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STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 96-06
Date: February 28, 1996

MAR 1996

The Ethics Committee has received a request for an opinion on the following question:

Does a law firm have a conflict of interest if they represent parties who are adverse to other parties in the same litigation who had consulted with a member of the law firm earlier, when the firm declined representation.

The law firm requesting the opinion has indicated that the initial caller discussed with a member of their firm in two brief telephone conversations a description of the claims set forth in the action and the identity of the parties in order to determine whether any conflicts existed at that time, and whether representation of the initial caller could be undertaken, without exchanging any confidential information. The law firm was later requested to represent the party adverse to the initial caller. The law firm contacted the present counsel for the initial caller who submitted a letter to the law firm claiming conflicts of interest and other reasons why the law firm should not represent the adverse party, without disclosing any specific confidential information that had been communicated to the law firm during the initial telephone conversations.

This fact situation involves the application of **Rule 1.7 and 1.10 of the North Dakota Rules of Professional Conduct**, but does not involve Rule 1.6, 1.8, or 1.9.

This Ethics Committee's opinion is governed in part by the more extensive Opinion No. 96-04, issued February 28, 1996, although this opinion does not involve a public interest law firm or communications to non-lawyer staff persons in a law firm.

Although not specifically indicated in the request, it is assumed that there are no other parties and no other allegations against the initial caller in the lawsuit, from those considered or discussed at the time of the initial conference with the law partner.

Rule 1.7, Conflicts of Interest, does not apply to this fact situation because there appear to be no other lawyer's responsibilities to another client, to a third person or by the lawyer's own interests. If the requesting law firm is satisfied that no confidential information was exchanged, there would be no information that could be used to the disadvantage of the initial caller.

State Bar Association of North Dakota Ethics Committee Opinion No. 96-04, February 28, 1996, addressed a similar problem with the following initial observation:

Since representation of the potential client was declined, analysis of the issues begins with the determination of whether the potential client is considered a former client. If the potential client is considered a former client, N.D.R. Prof. Conduct 1.9(a) would prohibit representation of the opposing party in the same matter.

Because the initial caller did not become a client by those telephone conversations, that party is not a former client.

Rule 1.10 of the North Dakota Rules of Professional Conduct (1995) establishes the rule that if a lawyer in a law firm has a conflict such as would preclude representation of a client, all lawyers in the firm have a disqualifying conflict by imputation. Therefore, if confidential information has been communicated in the conferences with the initial caller, the entire law firm would be bound by that fact. The issue as to what constitutes a conflict which would give rise to an imputed disqualification must be determined by the law firm, based on the contents of those

initial conversations, as already discussed.

The question has also been posed as to whether the law firm can rely upon the failure of the initial caller's present counsel to articulate particular information claimed to be confidentially shared with the law firm's partner earlier. The law firm may not rely upon the failure of the initial caller's present counsel to articulate particular information in determining whether it received confidential information during that communication. The firm must make its own determination with regard to whether it received confidential information. Whether the firm received confidential information is a factual question upon which the Committee will not issue an opinion.

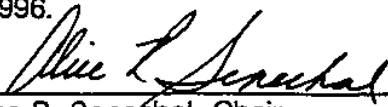
CONCLUSION

Having declined representation of a potential client based on information obtained during the intake and application process handled by one member of the law firm does not prevent another member of the firm from representing the adverse party to that potential client where the client relationship had not been consummated and where the law partner had not obtained any confidential information from the potential client as part of the process of determining whether the firm would represent that potential client.

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer 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 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 Albert A. Wolf and was unanimously approved
by the Committee on February 28, 1996.



Alice R. Senechal, Chair

[REDACTED]

January 30, 1996

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



RE: Ethics Committee

Dear Ms. Tabor:

I seek an opinion from the Ethics Committee of the State Bar Association concerning an interpretation of Rules of Professional Conduct 1.7 and 1.9.

In 1995, several former employees of another law firm commenced a lawsuit against that law firm. In summary, the basis for the lawsuit were allegations of sexual harassment in the work place.

At or about the time the lawsuit was commenced, the Defendant lawyer contacted a number of attorneys and discussed the case. Among the attorneys contacted by the Defendant lawyer was a member of my law firm. According to my partner, there were two brief telephone conversations between him and the Defendant lawyer. My partner advises that no confidential information was exchanged. Rather, the Defendant lawyer described the claims made against him and inquired whether my partner would be willing to undertake the case. After consulting with a client who may have interests adverse to the Defendant lawyer, my partner spoke with the Defendant lawyer and declined the case. My partner advises me that no confidential information was disclosed and that the discussions were limited to a description of the claims set forth in the Complaint and the identity of the parties so that he could determine whether any conflicts existed at that time and whether the representation of the Defendant lawyer could be undertaken.

Ultimately, the Defendant lawyer retained other counsel. In the course of the litigation, he has discharged his original lawyer and retained substitute counsel.

The litigation to date has been remarkable in the number of ethical charges and counter charges asserted between the parties and their counsel. I understand there have been numerous motions to

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disqualify counsel, ethical grievances filed, and a lawsuit commenced against the plaintiffs' present counsel.

In any event, the plaintiffs' present counsel must withdraw from the case. The plaintiffs have requested me and my present law firm to represent them at trial of the case. I believe that my experience will permit me to competently and zealously represent the plaintiffs' interests. Nevertheless, I have not yet agreed to represent the plaintiffs. I have not agreed to represent the plaintiffs because of the ethical concerns giving rise to this request for an Ethics Committee opinion.

