



STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHIC'S COMMITTEE

OPINION NO. 93-11

JUNE 28, 1993

STATE BAR ASSOCIATION
HOWE BUILDING, 2ND FLOOR
ATTORNEYS AT LAW
BOX 370, DICKINSON, NORTH DAKOTA 58601

The Ethics Committee received a request for an opinion from [REDACTED]

The issue presented is whether, under the North Dakota Rules of Professional Conduct, [REDACTED] would be precluded from accepting employment by client "B" to review and comment upon a future rule and to represent client "B" at a future administrative hearing in opposition to a proposed rule without the consent of client "A".

The situation giving rise to the problem stems from recent proposed rule changes by a state administrative agency.

In the past, [REDACTED] has represented both client "A" and client "B" on a variety of legal issues including regulatory matters. In fact, prior to the present situation, client "A" had employed her to review proposed rule changes and give advice concerning those changes. After receiving such advice, client "A" determined that it did not wish to comment upon or oppose any proposed rule change and expressed that it did not want [REDACTED] to do so on its behalf. The proposed rules which were the concern of client "A" were later withdrawn from consideration by the agency.

The current problem arises from the fact that the agency is likely to propose new rule changes in the near future. In anticipation of this, client "B" has contacted [REDACTED] and asked if she would assist in analyzing and commenting upon any future rule which is proposed. Moreover, client "B" indicated that it is interested in opposing any rule more restrictive than those which currently exist. Both client "A" and client "B" recognize that they may be adversely affected by any rule which is adopted by the agency in the event that they should desire to expand their interests in the state. Upon learning of the possible representation of client "B" and opposition to future proposed rules, client "A" advised the attorney that it viewed the retention by client "B" as a conflict of interest. Thus, [REDACTED] contact to the Ethics Committee concerning whether a conflict of interest did, in fact, arise, requiring her to obtain written consent of client "A" to represent client "B" in such matters.

The general rule governing conflicts of interest is set forth in Rule 1.7 of the North Dakota Rules of Professional Conduct. Rule 1.7 provides that:

- (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.

N.D.R.P.C. 1.7 (1992).

The comment to Rule 1.7 states that "loyalty is an essential element in a lawyer's relationship to a client." N.D.R.P.C. 1.7, comment. Loyalty is impaired . . .

[W]hen a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation.

Id.

In determining whether a conflict exists, it has been stated that

[T]he test of "inconsistency" is not whether the attorney has ever appeared for the party against whom he now proposes to appear, but it is whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him

ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-760 at 351. (1969) (citing Morrow, J. In Re Boone, 83 F. 944, 952-953 (C.C.N.D.Cal. 1897)).

Moreover, the comment to Rule 1.7 notes that the critical questions to be asked in such instances are; first, what is the likelihood that the conflict will arise and, second, if a conflict does arise what is the likelihood that it will interfere with the attorney's ability to represent the client. N.D.R.P.C. 1.7, comment.

Because both clients operate in the same regulatory environment, it is not unreasonable to assume that a conflict could arise if the attorney represents client "A" in support of rule changes and client "B" in opposition thereto. By representing both sides of the same issue, it is likely that conflict will arise. Further, by representing both clients, the attorney's ability to represent each will be adversely impacted. Quite possibly, the attorney could appear before the agency in opposition to rule changes on behalf of client "B", and shortly thereafter appear on behalf of client "A" in support of the rule changes. Clearly this would interfere with the attorney's ability to represent each of the clients concerning the regulations. This is precisely what Rule 1.7 seeks to avoid.

In addition to any conflict under Rule 1.7, a conflict may also arise if client "A" is considered to be a former client under Rule 1.9 of the North Dakota Rules of Professional Conduct. Rule 1.9 provides that:

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 substantially related matter ex. as Rule 1.6 would require or permit with respect to a client.

N.D.R.P.C. 1.9 (1993). Thus, if client "A" is a former client, the attorney cannot represent client "B" in any matter, materially adverse to "A's" interest, which is the same or substantially related to the attorney's previous representation of client "A".

