

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 96- 03

February 13, 1996

COPY

The Ethics Committee has been requested to issue an opinion as to whether the Requesting Attorney has a conflict of interest under the following facts:

FACTS

The Requesting Attorney was formerly employed by the [REDACTED] and assigned to the [REDACTED] as claims litigation counsel. The Requesting Attorney represented the [REDACTED] in administrative hearings and litigation. He was also regularly called upon to advise the [REDACTED] with respect to pending claims. His case load was limited to cases filed by injured workers whose last name began with Ro-Z.

The Requesting Attorney is now in private practice. He has been requested to represent injured workers who had claims which were pending before the [REDACTED] during his assignment to that agency.

The [REDACTED] has taken the position that the Requesting Attorney is disqualified from representing any injured workers whose claims were pending with the agency during the Requesting Attorney's tenure.

The Requesting Attorney has made specific inquiry regarding three particular files:

- (1) The injured worker (Mr. T.) filed a [REDACTED] claim and the [REDACTED] issued an Order Awarding Benefits. Thereafter, the Requesting Attorney left the employment of the [REDACTED] office. Subsequently, he was consulted by the injured worker concerning a Notice of Intention to Discontinue/Reduce

Benefits that he had apparently received after the Requesting Attorney was no longer assigned to the [REDACTED]. The dispute involved the injured worker's alleged failure to cooperate in certain testing that could result in termination of his disability benefits. The litigation concerning the [REDACTED] denial of benefits to the injured worker due to an alleged lack of cooperation with medical testing is entirely unrelated to the employer dispute in 1994.

- (2) A worker (Ms. W.) sustained a work place injury in July, 1994. The [REDACTED] issued an Order Denying Disability Benefits in November, 1994, on the ground that the injured worker had voluntarily withdrawn from the labor market. The [REDACTED] states that that action was taken upon the advice of the Requesting Attorney although no such documentation appears in the file and the Requesting Attorney has no recollection of ever having reviewed the file while assigned to the [REDACTED]. Thereafter, the injured worker reapplied for disability benefits and has asked the Requesting Attorney to represent her because the [REDACTED] has failed to make any decision on her application. The Requesting Attorney states that the current issue is entirely unrelated to the issues considered by the [REDACTED] in November, 1994, when he may have advised the [REDACTED].
- (3) An injured worker (Mr. S.) received an Order Denying Medical Benefits in September, 1995. The injured worker asked the Requesting Attorney to represent him. There is no evidence that an administrative Order had ever been issued while the Requesting Attorney was [REDACTED] counsel. There is nothing in the record that shows that the Requesting Attorney ever saw the file when he was

██████████ counsel. It appears that the September, 1995, denial of benefits presents a new issue which had never previously been in dispute. Nevertheless, the ██████████ has taken the position that the Requesting Attorney is disqualified from representing the worker because a claim by that worker was pending while the Requesting Attorney was employed as counsel for the ██████████

APPLICABLE RULES

Rule 1.11(a) states:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. . . .

As used in the above Rule, the term "matter" includes judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party.

Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same matter in which that person's interests are materially adverse to the interests of the former client.

DISCUSSION

Taken together, the Rules would prohibit the Requesting Attorney from representing a client in an action adverse to the agency only if he was involved both personally and substantially in any judicial or administrative proceeding, request for a ruling, or investigation. This is a determination which must necessarily be made on a case-by-case basis. It appears that the ██████████ takes the position that injured worker's entire file constitutes a single "matter." The

Committee's opinion is otherwise. Depending upon the circumstances, the file may constitute a single "matter" or may consist of several "matters." The distinction is based upon the particular legal or factual issues raised at various times while the claim or claims are open and whether there is a commonality should be considered with respect to each. Thus, we must address each of the cases referenced by the Requesting Attorney:

(1)

Mr. T. had a claim pending with the [REDACTED] while the Requesting Attorney served as counsel to the [REDACTED]. The Requesting Attorney was personally involved in issues relating to whether the worker had actually sustained injury and the extent to which it may have been aggravated as a result of the employment upon which the claim was based. The issues were resolved without the necessity of a hearing. The Requesting Attorney left the employment of the [REDACTED] on June 30, 1995. On or about August 19, 1995, the [REDACTED] notified Mr. T. that it was discontinuing his benefits because of his failure to cooperate in a functional capacities assessment. Mr. T. has now asked the Requesting Attorney to represent him with respect to that decision.