During the month of January, 1996, I discussed my potential involvement with the Defendant lawyer's present counsel. On January 24, 1996, I received correspondence from the Defendant law firm. To preserve the anonymity of this request, I have not attached a copy of the correspondence. Rather, I have reproduced the body of the letter in the Attachment to this correspondence.

My impression of the correspondence from the Defendant law firm is that ethical complaints, as well as civil litigation, may result should my law firm and I decide to represent the plaintiffs. That is of obvious concern. I am also concerned that the plaintiffs may be irreparably damaged if I accept the case and later am required to step aside if a conflict of interest is demonstrated. Thus, my request for this opinion.

My partner declined to represent the Defendant lawyer. We do not believe that disqualification should result from a brief initial consultation in which the only information exchanged was that necessary to described the allegations, the parties, and sufficient information to determine whether a conflict would exist. In short, we do not believe that a party should be able to disqualify lawyers from representing an adverse party simply by contacting lawyers and soliciting their representation.

Of course, a problem may also be created should the parties to the telephone conversations differ in their recollection of the conversations. To date, the Defendant attorney has not articulated any specific information which he claims to have given to my partner and which he now asserts to have been of such substance as to prohibit our representation of the plaintiffs.

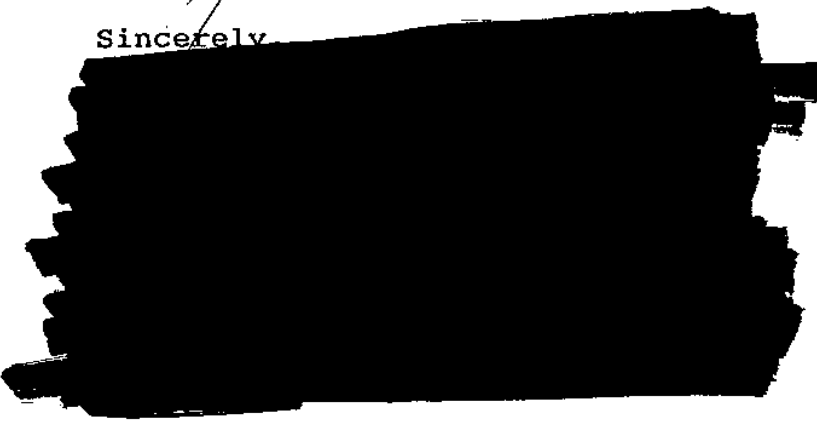
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Essentially, I have two questions:

- (1) Are my law firm and I disqualified from representing the plaintiffs on the basis of the conversations in which the Defendant attorney sought representation and my partner declined?
- (2) May this law firm rely upon the Defendant attorney's failure to articulate any particular information which he claims to be confidential and to have shared with my partner in evaluating whether we may have a conflict of interest which prohibits us from representing the plaintiffs in this case?

The underlying litigation is a case which, in our opinion, raises important issues and requires competent, zealous counsel on both sides. Therefore, whatever guidance you can provide would be most appreciated.

Sincerely,



Enc.

January 24, 1996

VIA FACSIMILE TRANSMISSION

[REDACTED]

RE: _____

Gentlemen:

I understand from co-counsel, _____, that your firm is considering representing the Plaintiffs in the above-referenced matter. I am writing to advise you that you would have a conflict of interest in attempting to take this case based upon the fact that Mr. _____ had previously visited with attorney _____ from your office about taking his defense in this case. Certain significant details were shared with _____ that would be in conflict with your now accepting the Plaintiffs' case. _____ is fully aware of this discussion. If you accept this case, we most assuredly would be taking appropriate legal action, including moving the Court for disqualification. We are not interested in foregoing this matter in exchange for forbearance on _____'s [one of the present plaintiffs] motion to disqualify _____ [our present counsel].

Aside from the conflict of interest, there are a lot of reasons why you should be very concerned about taking this case. If you were to take the time to review the transcripts of Plaintiffs' depositions, you would see that this case is very weak. Frankly, the proof requirements mandated by the decision interpreting Title VII and the North Dakota Human Rights Act simply cannot be met. First, the alleged conduct simply does not rise to the level of being violative.

Secondly, the alleged conduct is not nearly pervasive enough to be violative. Thirdly, and perhaps most importantly, the alleged conduct does not constitute disparate treatment and therefore is not gender-related. Finally, Plaintiffs have serious credibility problems which are abundantly manifested by their deposition testimony. In fact, we firmly believe that the counterclaim in this matter is clearly stronger than the complaint itself.

You should also be aware that [this law firm] has also recently commenced an independent action against [plaintiffs' present

counsel] for libel based upon the falsely prepared complaint in [this] matter. The falsehood stems from the complaint, prepared by _____ and published in the _____ [newspaper] which alleges that Mr. _____ This outrageous allegation was apparently fabricated by [plaintiffs' present counsel] since all of the Plaintiffs denied the occurrence of the act under oath at their depositions. We believe the entire complaint was either exaggerated or falsified.

We are currently preparing a Motion for Summary Judgment which we fully will be granted. In the unlikely event that it is not, we intend to defend this matter to verdict. Frankly, based upon the evidence in this matter, we fully expect to prevail on the counterclaim against all Plaintiffs.

You cannot take this case due to the conflict of interest. However, in any event, it would not be in your interest to become involved in this matter.

Very truly yours,

[signed by an associate in the defendant law firm]

pc: [defendant lawyer's present counsel]