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STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 96-02

January 22, 1996

The Committee has received a request for an opinion concerning conflicts of interest involving an attorney retained by a public interest law firm on a contract basis to represent clients of the public interest law firm. Specifically, the request asks: 1) whether both the public interest law firm and the contract attorney must "screen" client assignments to determine whether there is a conflict of interest; 2) whether, with regard to this system for identifying conflicts, an index system that cross-references clients and provides full disclosure to all parties when a conflict arises is adequate; and 3) whether, if a member of the association of attorneys with whom the contract attorney works is conducting collection activities, the contract attorney would be disqualified from continuing as a contract attorney because of future potential conflict problems even if the contract attorney uses a "screening" system to separate the collection activities of the attorney's associate from the contract attorney's representation of the clients of the public interest law firm.¹

FACTS

The attorney requesting the opinion has a contract with a public interest law firm to provide legal services to clients of the public interest law firm. The public interest law firm initially evaluates whether it is appropriate for the firm to provide representation to a client in a specific matter. If the firm determines services will be provided, the firm chooses either to handle the matter "in house" or to refer the matter to a contract attorney. The contract attorney who requested this opinion usually handles family law matters for the clients the

¹ The opinion request uses the word "screening" in two different contexts. The first and second questions presented concern "screening" methods by which conflicts or potential conflicts of interest may be identified before an attorney undertakes representation of a client, in other words, "screening" cases to identify cases that may create a conflict. The last issue uses the term "screening" to denote a mechanism or procedure, like a Chinese Wall, used to resolve an identified conflict of interest problem by keeping a firm's representation of matters or clients separate. This opinion uses the term "screening" in both senses, and its meaning should be determined by the context in which it is used.

public interest law firm assigns. The contract attorney's fees and expenses are paid by the public interest law firm. The contract attorney provides monthly status reports on the assigned matter to the public interest law firm.

According to information the attorney who requested this opinion provided, that attorney shares offices with and is associated with three other attorneys, each operating as an independent contractor. The requesting attorney states that each attorney in the association has his or her own separate file cabinets, although those file cabinets are not locked. The requesting attorney also states that there is no regular group staffing or discussion of matters being handled by the associated attorneys, although the attorneys will sometimes discuss cases informally or cover for each other in court or on other occasions. The letterhead the attorneys in the association use includes a law firm name and address and lists the four attorneys.

Currently, both the public interest law firm and the contract attorney "screen" cases assigned to the attorney by the public interest law firm for conflicts of interest. That is, before a case is referred to the contract attorney, the public interest law firm checks whether the public interest firm has any potential or actual conflicts of interest in representing the client in the case. If the public interest firm has a conflict, representation is declined and no referral is made. If the public interest law firm identifies no conflict with its other clients and decides to refer the case to a contract attorney, the client is referred to a specific contract attorney and the contract attorney checks whether he or she has a conflict of interest. In this case the contract attorney uses an index system containing information on all of the attorneys with whom the contract attorney is associated to check for conflicts. The requesting attorney stated that the public interest law firm's policy has been to not assign cases to a contract attorney if any member of the firm with which the contract attorney is associated has a conflict or potential conflict of interest.

The requesting attorney stated that this request for an ethics opinion arose out of a situation in which an attorney with whom the requesting attorney is associated was handling collection work against an individual. The public interest law firm referred a custody proceeding involving that individual to the requesting attorney. The conflict identification index in the requesting attorney's office identified the collection matter being handled by the attorney's associate as a potential conflict. The requesting attorney notified both the client and the public interest law firm of the situation. Although the client asked that the contract attorney continue the representation, the public interest law firm asked the contract attorney to return the file

to the public interest law firm for reassignment to a different contract attorney. No information was provided concerning whether any disclosure was made to or consent given by the client being represented by the collection attorney.

DISCUSSION

The first issue presented is whether both a public interest law firm and a contract attorney retained to represent a client on behalf of that firm must "screen" client assignments to determine whether there is a potential or actual conflict of interest.

North Dakota Rules of Professional Conduct 1.7 through 1.13 govern conflicts of interest. Those rules do not expressly discuss the necessity for a procedure to identify actual or potential conflicts of interest. However, logic dictates that to comply with the ethical conflict of interest rules an attorney must utilize appropriate methods of identifying whether a conflict or potential conflict of interest exists before beginning representation of a client. The answer to this first question then depends on whether both the public interest law firm and the contract attorney are considered to be representing the client.

