

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-02

February 16, 1993

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED], North Dakota. The facts as set forth in [REDACTED] letter are summarized below.

FACTS

On at least two occasions [REDACTED] firm has represented a certain corporation, but it is not the corporation's regular counsel. One case for the corporation was completed and closed some time ago. A second case involves a business matter in which one of [REDACTED] partners reviewed documents and made recommendations to the corporation in 1991 and did some further work, including attending a meeting on behalf of the corporation, in November of 1992. That file remains open. It is unclear at this point in time whether additional work will be necessary, but that potential exists.

[REDACTED] was recently asked to review a file and act as an expert witness on behalf of plaintiffs in a case in which the corporation (parent corporation) and its subsidiary corporation are defendants. The subsidiary corporation was the general partner of a limited partnership. Neither [REDACTED] nor his firm has represented the subsidiary corporation in any capacity. In addition, no one in his firm is presently acting as an attorney for any of the litigants in the case in question. Each party is represented by independent counsel. [REDACTED] role as an expert would be to address what legal options were available to the limited partnership to avoid losses or damage. The

claim presented in the case is that general partner did not independently evaluate the option of filing a bankruptcy case to limit the losses of the limited partnership.

The pending litigation is unrelated to either of the two matters for which [REDACTED] firm has provided representation to the parent corporation. [REDACTED] believes that his testimony would be limited to the conduct of the general partner, i.e. the subsidiary corporation. However, the parent corporation has objected to [REDACTED] involvement in the case as an expert witness on grounds of conflict of interest.

DISCUSSION

[REDACTED] letter raises questions including whether there is a conflict of interest presented by the circumstances described above that would require him to withdraw as an expert for the plaintiffs. Rule 1.7 of the Rules of Professional Conduct sets forth the general rule applicable to conflicts of interest, providing:

(a) 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.

(b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

(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.

(d) Except 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.

(e) 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 Committee believes the circumstances set forth above do not reveal a conflict of interest under Rule 1.7 that would require [REDACTED] to withdraw as an expert for the plaintiffs. There is nothing in the facts described which suggest that the firm's representation of the parent corporation might be adversely affected by [REDACTED] responsibilities as an expert in the litigation in question. This opinion is based upon the facts provided, including particularly that the matter in litigation is totally unrelated to all matters on which [REDACTED] firm previously provided representation to the parent corporation. The Committee assumes that there are no concerns raised regarding the potential use of confidential information from the parent corporation in [REDACTED] role as an expert witness.

Although the Committee does not believe that Rule 1.7 requires [REDACTED] to withdraw as an expert, it would point out that the rule may have application in this case from the standpoint of the plaintiffs. Among other things, assuming ongoing representation of the parent corporation by [REDACTED] firm, there is a possibility of future communications of confidential information between the parent corporation and members of [REDACTED] firm which, in turn, might lead

to a situation requiring [REDACTED] to withdraw as an expert. This could have a substantial adverse effect on the plaintiffs, who not only would have to replace their expert, but who might have difficulties in doing so given the fact that the deadline for disclosing experts in the litigation has expired. At a minimum, there is at least the potential for the appearance of impropriety. Thus, the Committee believes that disclosure to the plaintiffs of the firm's prior representation of the parent corporation is necessary and that, in accordance with Rule 1.7(c), [REDACTED] should obtain the plaintiffs' consent to his further involvement as an expert, assuming such things have not already been accomplished. The Committee would point out that the concerns arising out of the firm's continued representation of the parent corporation would be alleviated if [REDACTED] partner withdraws as counsel for the corporation in the unrelated business matter.

Because of the Committee's resolution of the issues addressed above, the Committee believes it is unnecessary to address the other specific questions raised by [REDACTED] letter.

CONCLUSION

The Rules of Professional Conduct do not require [REDACTED] to withdraw as an expert for the plaintiffs in the circumstances described above.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Pamela J. Hermes and was unanimously approved by the Ethics Committee.


Murray G. Sagsveen
Chairman

93-02

[REDACTED]

[REDACTED]

[REDACTED]

February 12, 1993

Fax No. 224-1621

Sandy Tabor
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Bismarck, ND 58502-2136

Dear Sandy:

Re: Request for opinion from SBAND Ethics Committee

I am requesting that the SBAND Ethics Committee render to me an advisory opinion regarding the factual circumstances outlined below. I would appreciate the Committee's opinion on whether a conflict of interest is present under Rules 1.7, 1.8, or 1.9, North Dakota Rules of Professional Conduct. Rule 3.7, North Dakota Rules of Professional Conduct, may also have some implications in this matter, but under the following facts would not appear to be directly on point.

