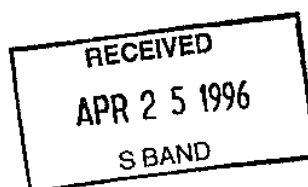


96-08

April 24, 1996

Ms. Alice R. Senechal
Chair, Ethics Committee
SBAND
106 N. 3rd Suite M-102
PO Box 5576
Grand Forks, ND 58206-5576



Dear Ms. Senechal:

Our office is in need of an opinion from the Ethics Committee concerning a situation which has arisen. Our representation of this person is being held in abeyance pending receipt of an opinion from your committee. The divorce action is also ground to a halt. Therefore, we would appreciate a prompt response from your committee.

On February 6, 1995, a lady contacted me for an initial consultation regarding her legal rights with respect to a divorce. I took very few notes but basically listened to her story and then answered her questions. At the end of the conference she decided that she wanted to think about her various options and asked if I would be willing to represent her when, and if she decided to file for divorce. I said that I would. She paid for the consultation and then left. At that time she was undecided about whether or not to proceed with the divorce action. Since there was no billing that needed to go out or any further work that needed to be done, no file was opened.

In July of 1995, her husband contacted [REDACTED] checked our card file and found that there had been no file opened on the wife. [REDACTED] conducted an interview of approximately one-half an hour in which he took some basic information. At that time the husband did not hire [REDACTED] to do anything or request any further services.

At our weekly office meeting held shortly thereafter, [REDACTED] asked if anyone had seen Mrs. [REDACTED]. I told him that she had been in for a consultation some time ago and had received general advice regarding divorce actions from me and assurances from me that our firm would represent her if in fact she decided to file for divorce. I also advised [REDACTED] that I was waiting for further instructions from her. [REDACTED] then said he would tell Mr. [REDACTED] that we couldn't represent him and he

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destroyed his notes. [REDACTED] has a recollection of the conference with Mr. [REDACTED] but has no recollection of any information obtained from him and [REDACTED] conveyed no information to me. Apparently, [REDACTED] also told Mr. [REDACTED] that our firm would not represent either party.

In September of 1995, Mrs. [REDACTED] contacted me again indicating that she thought something was going to happen shortly. Either not knowing or not remembering that [REDACTED] had told Mr. [REDACTED] that our office would not represent Mrs. [REDACTED], I told Mrs. [REDACTED] to let me know when she needed me. She called me in November of 1995, when I was out of state and unavailable and because something needed to be done immediately she contacted [REDACTED] for representation. Divorce proceedings were then started with [REDACTED] handling the case for [REDACTED] office. Shortly after the first of the year Mrs. [REDACTED] contacted me again and she wanted me to take over her case. I told her that I would providing that [REDACTED] agree to withdraw. At the time of this conversation with Mrs. [REDACTED] I was not aware of the assurance made by [REDACTED] to Mr. [REDACTED] that no one in our firm would represent her. I then spent several hours with Mrs. [REDACTED] going over her case. The substitution of attorneys was prepared and served. Shortly thereafter Mr. [REDACTED] contacted [REDACTED] and reminded him of his conversation. [REDACTED] told Mr. [REDACTED] that he remembered meeting with him but had no recollection or notes about the contents of the conversation. [REDACTED] then contacted [REDACTED] who was representing Mr. [REDACTED] and relayed the same information to [REDACTED] and asked him to see if his client would waive any possible conflict. He also advised [REDACTED] that in the meantime our office would take no further action and that if his client would not waive any possible conflict that we would ask for an advisory opinion from the ethics committee. [REDACTED] indicated that he would consult with his client and let us know. When we did not hear from [REDACTED] our office made several telephone calls and was finally able to reach [REDACTED] who advised us that his client could not agree to us representing Mrs. [REDACTED]. We then advised him that we were going to write to the Ethics Committee for their opinion.

At this point our firm has done nothing more on this case except to inform Mrs. [REDACTED] of the developments and to pass on certain correspondence which we received from the Guardian ad Litem. Our firm does not see an ethical conflict, but at this time we are seeking from your committee an opinion on how to proceed. Mr. [REDACTED] was never accepted by our firm as a client, nor was a retainer ever given. There is no question that at the time of the initial conference with Mr. [REDACTED] that Mrs. [REDACTED] had been accepted as a client and had received services from our firm and had paid us for these services.