The Comment to Rule 1.11 indicates that a reason for restrictions upon a former government lawyer's representation of private clients is to avoid unfair advantage that could accrue to the private client by reason of the lawyer's access to confidential government information about the client's adversary obtainable only through the lawyer's government service.

Clearly, the issues involved in the 1994 dispute upon which the Requesting Attorney advised the [REDACTED] and the issues presently in dispute are different. However, both relate to the

claimant's actual injuries and physical condition. As such, the Committee is of the opinion that both involve the same "matter." Because the Requesting Attorney was both personally and substantially involved in advising the [REDACTED] with respect to the specific claimant's file, the Committee believes that he is disqualified from representing that specific client in a matter adverse to the [REDACTED]

(2)

The [REDACTED] claims that it denied Ms. W. disability benefits on the advice of the Requesting Attorney. The denial was on the basis that Ms. W. had voluntarily withdrawn from the labor market. While denying any recollection of advising the [REDACTED] the Requesting Attorney acknowledges that he "may have" advised the [REDACTED]. In May, 1995, while the Requesting Attorney was still assigned to the [REDACTED] Ms. W. reapplied for disability benefits, alleging a change in her medical condition. She has now asked the Requesting Attorney to represent her with respect to the reapplication.

While a lawyer should not be prohibited from utilizing the expertise that he has developed in government service for the benefit of private clients, he or she is not permitted to utilize specific information that may have been acquired while representing the government agency on a specific matter. That is why a lawyer may not take a position adverse to the agency which he formerly represented if the lawyer had participated personally and substantially in that matter.

Here, there is a factual dispute between the Requesting Attorney and the [REDACTED] as to whether the Requesting Attorney had participated personally and substantially in the matter by advising the [REDACTED]. It is not the role of the Committee to decide factual disputes or to weigh credibility. It is up to the individual lawyer to evaluate his or her position on the basis of the

circumstances as he or she believes them to be while recognizing that others may interpret those facts differently.

If the [REDACTED] denied the disability benefits on the advice of the Requesting Attorney, the Committee is of the opinion that the Requesting Attorney's specific advice to the [REDACTED] regarding the eligibility of the specific client for [REDACTED] benefits would disqualify the Requesting Attorney from representing the client on claims arising out of the same work place injury.

(3)

Mr. S. asked the Requesting Attorney to represent him in a [REDACTED] matter. There is no evidence that an administrative Order had ever been issued or that the Requesting Attorney ever saw the Claimant's file. The simple fact that the file would have been assigned to the Requesting Attorney had an adversary proceeding occurred does not disqualify the Requesting Attorney from now representing Mr. S. in a capacity which is adverse to the [REDACTED]. The Requesting Attorney neither personally nor substantially participated in any "matter" involving Mr. S. that was before the [REDACTED] during his tenure.

SUMMARY

It is the Committee's opinion that an attorney is not prohibited from utilizing expertise developed while representing a government agency in matters adverse to the agency after his or her employment has terminated. Further, it is the Committee's opinion that an attorney is not prohibited from representing clients adverse to the agency even if the client may have had a matter pending with the agency while the attorney represented it. However, if the attorney was "substantially and personally" involved in advising the agency with respect to the specific client's

matter, he or she may not thereafter take a position adverse to the agency.

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 Jay Fiedler and was approved by the Committee on February 13th, 1996.



