

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 96-01
JANUARY 22, 1996

COPY

The Ethics Committee has been requested to issue an opinion as to whether the requesting attorney's law firm has a conflict of interest under the following facts:

FACTS

An attorney from the law firm is representing C in a contract action against A. The same attorney represented C when A purchased the property from C. A's wife (B) was not a party to the property transaction, nor is she a Defendant in the contract action against A.

Another attorney from the law firm has been retained by B to commence a divorce action against A and may also file a tort action against A on behalf of B. The attorney has already obtained a protection order on behalf of B against A. In addition B is willing to cooperate with C in the contract action against A.

DISCUSSION

North Dakota law has long recognized that any attorney-client relationship arises out of an agency agreement. Mattco, Inc., v. Mandan Radio Assoc., Inc., 246 NW 2nd 222 (ND 1976); Moe v. Zitek, 27 NW 2nd 10 (ND 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 NW 2nd 805 (ND 1990). (See Ethics Committee Opinion 94-03)

The facts do not disclose any attorney-client relationship between the law firm and A. On the contrary, the law firm's sole association with A appears to be in matters in which the law firm represents or may represent opposing parties.

However, there is a potential conflict under Rule 1.7 relating to the dual obligation the firm would have to C and to B should it undertake to represent B in a divorce action and/or tort

action against A.

The firm's duty to C is to obtain the best result possible for C in C's action against A. This may result in a diminishment of the marital estate of A and B, from which B will be seeking a share in the divorce action or a diminishment of the assets of A from which B will be seeking recovery in the tort action.

Conversely, the firm's representation of B in the divorce or in her tort action against A may have an adverse effect on the ability of C to prevail in his action against A.

CONCLUSION

If the lawyers of the firm believe they cannot represent B without adversely affecting their responsibilities to either C or B, they must decline representation of B in the divorce and the tort action. See Rule 1.7(a), North Dakota Rules of Professional Conduct.

On the other hand, if the lawyers reasonably believe their dual representation need not adversely affect the respective interests of C and B, then Rule 1.7(c) requires that they obtain the consent of both clients after consultation and full explanation of the implications of the dual representation.

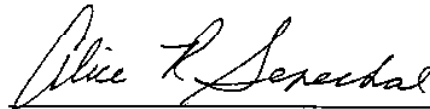
The Committee does not believe that A can show any conflict as to his interests unless it can be proved that A reasonably believed the requesting law firm was representing him as well as C in the property transaction and, in reliance thereon disclosed information that would be material in the divorce action should the firm represent B in that matter.

The fact that the firm represented B in obtaining a protection order against A would not significantly impact upon the concerns expressed above and would seem not to constitute a conflict.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. 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 that is the subject of the opinion or advisory letter.

This opinion was drafted by Robert A. Wheeler and was approved by the Committee on January 22, 1996.

A handwritten signature in cursive script, reading "Alice R. Senechal", written in dark ink.

Alice R. Senechal, Chair

96-01

December 1, 1995

The Ethics Committee
North Dakota State Bar Association
Attn: Alice Senechal, Chairman
106 North Third, Suite M-102
P. O. Box 5576
Grand Forks, ND 58206-5576

Re: Ethics Committee Opinion

Dear Ms. Senechal:

I have come across a situation in which I feel I need an unbiased second opinion.

An attorney in this office is currently suing an individual (A) on a Contract on behalf of (C). Subsequent to this lawsuit being filed the wife (B) of A, who is not listed as a Defendant in the Complaint, came to this office to obtain a protection order against A and also to commence a divorce action against A. In addition, it is likely we will file a tort action against A on behalf of B.

At the time B approached this firm for representation she was aware of the pending litigation against A. In addition, she has offered to cooperate with the plaintiff in the action against her husband. The same attorney in this office who is suing A also represented C when A purchased property from C. B was not a party to the sale.

Although I do not believe there is a conflict by my representation of B, I would appreciate it if the Ethics Committee could provide me with an opinion on this issue.

Sincerely,