

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

Opinion No. 94-03

March 24, 1994

The Ethics Committee has received a request from [REDACTED] of [REDACTED]

North Dakota, for an opinion on the following question:

Whether an attorney who represents a client in a divorce proceeding and who is employed by a firm that previously represented the father-in-law of the client over ten years ago may be compelled to withdraw from her representation of the client by the son of the former client?

I. BRIEF FACTUAL SUMMARY

On April 22, 1982, a senior partner (subsequently separated from the firm) of the requesting attorney prepared a Last Will and Testament for John Doe, Sr. The document included a Testamentary Trust, naming John Doe, Jr., as Trustee. John Doe, Sr. died on August 18, 1984. The requester's firm has not represented John Doe, Sr., the Estate of John Doe, Sr., or the John Doe, Sr., Testamentary Trust since 1982. The requester's firm has never represented John Doe, Jr.

On September 8, 1992, an action for divorce was commenced against Jane Doe by John Doe, Jr. Jane Doe retained the requesting attorney. On November 30, 1993, the attorney for John Doe, Jr. entreated the requesting attorney withdraw from the case because of an alleged conflict of interest.

At no time prior to November 30, 1993, did John Doe, Jr. have any contact with the requester's firm. In late December, 1993, John Doe, Jr. requested a copy of his father's files from the firm and indicated to an employee of the firm that he would like to know "the intent" of the Testamentary Trust that he had served as Trustee for nearly ten years.

II. DISCUSSION

The initial inquiry required to resolve the question presented involves a determination whether or not John Doe, Jr., may be considered a former client of the requesting attorney. If so, Rule 1.9 of the Rules of Professional Conduct would be applicable.¹

North Dakota law has long recognized that an attorney-client relationship arises out of an agency agreement. Mattco, Inc., v. Mandan Radio Assoc., Inc., 246 N.W.2d 222 (N.D. 1976); Moe v. Zitek, 27 N.W.2d 10 (N.D. 1947). The essential nature of an agency relationship is that an act is performed by one person on behalf of another. Red River Commodities, Inc. v. Eidsness, 459 N.W.2d 805 (N.D. 1990).

The facts related by the requesting attorney do not reveal any agency relationship between John Doe, Jr. and the law firm. This conclusion also finds support in the traditional definition of the term "client." According to Black's Law Dictionary, a "client" is:

A person who employs or retains an attorney, or counsellor, to appear for him in courts, advise, assist and defend him in legal proceedings, and to act for him in any legal business. It should include one who disclosed confidential matters to an attorney while seeking professional aid, whether the attorney was employed or not.

Blacks Law Dictionary, 230 (5th ed. 1979).

While there is authority for finding that beneficiaries of a trust are derivative clients of the attorney for the trustee of a trust, (See, Hodge v. First Atlantic Corporation, 6 N.C. App. 353; 169 S.E.2d 917 (1969)) there does not appear to be any authority for holding that the trustee of a trust is a derivative client of the attorney for

the trustor. More importantly, such a finding of a derivative client relationship would be contrary to the legal basis for finding a derivative client relationship between the attorney for the trustee and the beneficiaries. The basis for the derivative relationship in the trustee/beneficiary case arises out of the fiduciary duty owed by the trustee to the beneficiary. The trustor owes no similar fiduciary duty to the trustee.

Under the facts related, no attorney/client relationship exists as a result of the law firm's representation of John Doe, Sr., in the preparation of the Last Will and Testament.

A different question is presented by the requests of John Doe, Jr., relating to the "intent" of the trust. In order for the requests for assistance to create an attorney/client relationship, the attorney must undertake the representation. The issue is whether or not the firm ever undertook to advise John Doe, Jr. or the Trust.

The facts related would indicate that no advice was ever given by the firm. In fact, there is no evidence that John Doe, Jr., ever met with any attorney in December of 1993. All that the firm did was surrender the files relating to the creation of the trust to John Doe, Jr. This does not amount to representation.

Under the circumstances there is no attorney client relationship between John Doe, Jr. and the requesting attorney or her firm. Thus, Rule 1.9 of the North Dakota Rules of Professional Conduct has no applicability to the case.

Thus, in order for there to be a disqualifying conflict, it must arise under Rule 1.7 of the North Dakota Rules of Professional Conduct.² This committee has previously noted that the test under rule 1.7 is whether the representation is inconsistent with the

attorney's prior representation, stating:

[T]he test of "inconsistency" is not whether the attorney 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 . . .

SBAND Ethics Committee, Opinion No. 93-12 (July 13, 1993). The issue, then, is whether or not the lawyer in representing Jane Doe will have to do anything that will injuriously affect its former client, John Doe, Sr.