Alice R. Senechal, Chair

November 16, 1995

Ms. Sandi Tabor
Executive Director
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502

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Dear Ms. Tabor:

I seek an opinion from the Ethics Committee of the State Bar Association, concerning an interpretation of Rule of Professional Conduct 1.11.

As an Assistant Attorney General representing the [REDACTED] I was counsel for claims litigation in cases filed by injured workers whose last name began with Ro - Z. The [REDACTED] therefore "counsel of record" appears to believe that I am alphabet, and disqualified from representing such an injured worker if, while I was an Assistant Attorney General, I had ever reviewed the file concerning any issue.

For example, [REDACTED] filed a [REDACTED] claim, and the [REDACTED] issued an Order Awarding Benefits. The employer, [REDACTED], contested whether its account was entirely responsible. I represented the [REDACTED] in connection with that matter, and the issue was resolved without hearing when the [REDACTED] through its Claims Director, [REDACTED] agreed to provide employer relief. A copy of the [REDACTED] Order Awarding Benefits dated November 30, 1994, is enclosed. The record does not reflect that the employer asked for a hearing or took an appeal from this November 30, 1994, Order. That matter is final.

[REDACTED] consulted me on October 10, 1995, about a Notice of Intention to Discontinue/Reduce Benefits that he had received on or about August 19, 1995, which advised him that failure to cooperate in certain testing would result in termination of disability benefits (copy enclosed). My employment with the office of Attorney General ended on June 30, 1995. The [REDACTED] litigation concerning the [REDACTED] denial of benefits to [REDACTED] due to an alleged lack of cooperation with medical testing is entirely unrelated to the employer dispute in 1994.

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██████████ sustained an injury on July 14, 1994, and the ██████████ issued an Order Denying Disability Benefits on November 10, 1994, on the ground that ██████████ had voluntarily withdrawn from the labor market (copy enclosed). (The ██████████ counsel, ██████████ tells me that the ██████████ took this action on my advice. No such documentation was provided in the file copy I received. I have absolutely no recollection of having reviewed this file while I was ██████████ counsel). ██████████ re-applied for disability benefits after a surgery was performed in May 1995 (copy enclosed). ██████████ asked me to represent her because the ██████████ has failed to make a decision in this case (which remains pending). The ██████████ November 10, 1994, Order is not res judicata to the extent that ██████████ can show a change in medical condition, and the current issue is unrelated to the issue presented by the November 10, 1994, Order where I may have advised the ██████████

██████████ received an Order Denying Medical Benefits by Order dated September 21, 1995 (copy enclosed). ██████████ asked that I represent him in connection with this Order. There is no evidence that an administrative Order had ever been issued while I was ██████████ counsel assigned to the alphabet from Ro - Z. There is nothing in the record that shows I ever saw this file when I was ██████████ counsel and this denial of benefits obviously presents a new issue not previously in dispute. The ██████████ apparently believes that I am somehow disqualified from representing any worker who last name begins with the letters from Ro - Z.

The ██████████ attempt to preclude me from representing these workers on issues unrelated to any prior involvement I may have had as an Assistant Attorney General is disturbing. The ██████████ is not prejudiced by this representation, but the rights of citizens of North Dakota to zealous, experienced, and highly-skilled counsel is impinged. The facts show that not only was my prior involvement in these cases quite minor, but was also unrelated to the current litigation.

N.D. Rule 1.11 states that a lawyer "shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee [absent consent of the agency]". The American Bar Association Committee on professional ethics defined matter:

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[T]he term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter . . . [T]he same "matter" is not involved [where] there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

Formal Opinion at 6, reprinted in 62 A.B.A.J. 517, 519 (1976).

[REDACTED] sought my assistance as counsel, and have heartily agreed to release information to the Bar Association. I enclose a release signed by each of these clients. Thank you for assisting me in resolving this important question as to whether Rule 1.11 precludes me from representing [REDACTED]

Sincerely,
[REDACTED]

[REDACTED]
Enclosures
[REDACTED]