

[REDACTED]

September 5, 1995

Alice Senechal
Chairman of the Ethics Committee of the State Bar Association
P. O. Box 5576
Grand Forks, ND 58206-5576

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Dear Ms. Senechal:

I have accepted a request by the State Bar Association to provide pro bono representation to a woman for the purpose of obtaining an increase in child support. I have a question as to whether I may have a conflict of interest in representing her.

While the woman was still married and prior to her divorce from her husband, her husband employed the services of [REDACTED] Law Firm on a patent matter and on a matter involving the parties' farmland. At that time, I was a member of the [REDACTED] Law Firm.

In 1986 the husband retained the services of another firm for purposes of obtaining a divorce. He had called most of the law firms in town so it was difficult for the wife to obtain her own lawyer. She opted not to have representation and merely signed the child custody and property settlement agreement.

In 1988 she called me to represent her in a motion to obtain an increase in child support. I was still a member of the [REDACTED] Law Firm. I told her I could not represent her at that time because of a conflict of interest; i.e., my partner, [REDACTED] had previously represented her husband in the matters outlined above. I had no personal knowledge of anything in the files pertaining to the issues on which my partner had represented her husband, but the firm's conflict listings indicated that our firm had represented him on the patent matter and the farmland matter so I advised her at that time that I had a conflict of interest.

Three years ago I left my former law firm. I have been contacted by the State Bar Association to represent the wife pro bono in a motion to increase child support.

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When she came to my office last week, she reminded me of the facts outlined above. I have no independent recollection of them.

My question is: Do I have a conflict of interest based on the above facts if I accept representation of the wife in her attempt to increase child support?

I would appreciate you and your committee's formal written opinion of this matter.

Sincerely,

[REDACTED]

[REDACTED]

cc: Sandy Tabor

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 95-12
OCTOBER 9, 1995**

The Ethics Committee has received a request from attorney [REDACTED] for an opinion on the following issue:

Lawyer A is asked to take over the pro bono representation of Wife on a motion to increase child support. Several years ago, while Husband and Wife were still married and while Lawyer A was associated with Law Firm A, the firm represented Husband with respect to a patent matter and matters which involved the parties' farmland. Lawyer A has no personal knowledge of anything involving these issues. At the time of the divorce, Husband sought the services of Law Firm B; the Wife was not represented. Three years ago, Lawyer A left Law Firm A. Is she vicariously disqualified from representing Wife at this time?

Rule 1.9(a) of the Rules of Professional Conduct prohibits such representation where Lawyer A represents another person "in the same matter" where the interests of that person are materially adverse to the interests of the former client. Lawyer A may represent the other person in a "substantially related matter" if the consent of the former client is obtained after consultation. Rule 1.9(b). Lawyer A may not, however, use any information which relates to the former representation to the disadvantage of the former client "in the same or a substantially related matter" except as allowed by Rule 1.6. and Rule 1.9(c) of the Rules of Professional Conduct. The only subsection of Rule 1.6 which may have relevance to this issue is subsection (h), which permits revelation of that information which has become generally known.

Under Rule 1.7(c) "matter" is defined so broadly as to include nearly every legal proceeding imaginable and would certainly envision the inclusion of the child support proceeding involved in this particular case.

Rule 1.10(c) is perhaps the most relevant rule to the issue presented here. Although the circumstances of this case do not fall squarely within the parameters of Rule 1.10(c), the comments to that rule and the recent Supreme Court case of Heringer v. Haskell, et al., Supreme Court No. 950034; 8/29/95, provides insight into the protections to be afforded generally by the rule. The purpose of Rule 1.10 (c) is to assure that loyalty to the client is not compromised. When a lawyer leaves one firm and moves to another, assurances must be given to former clients that the firm's loyalty to the client will not be jeopardized.

There are essentially two functions involved in determining the question of "vicarious disqualification." These are (1) preserving confidentiality and (2), avoiding positions adverse to the former client.

The preservation of confidentiality has been construed to entail a determination of the lawyer's access to information. The extent to which the lawyer has had access to the client's confidential information becomes the relevant point of inquiry. Where the lawyer has general access to the files of all the firm's clients, it will be assumed that the lawyer is privy to all the information contained in the files. Where, however, the lawyer has access to only a limited number of client's files, it will be assumed that the lawyer has access to information on only those clients he/she has actually served. In the situation where the lawyer has acquired no

material information which relates to a client of the firm, and later joins another firm, the lawyer will not be disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict. See N.D. R. Prof. Cond. 1.10 comment.

The Supreme Court utilized the three-step analysis contained in Rule 1.10 (c) in the Heringer case making the following inquiries:

1. "Are the new client's interests materially adverse to the old client's interests?"
2. "Is the matter the same or substantially related to the prior representation?"
3. "Does any lawyer remaining in the firm have material information?"

Heringer, *supra*, pg. 8.

As this three-step analysis applies to the case at hand, the Wife's interests are clearly adverse to the Husband's making the answer to #1 "yes". Question #2 is harder to answer because of the lack of factual information to make this determination. Although there is evidence that Husband was represented by a different firm in the divorce proceedings, there may be some issues involving the farm land owned by the parties which has some direct bearing on the issue of child support. Assuming the matters are substantially related, so the answer to question No. 2 is also "yes", the answer to No. 3 becomes decisive of this imputed disqualification issue.

Again, the crucial inquiry relative to question No. 3 was whether there was access to confidential information. It is the burden of the attorney whose

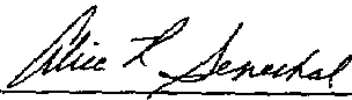
representation has been challenged to show a lack of access to the previous client's confidential information.

If, while associated with Firm A, Attorney A had acquired no material information, nor had access to confidential information, from her former firm's representation of the Husband in the patent and farmland matters, there would be no vicarious or imputed disqualification. Likewise, attorney A may represent the wife even though she had access to such information if the information was of the type that falls under the exception of Rule 1.6(h), information which has generally become known. If, on the other hand, she had general access to or had acquired material information concerning Husband, she would be disqualified from representing the Wife in this support proceeding.

This opinion is provided pursuant to 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 which is subject of the opinion or advisory letter.

This Opinion was drafted by Patricia R. Ellingson and was unanimously approved by the Committee on October 9, 1995.



Alice R. Senechal, Chair