The general rule has often been stated that an attorney will be disqualified from representing an interest adverse to that of a former client where there is a substantial relationship between the subject matter of the former representation and the matters embraced within the later adverse representation. 7 Am. Jur. 2d, Attorneys at law Sec. 186 (1971). See, Liddell v. Board of Education, 505 F.Supp. 654 (E.D. Mo. 1980). The issue of substantiality is resolved in favor of disqualification where the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client. Lemelson v. Synergisitics Research Corp., 504 F.Supp. 1164 (S.D.N.Y. 1981).

While it is possible to envision a set of circumstances where a client divulges confidential information about his family to his attorney, which might be relevant in a subsequent divorce action and which would create a conflict of interest such as would prevent an attorney from representing the spouse of a child of a client, this does not appear to be the case here.

So long as the firm's prior representation of John Doe, Sr., did not provide the

firm with confidential information about John Doe, Jr. that would be relevant in the divorce action, there does not appear to be a conflict of interest such as would require disqualification.

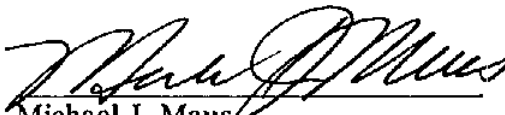
III. CONCLUSION

The Committee is of the opinion that the representation of Jane Doe does not violate the rules of professional conduct so long as the law firm did not obtain confidential information about John Doe, Jr., in its representation of John Doe, Sr. that is relevant in the pending divorce litigation.

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 or advisory letter of the Ethics 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 Ralph R. Erickson and was unanimously approved by the committee on March 24, 1994.


Michael J. Maus
Chair

1. Rule 1.9 of the North Dakota Rules of Professional Conduct provides:

RULE 1.9. Conflict of Interest: Former Client.

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

- (a) Represent another person in the same manner in which that person's 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 a substantially related matter except as Rule 1.6 would require or permit with respect to a client.

Rule 1.9, N.D.R.P.C. (1993).

2. Rule 1.7 provides, in relevant portion:

RULE 1.7. Conflict of Interest: General Rule.

(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.

* * *

(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 ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party.

Rule 1.7, N.D.R.P.C. (1993).

VIA FACSIMILE

February 22, 1994

Michael Maus
c/o Sandra Tabor
Ethics Committee
North Dakota State Bar Association
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**ETHICS OPINION REQUESTED CONCERNING POTENTIAL
CONFLICT OF INTEREST**

I would request that the Ethics Committee provide an opinion concerning a potential conflict of interest. The facts are as follows:

1. On April 22, 1982, a senior partner in the law firm in which I am employed, drafted a Last Will and Testament for John Doe, Sr. The Last Will and Testament contained a testamentary trust, naming John Doe, Jr. as trustee.
2. A standard advice letter was mailed to John Doe, Sr. reviewing the various provisions of the Will, on May 3, 1982. A bill was issued to John Doe, Sr. on June 10, 1982.
3. John Doe, Sr. died August 18, 1984.
4. Our law firm did not handle the probate, nor has it represented or performed any legal work for the testamentary trust or John Doe, Jr. since the Will was drafted in 1982.
5. On September 9, 1992, this attorney was retained by John Doe, Jr.'s wife, Jane, to defend her in a divorce action commenced by John Doe, Jr. on September 8, 1992.
6. Discovery was commenced and the case scheduled for trial December 1 and 2, 1993, as a backup to several criminal jury trials.

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7. On November 30, 1993, a request was made that this attorney withdraw as counsel for Jane Doe, or seek an advisory opinion from the Ethics Committee, due to the potential conflict of interest should John Doe, Jr. seek legal advice from our firm in the future as to the existence, content and context of that testamentary trust.

8. On December 21, 1993, John Doe, Jr., came to our law firm requesting copies of trust papers from his father's file. He was advised that this attorney, as well as the attorney who drafted the original Last Will and Testament were unavailable. He was further advised that no copies of any files would be released without approval of the attorney responsible. After waiting to consult with the senior attorney, John Doe, Jr. again asked to see the estate planning file. At this time, he disclosed to the legal assistant that he was involved in a divorce action. He stated to the legal assistant that he would like to know "the intent" of John, his father, when he made the trust. John Doe, Jr. decided not to wait any longer and left our office. This contact is the only contact this office has had with John Doe, Jr. concerning "the intent" of his father's trust.

9. On December 29, 1993, a copy of the contents of the John Doe, Sr. estate planning file were provided to the attorney for John Doe, Jr.

10. At no time has this law firm been retained by or represented John Doe, Jr. in any capacity.

This attorney would like to continue to represent Jane Doe in connection with this divorce proceeding. Trial has been scheduled for May 3, 1994.

Thank you for your careful attention to this matter.

Yours truly,