The facts I am dealing with are as follows:

Our firm, on at least two separate occasions, has represented a corporation. Our firm is not regular counsel for the corporation and has represented the corporation only when its regular counsel has a conflict. We assume its regular counsel refers conflict cases to other lawyers as well. One of the cases referred is a closed and completed matter which is totally unrelated to the matter at hand. That case was completed some time ago and no further work has been done on the matter for the corporation.

The second case our firm has been involved in as counsel for the corporation is a business matter where its regular counsel had a conflict. It does not involve

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litigation nor is it related in any manner to the matter at hand. My partner reviewed some documents and made recommendations to the corporation in February 1991. We heard nothing further on the matter until November 1992, when my partner was again asked to review the situation and attend a meeting on behalf of the corporation. As of now the file is still open, but my partner is unsure whether he will be asked to do any further work in the matter. The potential exists that my partner will be asked to further review documents, draft documents or attend meetings on behalf of the corporation, but then again, he may do nothing further in the matter. It is hoped the matter will be completed by March 1, 1993.

Recently, I was asked to review a file and act as an expert witness on behalf of plaintiffs in a matter wherein the corporation outlined above is a defendant. The defendant corporation is the parent corporation of the other defendant (subsidiary corporation) which neither I nor my firm has ever represented in any capacity. The subsidiary corporation was the general partner of a limited partnership. The plaintiffs are a group of limited partners. No one in my firm is acting as an attorney for the litigants and each party is represented by independent counsel. My role as an expert is to address what legal options were available to the limited partnership to avoid loss/damage. The claim is that the general partner didn't independently evaluate the option of filing a bankruptcy case to limit the losses of the limited partnership.

To my knowledge, my testimony is limited to the conduct of the general partner (subsidiary corporation), not the parent corporation. Again, this pending litigation is unrelated to the either of the two matters outlined above where my partners represent/represented the defendant parent corporation.

Upon learning that I was a potential expert witness in the matter, the corporation (parent) contacted our firm to object to my involvement in the case as an expert witness. It apparently views my role as an expert as a conflict of interest since our firm has represented the corporation in the past. When it objected it cited the closed matter as the conflict. It apparently had forgotten about the second matter which may still be active. In any event, the corporation views the situation described above as a conflict of interest situation and objects to my acting as an expert witness against it in the pending litigation.

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One other point you should know as you consider this matter is that the Plaintiff's have disclosed me as an expert and the deadline set by the Court for such disclosure has passed. If it is your opinion that the rules are applicable to my acting as an expert on legal issues and that a conflict does exist requiring my withdrawal as an expert, how do Rules 1.16 and Rule 3.7 apply in regard to assuring that "withdrawal" does not create a substantial hardship or disadvantage to the party you represent?

In light of the foregoing facts, I would appreciate advice on the following questions:

1. Do the Rules of Professional Conduct apply to my role as an expert witness in litigation where neither I nor anyone in my firm is representing the litigants in the matter wherein I am to testify as an expert?
2. Does a conflict of interest exist for me and my firm in a situation where I will be acting as an expert witness testifying against the subsidiary of a corporation where the parent corporation is being represented, in a wholly unrelated matter, by another member of my firm?

On this point, while this file is active and may require more work from my partner, it is also possible that no further work will be done on the matter by this firm. Does this effect your response to question #2?

3. Does the fact that we once represented the parent corporation in a matter which is now closed, again wholly unrelated to this matter, create a conflict of interest for me as an expert witness in the pending litigation?
4. Does the fact that my testimony as expert will pertain to the conduct of the subsidiary, rather than the parent corporation, effect your conclusion?
5. If you conclude that a conflict of interest exists and that it would be advisable for me to withdraw as an expert, should such withdrawal be conditioned on the Court approving additional time for the plaintiffs to find a replacement expert witness? In other words, if the Rules of Professional Conduct are applicable to my acting as an expert witness in the matter, shouldn't withdrawal take into consideration the requirements of Rule 1.16 and Rule 3.7 as to the hardship withdrawal may create for the party?

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5. Would the withdrawal of my partner as counsel for the corporation in the business matter unrelated to the litigation remove any conflict of interest that might exist? We assume it would not be difficult for the corporation to retain other counsel in the matter since it has not been very active and may not require any further work, but my partner has been the only lawyer involved in the matter from the beginning which started in 1991.

Your guidance on this matter would be greatly appreciated.

Very truly yours,

[REDACTED]

