concerned that the work done by the out-of-state lawyers may constitute the unauthorized practice of law, and subject Requesting Attorney to discipline under N.D.R. Prof. Conduct 5.5(e); See Also N.D.C.C. § 27-11-01.

In State Bar Association Ethics Committee Opinion 00-09 the Committee stated:

The seminal case in North Dakota on what constitutes the practice of law is *Cain v. Merchants Nat'l Bank & Trust Co.*, 268 N.W. 719 (N.D. 1936). In *Cain* an injunction was sought against Merchants National Bank & Trust Company (hereinafter Merchants) to prevent it from engaging in the unauthorized practice of law. *Id.* at 720. Part of the alleged activity of Merchants was the preparation of legal documents, such as chattel mortgages, bills of sale, and crop contracts, in some of which transactions Merchants was a party and in some of which transactions Merchants was not a party. *Id.* at 721. The Court in *Cain* held that the practice of law clearly includes more than just representation in Court. *Id.* at 722. Quoting the Supreme Judicial Court of Massachusetts, the North Dakota Supreme Court stated:

Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of

subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counselor at law' . . . bear an intimate relation to the administration of justice by the courts. No valid distinction, so far as concerns the questions set forth in the order, can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the ground work for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counselors at law outside of courts. Decisions of the courts, some of which deal with statutes, are unanimous on these points, so far as we are aware.

Id. In *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986), the North Dakota Supreme Court was considering whether an unlicensed attorney could collect a fee for legal work done in this state. The Court cited extensively from *Cain, supra* and held that "an out-of-state attorney who is not licensed to practice law in this State cannot recover compensation for services rendered in the State of North Dakota." *Id.* at 165. Both the facts of *Cain* and *Ranta* are distinguishable from the facts here where the out-of-state lawyers will not be physically practicing law or performing services in this state. No North Dakota case appears to have addressed the issue of whether legal work

performed in another state for a North Dakota client is the practice of law in North Dakota. Therefore, the Committee looks to the law of other states for guidance.

California has addressed the issue in *Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Svc's Inc.*, 949 P.2d 1 (Cal. 1998). In that case, a California client sued a New York law firm for malpractice in connection with legal work done, in part, in California. *Id.* at 3. The law firm counterclaimed for fees owed. It was undisputed that the law firm's attorneys were unlicensed in California. *Id.* However, the law firm's attorneys did legal work in both New York and California. While holding that the work performed by the attorneys in California was the unauthorized practice of law, *Id.* at 7, the court also held that work performed in New York for a California client was not the practice of law, as defined by California's statute. *Id.* at 11.

The Committee's opinion is that the Requesting Attorney may consult with the out-of-state lawyers under the first proposed collaboration so long as 1) the Requesting Attorney retains responsibility for the work of the out-of-state lawyers, 2) the out-of-state lawyers do not actually work in North Dakota, and 3) the out-of-state lawyers do not communicate or give advice directly to the client. In this way, the purpose of and protections afforded in N.D.C.C. § 27-11-01, viz. to determine whether an individual is competent and qualified to practice in state before they actual practice, is met; the Requesting Attorney retains responsibility and is the sole communicator with the client.

The Committee concludes that, based on the facts presented to it, that the first proposed collaboration should be permissible under the circumstances described above. If the first proposed collaboration becomes one where a fee is split between the

Requesting Attorney and the out-of-state lawyers, then the Committee draws the Requesting Attorney's attention to N.D.R. Prof. Conduct 1.5(e).

Second Proposed Collaboration

The Committee's opinion is that the second proposed collaboration does not trigger N.D.R. Prof. Conduct 1.5 consistent with the analysis set out above and the fact that the Requesting Attorney would not be generating a fee in the separate business as a lawyer. However, the second proposed collaboration concerns Rule 5.7, which states:

(a) A lawyer is subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Thus, a lawyer operating an ancillary, or "law-related" business may be subject to the Rules of Professional Conduct. *In re Galbasini*, 786 P.2d 971 (Ariz. 1990); *In re Leaf*, 476 N.W.2d 13 (Wis. 1991). This Committee's previous opinion indicates that whether a North Dakota attorney is subject to the rules of professional conduct as it pertains to businesses that provide "law-related" services is a fact specific question.

