

STATE BAR ASSOCIATION OF NORTH DAKOTA  
ETHICS COMMITTEE  
OPINION NO. 14-01

*THIS OPINION IS ADVISORY ONLY*

QUESTION PRESENTED

Wife and Husband held general durable power of attorney (POA) for Aunt (of Wife). After establishing the POA for Aunt, legal work was completed on behalf of Wife and Husband. It was subsequently alleged that Wife and Husband were inappropriately using Aunt's funds for their personal use.

The Ethics Committee has been asked to render its opinion on whether Wife and Husband are still Attorney's clients? If not, will his representation of Aunt in a civil action against them violate his duties owed to them as former clients under North Rules of Professional Conduct Rule 1.9? Would such representation be a violation of any other rule?

OPINION

Based on the facts presented below, Attorney would not be able to represent Aunt in a civil action against Wife and Husband. Representation of Aunt would be a violation of Rules 1.9 and 1.7, N.D.R. Prof. Conduct.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.7, N.D.R. Prof. Conduct: Conflict of interest: General

Rule 1.9, N.D.R. Prof. Conduct: Duties to Former Client

FACTS PRESENTED

Attorney performed various legal services for Aunt, most recently of these services was assisting in drafting a durable power of attorney. Aunt decided to appoint her niece, Wife, as agent. Wife and Wife's husband, Husband, became co-agents and were then in charge of Aunt's financial affairs. Wife was the primary agent responsible for paying Aunt's bills and managing her financial affairs. Shortly after, Aunt entered a nursing home.

In early 2011, Attorney represented Husband on a child support matter and later with estate planning documents such as wills and a power of attorney for both Wife and Husband. The work had ended by April 2011. However, no letter indicating a termination of the attorney client relationship was sent to the clients. Since that time, Attorney has not represented Husband and Wife in any legal affairs. Attorney had an expectation that he would perform legal work on any further estate changes that would be needed by the Wife and Husband. Continued contacts between attorney and clients now were exclusively regarding Aunt's financial and tax affairs.

In early 2013, Attorney was contacted by Aunt's nursing home informing him that she was running out of money and they were in need of financial statements to complete an application for Medicaid. The bank statements provided by Wife disclosed numerous checks written to or on behalf of Wife, totaling over \$100,000. These transfers were deemed as disqualifying by Social Services and Aunt was denied Medicaid.

In May of 2013, Attorney met with Aunt and appointed two new, unrelated persons, to hold power of attorney. Wife was informed by mail that her powers had been revoked.

A criminal investigation is underway of Wife, but no charges have been filed. The nursing home, on Aunt's behalf, investigated appealing the denial of her Medicaid application on hardship grounds, but was discouraged in that endeavor because no civil action against Wife or Husband has been started.

## DISCUSSION

Even though the legal matters may appear on their face to be different, the representation overlaps in that in a child support matter, financial disclosures that are not known to the general public are tendered to legal counsel. Also, estate planning may deal with the location and distribution of financial assets after one's death. In order to properly represent clients in estate planning matters, full and complete asset disclosure must be done. As such the attorney gains a complete and full understanding of a client's assets. This is an understanding that would not exist but for the attorney-client relationship. So, in this case the interests are materially adverse. Furthermore, Attorney himself stated that he fully anticipated that Wife and Husband would come to him in the future for any future estate planning changes. These facts establish that Attorney did not believe his attorney/client relationship with Wife and Husband had terminated. Given Attorney's long standing/ongoing relationship with Aunt, it is reasonable to determine that Wife and Husband reasonably believed that they had established the same sort of ongoing attorney/client relationship. It is reasonable to assume that Wife and Husband are still Attorney's clients unless and until that relationship is properly terminated.

Attorney acknowledges that the key issue is whether the present case (action to recover money) is the same or substantially related to the matters of Attorney's prior representation of Wife and Husband's estate. Rule 1.9 comment 1 states, "Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give written consent."

Attorney suggests that his representation of Wife and Husband in their estate planning and child support is not substantially related to the present action to recover money. Rule 1.9 comment 3 provides a very helpful description and example of "substantially related," it states in part:

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the

subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

Rule 1.9(b)(1) prohibits a lawyer from representing a party in the same or substantially related matter if a client has previously been represented whose interests are materially adverse to that person. The prosecution of one party for stealing money from another party explicitly displays material adversity. Attorney represented Wife in appointing Wife and Husband as POA, the prosecution of the wrongful use of that POA can also be deemed substantially related. Because the matter is substantially related, Rule 1.9(c)(1) prohibiting an attorney from using information gained from prior representation against the former client applies. During Attorney's representation of the parties he has gained very valuable information, specifically information regarding finances and holdings of both parties. This information obtained by Attorney would very likely result in a serious disadvantage for Wife and Husband should a judgment need collection. Information obtained during prior actions would be very useful to Attorney in prosecution in the present action, and therefore be in violation of Rule 1.9.

Also, Rule 1.7 (a) states "[a] lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." Further, Rule 1.7 (c):

[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 to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As discussed above, Attorney's representation of Aunt would be adversely affected by his responsibilities to Wife and Husband due to the sensitive financial obtained in representation of all the parties.

Furthermore, if Wife and Husband are charged criminally there is a very likely chance that Attorney could be called as a witness because he created the relationship of Wife and Husband as POA. The issue is further complicated in that Attorney still has an ongoing attorney-client relationship with Wife and Husband and an attorney cannot be compelled to testify against a client. The attorney-client relationship prohibits Attorney from being able to represent either of the parties in the action to recover funds that were allegedly unlawfully appropriated.

## CONCLUSION

Wife and Husband are still Attorney's clients. Representation of Aunt would result in violation of Rule 1.9.

Rule 1.9(b)(1) prohibits a lawyer from representing a party in the same or substantially related matter if a client has previously been represented whose interests are materially adverse to that person. For the above mentioned reasons, the action is of the same or substantially related matter which is materially adverse to Wife and Husband. The information obtained in the Representation of Wife and Husband would create a disadvantage to them in the present action to recover Aunt's money. This is prohibited by Rule 1.9(c)(1).

Additionally, Rule 1.7(a) and Rule 1.7(c) prohibits a lawyer from representing a client if the actions would adversely affect another client or third party. The facts and discussion above indicate this would occur, making it a violation if Attorney were to act.

This opinion was drafted by Ward K. Johnson, III and was unanimously approved by the Ethics Committee on the 19th day of February, 2014.

  
Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which states:

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.