

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-14

August 17, 1993

The Ethics Committee has received a request from [REDACTED] for an opinion based on the following facts.

A divorcing couple, "H" and "W", employed a mediation service to arrive at an agreement regarding custody, child support, and property division issues involved in their proposed divorce. "W" brought the agreement to [REDACTED] requesting that she draft the necessary documents as quickly as possible since "W" was preparing to leave the state and wanted her divorce finalized before departing. [REDACTED] explained that someone must be present in order to "prove up" the divorce and by that time "W" would be gone. In order that "W" could leave the state, "W" suggested that [REDACTED] list "H" as plaintiff and represent him as needed.

The documents were drafted and later that day "H" picked up a copy of the proposed documents from [REDACTED] office. Later, "H" called to inform [REDACTED] that his attorney had advised him that the agreed upon child support was too high and that they would draft their own documents to serve "W" at a later date. After [REDACTED] informed "W" of these events, "W" asked [REDACTED] to represent her in the matter.

"H"'s attorney has stated that he believes [REDACTED] cannot represent "W" because she had drafted the proposed documents on which she stated she was representing "H".

DISCUSSION

Rule 1.9 of the Rules of Professional Conduct states that:

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

- (a) represent another person the same matter in which that person's interests are materially adverse to the interest's of the former client; or

....

The question in this case turns on what the requirements of "representation" are. Representation necessarily requires the commencement of an attorney-client relationship. In North Dakota "the relationship between an attorney and client is one of agency...." Mattco Inc. v. Mandan Radio Ass'n, Inc., 246 N.W.2d 222, 228 (N.D. 1976). This means the relationship of attorney and client rests basically upon contract theories. Moe v. Zietek, 27 N.W.2d 10, 13 (N.D. 1947). "The contract [,however,] may be either express or it may be implied from the conduct of the parties." Id. (citing Healy v. Gray, 168 N.W. 222 (Iowa 1918)). In addition "the employment of an attorney need not be made directly by the client." Id. Since it appears no express contractual relationship existed between "H" and attorney, and since the person who employed the attorney is not necessarily a controlling factor, analysis of the parties' actions and attitudes must be employed to define the relationship.

Situations exist when attorneys have been held liable for the representation of a client even though the attorney believed that there was never an attorney-client relationship. See In re Petrie, 742 P.2d 796, 801 (Arz. 1987) (stating that "[a]n

important factor in evaluating the relationship is whether the client believed that an attorney-client relationship existed.") (citations omitted). The theory justifying this stance appears to be protection of the client from the irreparable harm possible when led to believe they were represented when they are not. The opposite situation, one in which an attorney believes she is representing a client and the client does not, presents none of the aforementioned dangers. This client will not suffer irreparably since the client had retained counsel elsewhere. Therefore, enforcement of an attorney-client relationship in that situation is unnecessary to insure the protection of the client. It would, therefore, be illogical to find that representation has arisen in this situation, especially when there was basically no communication between the proposed client, "H", and [REDACTED] and no reliance by "H" upon [REDACTED] for representation.

CONCLUSION

Since the facts of the situation suggest that no privileged communications took place between [REDACTED] and "H" and "H" showed no reliance upon [REDACTED], it appears that [REDACTED] and "H" did not establish an attorney-client relationship. Therefore, [REDACTED] may continue to represent "W". However, it should be noted that if communications took place between "H" and [REDACTED] during the "brief conversations" referred to by [REDACTED], and that communication could be construed as having a bearing on this matter, representation may be inappropriate under Rule 1.6.

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

A lawyer that acts in 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.

Id.

This opinion was drafted by Timothy J. Wahlin, a third year law student, and Murray G. Sagsveen. It was unanimously approved by the Ethics Committee on August 17, 1993.



Michael J. Maus
Chairperson

ar:73-5669.opn

July 20, 1993

Michael J. Maus
Ethics Committee Chairman
137 1st Avenue West
P.O. Box 370
Dickinson, ND 58602-0370

Dear Mr. Maus:

I am requesting an opinion concerning a possible conflict of interest that would prevent my representation of the wife in the following divorce case. The factual situation is as follows:

The divorcing couple, Jane R. and Larry R., used a local mediation service to arrive at an agreement regarding the custody, child support, and property division issues involved in their proposed divorce stipulation. The wife, Jane R., brought the agreement to me and asked me to draft the necessary documents. Since she was moving to a west coast city with two days, it was necessary to draft the documents as quickly as possible. Although she indicated that she wanted me to represent her, she asked me to draft the documents with her husband listed as the Plaintiff. She did this only after I explained that someone present in the state would have to prove up the divorce. Since she would be unable to return for the hearing, she felt that having her husband listed as Plaintiff and having me represent him at the hearing was the only way to expedite matters. As requested, I drafted proposed documents for the couple to review. Later in the day, her husband picked up a copy of the proposed documents in the reception area of my office. Later, the husband called and informed me that his attorney had advised him that the agreed upon child support was too high and that they were going to draft their own documents and serve the wife at a later date. When I informed his wife about this message, she asked me to continue representing her. Since she was leaving town, she delivered documents regarding the couple's financial affairs and left believing that she had legal representation.

After several weeks, the wife received a Summons, Complaint, Admission of Service, and a proposed Stipulation that differs significantly from their mediated agreement. When I contacted the husband's attorney, I was told that he believed I could not represent the wife because I had drafted proposed documents that stated I was representing the husband. If I cannot represent her, she is without legal representation in this state and at a definite disadvantage.

Additional facts:

At no time did I give the husband any legal advise. Our only conversations were as follows: a brief telephone conversation when he inquired as to whether the documents were ready; a brief conversation when he picked the documents up; and a telephone call informing me that the documents were unacceptable to his attorney.

The only retainer I received was from the wife.

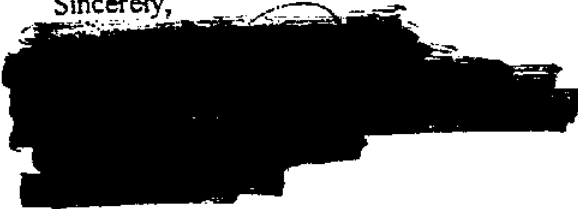
The documents were drafts of proposed documents that the parties were given for the purpose of reviewing and proposing changes.

There were no documents served or signed by anybody involved.

I did not sign the summons or any of the proposed documents.

I would appreciate an opinion as soon as possible. I anticipate that the wife will be served in the very near future and she needs representation. Thank you.

Sincerely,

A large, solid black rectangular redaction box covering the signature and any handwritten notes or dates that might have been present.

cc: Sandy Tabor