State Bar Association Ethics Committee Opinions 98-07 and 01-03. Businesses concerning insurance and taxation may be “law-related.” *Id.*

Accordingly, Requesting Attorney may be subject to the Rules of Professional Conduct when providing services unless: 1) steps are taken to make distinct the law practice from the law-related services, and/or 2) reasonable measures are taken to assure that persons referred from the out of state lawyers know that the services of the separate business are not legal services and the lawyer-client relationship does not exist. N.D.R. Prof. Conduct 5.7; *see also Matter of Pappas* 768 P.2d 1161,1167 (Ariz.1988).

Requesting Attorney indicates that no referrals would be expected merely because of the first proposed collaboration. In other words, Requesting Attorney and the out-of-state lawyers would not engage in a *quid pro quo*. The out-of-state lawyers are free to refer their investment clients to any individual they wish. Simply because they may choose to refer clients to Requesting Attorney’s separate business, even though they may have a relationship under the first proposed collaboration with Requesting Attorney, does not give rise to the implication of unethical conduct. Requesting Attorney should comply with Rule 5.7, however, in providing the services to clients in the separate business.

CONCLUSION

The Committee concludes that the Requesting Attorney may first collaborate with the out-of-state attorneys, provided 1) Requesting Attorney retains responsibility for the work of the out-of-state lawyers, 2) the out-of-state lawyers do not actually work in North

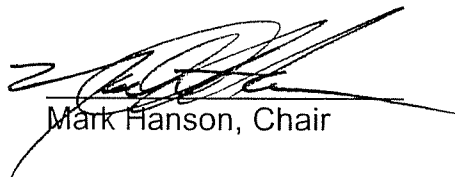
Dakota, and 3) the out-of-state lawyers do not communicate or give advice directly to the client. If the first proposed collaboration becomes one where a fee is split between the Requesting Attorney and the out-of-state lawyers, then the Committee draws the Requesting Attorney's attention to N.D.R.Prof. Conduct 1.5(e).

With regard to the second proposed collaboration, it does not trigger N.D.R.Prof. Conduct 1.5. However, the Requesting Attorney should comply with N.D.R.Prof. Conduct 5.7 in providing services to the clients of the separate business.

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 Joseph A. Wetch, Jr. and approved by the Committee on April 11, 2005.


Mark Hanson, Chair

Michael J.B. Schaff
Attorney-at-Law



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RECEIVED

JAN 18 2005

05-02

January 14, 2005

State Bar Association of North Dakota
Attn: Ethics Committee
504 North Washington Street
Bismarck, ND 58501

Dear Ethics Committee Members:

I operate a law practice in Mandan as a sole-practitioner. My practice primarily involves estate planning, but I have also worked on a few real estate and business transactions.

Two of my law school classmates have recently opened a law practice in Jacksonville, Florida. Although their area of practice is a bit broader than mine, it is very similar to my practice.

We have been discussing a collaboration between our two firms that I wanted you to review before we proceeded.

I would like to contract with the Florida law firm to provide services for me. Services would consist primarily of consulting about estate planning strategies and document review. In some instances, services would also likely include document drafting. However, I will make the first decision concerning strategies and documents and will be fully responsible to my clients.

In exchange for those services, I would pay the law firm on an hourly or project basis. It is my understanding that this would be acceptable as long as the arrangement was disclosed to the client, the client consented, and the fee was proportionate to the work performed.

I would not expect to receive any compensation from the Florida law firm. However, I operate a separate business named Schaff Tax & Financial Services, Inc. that provides investment and insurance services. Where appropriate, the Florida law firm may refer investment clients under limited circumstances. I would consider this to be separate and distinct from the consulting relationship referenced above. Also, I do not expect any referrals in exchange for the fees that I pay for such consulting services.

Michael J.B. Schaff
Attorney-at-Law

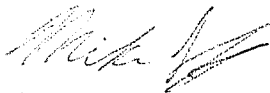


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Please let me know whether you believe the proposed relationship is allowed by the rules of professional responsibility. If it is allowed, please also let me know what guidelines you would recommend to avoid potential rules violations. Finally, please provide me an opinion concerning the potential referral of investment clients to my financial services business.

I appreciate your consideration of this matter and look forward to receiving your opinion.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mike Schaff", with a stylized flourish at the end.

Michael J. B. Schaff