

COPY

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 96- 06

MARCH 18, 1996

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 currently represents an organizational client (A) in two pending matters. One matter involves a complaint against an organization (B) and the second matter involves a complaint against a former employee (C) of the organizational client (A).

The requesting attorney has now taken up representation in a third matter wherein he represents a client (D) against the organizational client (A) which he represents in the two pending matters stated above. The requesting attorney advises that in addition to the two unrelated and pending cases, he has represented this same organizational client (A) on prior occasions in other cases which have now been concluded. The issues involved in the cases which have been concluded are not disclosed. Therefore, consideration of whether Rule 1.9 concerns related to conflict of interest resulting from a former attorney/client relationship have been omitted from this discussion. The requesting attorney should, however, review Rule 1.9 to consider its possible ramifications.

The requesting attorney states that he had a conversation with a representative of the organizational client (A) (now Defendant)

regarding the current law suit and outlined his client's (D) position and provided the organizational client's (A) representative with a copy of the complaint against the organizational client.

The representative of the organizational client (A), Defendant, indicates he felt the requesting attorney was seeking to represent the organizational client as regards the matter and indicates that he, as representative of the organizational client, discussed the current matter at length in the context of having the requesting attorney represent the organizational client.

The organizational client, by its representative, feels the requesting attorney is in conflict of Rule 1.7 if the requesting attorney continues his representation against the organizational client and further, that any information given or gained as a result of the discussion between the representative of the organization and the requesting attorney should be communication subject to the attorney/client privilege. Further, the representative of the organizational client explicitly states the organization will not waive any conflict nor will the organization waive any attorney/client privilege protecting the communications indicated.

DISCUSSION

The requesting attorney's letter raises the following questions:

1) Is there a conflict of interest presented by the circumstances described that require him to withdraw as attorney for the Plaintiff (D) in the current matter.

Rule 1.7 of the Rules of Professional Conduct sets forth the following:

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

(c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Except as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless a client who would be disadvantaged consents after consultation.

(e) As used in Rules 1.7 through 1.12, the term "matter" includes any 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.

Comments to Rule 1.7 states...

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation.

Therefore, it would be required of the lawyer, even though he might reasonably believe his continued representation would not be adversely affected, that he consult with his current client (D) and the organizational client (A) and obtain the consent of both. To proceed in the absence of consent from both parties would be a per se violation of Rule 1.7 (c).

The facts presented indicate the organizational client (A) has already stated it will not consent to the requesting attorney's continued representation of "D". Therefore, the requesting attorney must withdraw as counsel for client "D".

CONCLUSION

The Rules of Professional Conduct require the requesting attorney to withdraw as attorney for the Plaintiff in the circumstances described above.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Discipline. This Rule 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 Wayne T. Anderson and was unanimously approved by the committee on March 18, 1996.



Alice R. Senechal, Chair

FEB 1996

January 31, 1996

[REDACTED]

Sandra Tabor
Executive Director
State Bar Association
P. O. Box 2136
Bismarck, ND 58502-2136

Dear Sandi:

I am writing to request an opinion from the Ethics Committee. Enclosed find the letter which I have recently received from [REDACTED] the administrator of the [REDACTED] in [REDACTED]. Also find enclosed a copy of the draft complaint on behalf of [REDACTED] which is the subject of his letter.

I am currently representing [REDACTED] on two other matters. They involve complaints against [REDACTED] and a former employee of the [REDACTED]. Enclosed find the pleadings in each of those cases.

Over the years I have practiced almost exclusively in areas involving [REDACTED] matters. I have always followed the position of undertaking representation of whosoever comes into the office, without regard to former representation or future hopes of representation by others. Thus, I have both represented [REDACTED] and been adverse to [REDACTED] on numerous occasions. The same is true of most of the [REDACTED] entities in [REDACTED] and [REDACTED].

I have always taken the personal position that a conflict of interest results if one is in possession of confidential information which may be used to the detriment of a client, or if the business interests of the lawyer conflict with those of the client, but not otherwise. Thus, I have in the past both represented [REDACTED] and been adverse to it. The [REDACTED] case differs in nature in that there is more money involved in the case and the conduct being alleged is of a greater degree of culpability.

[REDACTED]

Sandra Tabor
January 31, 1996
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In addition to the allegation of conflict of interest, [redacted] also alleges that I am barred by attorney-client relationship from proceeding against the [redacted] on the basis that he communicated information to me believing that I was to represent the [redacted] against [redacted].

My version of the conversation was that I advised him at the outset that I had been consulted by [redacted] that I proceeded to outline [redacted] complaints against [redacted] and then [redacted] complaints against [redacted] and then handed him a copy of the draft complaint to review and consider with [redacted] President of [redacted].

Given the understanding that those in the [redacted] community in [redacted] and [redacted] have that I proceed without consideration of personal relationships or friendships or the impact of representation upon my future practice, I do not see an actual conflict of interest. Nor do I believe that there was any reasonable communication of intention to represent [redacted] but rather a reasonable communication that I was representing [redacted].

However, [redacted] does not agree, and I will not proceed without approval from the Ethics Committee.

As you can certainly appreciate, time is somewhat of the essence and we would appreciate a response, permitting me to proceed, or allowing time to secure alternate counsel for [redacted]. I intend to rely on the direction of the committee.

Yours truly
[redacted]

Enclosures
cc: [redacted]