Under Rule 1.10 a lawyer may be disqualified from representing a client if members of a lawyer's firm would have a conflict of interest in representing that client. The Rules of Professional Conduct and prior opinions of this Committee establish that a public interest law firm like the one in question here is considered to be a firm within the meaning of Rule 1.10. See, e.g., Terminology, N.D.R. Professional Conduct; Comment, N.D.R. Professional Conduct 1.10; SBAND Ethics Committee Opinion No. 95-03; SBAND Ethics Committee Opinion No. 92-05.

In the cases relevant here the public interest firm does an initial assessment of the client's eligibility and need for legal services, assigns the specific attorney who will provide legal services to the client, and monitors the status of the matter on which the client is being represented. The contract attorney provides legal services directly to the client.

Under these facts, both the public interest firm and the contract attorney would be considered to be representing the client. Accordingly, to ensure compliance with the ethical rules involving conflicts of interest both the public interest law firm and the contract attorney must adopt and follow reasonable procedures to identify conflicts or potential conflicts of interest involving the client to be assigned to the contract attorney.

The next issue is whether, with regard to this system for identifying potential conflicts, an index system that cross-references clients and provides full disclosure to all parties when a potential conflict arises is adequate.

As stated above, the North Dakota Rules of Professional Conduct do not discuss the necessary components of a system established to identify potential conflicts of interest. The Annotated Model Rules of Professional Conduct (2d ed. 1992) states that "[t]he lawyer should adopt reasonable procedures appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest." Id. at 105. Therefore, whether a particular system of identifying potential or actual conflicts of interest is sufficient will depend upon these factors.

The adequacy of a particular system must be evaluated on a fact specific basis, and this Committee is not in a position to make a decision about the adequacy of the system the requesting attorney uses based on the facts provided. However, an index system that includes references to clients and issues being handled by a firm would appear to satisfy at least the basic requirements of a conflict identification procedure.

Once a conflict or potential conflict of interest has been identified, the attorney must consider and comply with the applicable rules of professional conduct. Specifically, the lawyer must evaluate whether representation may continue after appropriate disclosure and consent or whether the conflict or potential conflict precludes representation even if disclosure were made and consent obtained.

The final question presented is whether, if another member of the association of attorneys with whom the contract attorney works is conducting collection activities, the contract attorney would be disqualified from continuing as a contract attorney because of future potential conflict problems even if the private association uses a "screening" system to separate the collection activities of one associate from the contract attorney's representation of the clients of the public interest law firm. Upon further discussions with the requesting attorney, it became clear that this question actually contains two separate issues: first, whether, the collection activities being conducted by one member of the association of attorneys with whom the requesting attorney works would disqualify the contract attorney from handling almost any case for the public interest law firm because so many of the adverse parties in collection activities are likely to be clients of the public interest law firm; and, second, whether the association of attorneys with whom the contracting attorney works

may resolve this conflict problem by establishing some type of "screening" device -- such as a Chinese wall.

North Dakota Rule of Professional Conduct 1.10(a) provides:

Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, except as provided by Rule 1.11 or Rule 1.12.

Rules 1.11 and 1.12 concern successive government and private employment and former judges, arbitrators, adjudicative officers, and law clerks and, thus, are not relevant here.

The Comment to Rule 1.10 states:

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

Whether a particular group of attorneys constitutes a firm is a fact question and this Committee may not have all the relevant facts necessary to make that determination here. However, based on the information provided and the public perception of the attorneys in question as a law firm (demonstrated, for example, by the requesting attorney's letterhead), the associated attorneys should be considered a firm for the purposes of Rule 1.10. The associated attorneys apparently recognize this because their conflict screening system includes cases being handled by all of the attorneys; each attorney does not have an individual conflict screening system. Therefore, if any member of this group of attorneys would be prohibited from representing a client referred by the public interest law firm, the requesting attorney would also be prohibited from undertaking that representation.

Whether a potential or actual conflict of interest would exist in any particular case will depend on the facts and circumstances of that case and is beyond the scope of this opinion. In other words, there would not necessarily be a blanket ethical prohibition on one firm member doing collection work while another represents clients of the public interest firm, but the conflict issue would have to be considered for each client and in each case. Under the facts presented, it appears that there would be at least a potential conflict in many instances.²

Finally, there is no authority given in North Dakota Rule of Professional Conduct 1.10 to establish a screening system separating members of a private firm to handle a conflict of interest situation. SBAND Ethics Committee Opinion No. 95-08 recently discussed the use of a screening system to deal with concurrent or successive government and private employment. However, that opinion was based on N.D.R. Professional Conduct 1.11, not Rule 1.10, and the opinion specifically noted that Rule 1.11 -- unlike Rule 1.10 -- expressly provides for screening as a mechanism to avoid imputed disqualification. The situation given in this opinion involves the application of Rule 1.10, not Rule 1.11.