The attorney's representation of client "B" in opposition to rule changes seems very likely to be substantially related to the work previously performed on behalf of client "A" since both operate in the same regulatory environment. Moreover, since client "A" chose not to oppose any rule changes, it appears that client "B's" active opposition to the rule changes would be materially adverse to client "A's" interest. Therefore, unless client "A" were to consent to the proposed representation after consultation with the attorney, a conflict of interest could arise under Rule 1.9.

Conclusion

The Committee has concern that the proposed representation, as expressed in [REDACTED] letter, may violate the Rules of Ethics.

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 in good faith and with reasonable reliance on a written opinion of advisory letter of the Ethic's Committee of the State Bar Association of North Dakota shall not be subject for 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 Patricia R. Ellingson and was unanimously approved by the Ethics Committee on June 28, 1993.


Murray G. Sagsveen
Chairperson

93-11

June 3, 1993

Hand Delivered

Murray Sagsveen, Chairman
Ethics Committee
North Dakota State Bar Association
316 North Fifth Street
Bismarck, North Dakota 58502-1695

Dear Mr. Sagsveen:

I am writing to you to request an opinion of the Ethics Committee about whether the conflict of interest rules of the Code of Professional Responsibility apply to the situation which is described in this letter so as to require me to obtain Client A's written consent for representation of Client B or to decline representation of Client B.

The situation which gives rise to my question is as follows:

Recently a state administrative agency proposed a rule which appeared to restrict the ability of certain out of state corporations to acquire entities which are regulated by the agency. Acquisition activities which would be prohibited under the proposed rule are presently permitted by state statutes as they are interpreted by the agency. A company which has sought my advice on federal regulatory matters in the past and for whose subsidiary I have done litigation and other legal work unrelated to regulatory matters in the past, (Client A) contacted me and asked me to review the proposed rule and to advise the client of my general opinion of the rule. I reviewed both the proposed rule and the underlying statutory authority for it and advised Client A that I felt the rule exceeded the authority of the agency and that it would also be subject to legal challenge upon a number of additional grounds. Client A then determined that it did not wish to comment upon or oppose the proposed rule and that it did not want to me to do so on its behalf. Accordingly, I neither commented upon the proposed rule nor attended the hearing which the agency held. My entire conversation with Client A about this lasted approximately 10 minutes.

As a result of other parties' comments and opposition to it, the proposed rule was withdrawn from consideration. However, it is expected that the agency will be proposing another, narrower and thus, less restrictive rule in the future and that the agency will again be requesting public comment and hold a hearing as part of the promulgation process.

[REDACTED]

Murray Sagsveen
June 3, 1993
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In anticipation of this, Client B, a company which I have represented and continue to represent in connection with a variety of legal matters, has contacted me and asked if I would assist it in analyzing and commenting upon any future rule which is proposed. Client B has indicated that it is interested in opposing any rule which would be more restrictive than the law as it is currently interpreted.

Neither Client A nor Client B have told or otherwise indicated to me that they have actual plans for future acquisitions or divestitures which would be affected by a future rule. However, both recognize that they might be affected by any rule which is adopted in the event that they should desire to expand in the future or in the event that they should desire to divest themselves of a subsidiary. How they would be affected depends entirely upon their future posture and what that future posture would be is not presently known.

Client A has now advised me that it would view my retention by Client B to review, comment upon and, oppose a future, proposed rule to be a conflict of interest. I do not agree and reviewed the conflict of interest rules of the Code of Professional Responsibility and various interpretations of the rules, but have not found an opinion or rule which is directly on point.

Please advise me whether, in the opinion of the Ethics Committee, I am precluded under the Code of Professional Responsibility from accepting employment by Client B to review and comment upon a future rule and to represent Client B at a future administrative hearing in opposition to a proposed rule without the written consent of Client A.

I would appreciate your prompt consideration of this matter. If you require further information to render an opinion, please let me know.

Sincerely Yours,

[REDACTED]

cc: Sandy Tabor (by Fax)