Still, some courts and ethics tribunals have accepted screening as a method of preventing disqualification of a private law firm even when government employment has not been involved. See, e.g., Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983); Geisler v. Wyeth Laboratories, 716 F. Supp. 520 (D. Kan. 1989), remanded on other grounds, 934 F.2d 326 (10th Cir. 1990); Mich. Standing Committee on Professional and Judicial Ethics Opinion No. R-4 (Sept. 22, 1989). Others, however, have expressly held that screening may not be used in the private firm context. See, e.g., Amoco Chemicals Corp. v. MacArthur, 568 F. Supp. 42 (N.D. Ga. 1983); Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099 (Kan. 1989); Association of Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion No. 1990-4 (May 22, 1990).

Further, even in those instances in which courts or bar associations have approved the use of screening procedures, it has been held that the screening procedures must be effective. See Annotated Model Rules of Professional Conduct at 187-88. Factors considered in determining whether a screening procedure is

² Please note that this opinion discusses only the ethical considerations involved here. The Committee does not have before it the contract between the public interest law firm and the requesting attorney, and this opinion has no bearing on when cases may, should, or must be referred to the requesting attorney under that contract.

effective include the size of the firm, the extent of departmentalization, the location of offices (i.e., whether there are separate physical locations), access to case files and other information, sharing in profits or fees derived from the matter, policies concerning discussion of matters, and when the screening took place, as well as the screened lawyer's prior involvement and knowledge of the cases in question. Id. at 188.

Considering these factors, it appears very unlikely that a screening mechanism would be effective in the requesting attorney's firm. See Heringer v. Haskell, 536 N.W.2d 362 (N.D. 1995). Its small size, structure, and single location would make screening of limited effect. At least in this specific instance the Committee concludes that a screening mechanism would not be an appropriate method of resolving the conflict of interest issue.

CONCLUSION

To ensure compliance with the ethical rules involving conflicts of interest both the public interest law firm and the contract attorney should adopt and follow reasonable procedures to identify conflicts or potential conflicts of interest involving the client to be assigned to the contract attorney. The conflict identification procedures adopted should be appropriate for the size and type of firm and practice and should be designed to determine in both litigation and non-litigation matters the parties and issues involved and whether there are actual or potential conflicts of interest. Once a conflict or potential conflict of interest has been identified, the attorney must consider and comply with the North Dakota Rules of Professional Conduct 1.7 through 1.13.

Based on the information provided, the contract attorney and that attorney's three associates constitute a "firm" for the purposes of Rule 1.10. Therefore, if any member of this group of attorneys would be prohibited from representing a client referred by the public interest law firm, the requesting attorney would also be prohibited from undertaking that representation. Although there would be no blanket ethical prohibition on one firm member doing collection work while another represented clients of the public interest firm, the conflict issue would have to be considered for each client and dealt with appropriately in each case. Finally, at least in this specific instance, a screening mechanism, such as a Chinese Wall, would not be an appropriate method of resolving the conflict of interest issue.

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.

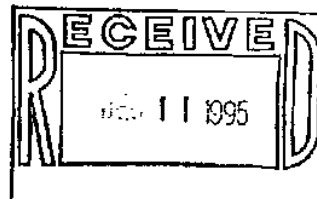
This opinion was drafted by Laurie J. Loveland and was unanimously approved by the Committee on January 22, 1996.



Alice R. Senechal, Chair

[REDACTED]

December 7, 1995



Alice Senechal
Chair Ethic Committee
P.O. Box 5576
Grand Forks, ND 58206-5576

Re: [REDACTED]
Conflict Questions

Dear Ms. Senechal:

This letter is to serve as my inquiry to the proper conflict screening procedures for [REDACTED] contract attorneys. More specifically, does both the [REDACTED] contract attorney and [REDACTED] need to screen client assignments for potential conflicts. Our office has an index system which allows for thorough cross-referencing. All office staff is directed to utilize the system to screen for potential conflicts. When a potential conflict arises, all parties are immediately notified with full disclose. Is this type of screening procedure adequate? Last, if there is collection activity by a member of an association of attorneys, would this immediately disqualify another member from continuing as a [REDACTED] contract attorney because of future potential conflict problems, even though a screening system is in place?

I would appreciate the Committees consideration and prompt response on these most important issues.

Sincerely,
[REDACTED]

cc: [REDACTED]