I have received information that Mr. [REDACTED] had contacted other firms that his wife had contacted for the express purpose of disqualifying them from representing his wife. At the present time each of these parties have contacted so many firms in the area that except for [REDACTED] it appears that many of the law firms have been tainted from representing either party. Any information [REDACTED] may have received from Mr. [REDACTED] could and would have been available by discovery and in fact interrogatories have been submitted by [REDACTED] and answers have been given covering the basic material which would have been obtained by [REDACTED]

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I would appreciate it if your committee would issue an advisory opinion as soon as possible.

Very truly yours,

[REDACTED]
lc: Ms. Sandra Tabor
SBAND
PO Box 2136
Bismarck, ND 58502
4-23.1

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NUMBER 96-08

MAY 30, 1996

COPY

The Ethics Committee has received a request for an opinion concerning a husband and wife who consulted partners in a law firm concerning a possible divorce.

Facts

The wife contacted Partner A in February 1995 for legal advice concerning a possible divorce. Partner A listened to the wife, took a few notes, and answered several questions. She asked if Partner A would represent her in a divorce action, and he said that he would. The wife paid for the consultation and, as she was leaving the office, said that she was undecided whether she would initiate a divorce action. Partner A never opened a file concerning his discussion with the wife because, as he explained: "Since there was no billing that needed to go out or any further work that needed to be done, no file was opened."

When the husband contacted Partner B in July 1995, Partner B checked the conflicts card file. When Partner B determined there would not be a conflict, they talked for about one-half hour about a possible divorce. The husband did not retain Partner B after the interview.

Partners A and B later learned, at a weekly office meeting, that they had interviewed both the husband and the wife about a divorce. When Partner A told Partner B that he had promised to represent the wife in any divorce, Partner B said that he would tell the husband the law firm would not represent the husband. Partner B may have later told the husband that the law firm would not represent either party.

Partner B destroyed the notes from his interview of the husband after the weekly office meeting. Partner B now states that he remembers the interview with the husband but does not remember any information provided by the husband during the interview. In addition, Partner B has not provided any information about the interview with the husband to Partner A.

The wife contacted Partner A in September 1995 because "something was going to happen shortly." Partner A responded that he would represent her (he was unaware that Partner B may have told the husband that the law firm would not represent either spouse).

The wife contacted the law firm in November 1995, when Partner A was out of the town. The wife then contacted another law firm, and she initiated a divorce action.

In early 1996, the wife contacted Partner A about further representing her in the divorce action (he was still unaware that Partner B may have told the husband that the law firm would not represent either spouse).

Partner A soon interviewed the wife for several hours.

After the notice of substitution of counsel was served, the husband reminded Partner B about their July 1995 meeting. Partner B responded by telling the husband and the husband's attorney that Partner B did not recall any details about the July 1995 meeting. Partner B also asked the husband's attorney if the husband would consent, in accordance with Rule 1.9, N.D.R.P.C., to the law firm's representation of the wife. When the husband refused to consent, Partner A requested an opinion from the Ethics Committee.

The request for an opinion concluded by stating:

At this point our firm has done nothing more on this case except to inform [the wife] of the developments and to pass on certain correspondence... Our firm does not see an ethical

conflict, but at this time we are seeking from your committee an opinion on how to proceed. [The husband] was never accepted by our firm as a client, nor was a retainer ever given. There is no question that at the time of the initial conference with [the husband], that [the wife] had been accepted as a client and had received services from our firm and had paid us for these services.

I have received information that [the husband] had contacted other firms that his wife had contacted for the express purpose of disqualifying them from representing his wife. At the present time each of these parties have contacted so may [sic] firms in the area that except for [the husband's attorney] it appears that many of the law firms have been tainted from representing either party. Any information [Partner B] may have received from [the husband] could and would have been available by discovery and in fact interrogatories have been submitted by [the wife's first attorney] and answers have been given covering the basic material which would have been obtained by [Partner B].

Discussion

These facts, which were provided by Partner A, reveal that:

1. Attorney A and the wife briefly established an attorney-client relationship during the first interview (even though Partner A did not open a file) and re-established the attorney-client relationship after the divorce action was initiated; and
2. Attorney B and the husband did not establish an attorney-client relationship during their one one-half hour interview.

Therefore, the issue is whether Partner A is disqualified from further representing the wife in the divorce action.

This Committee recently addressed the implications of discussions between an attorney and a potential client in Opinion Number 96-04. Because Opinion 96-04 is relevant to the issues raised by the fact situation summarized above, part of the opinion is quoted below:

The first issues deal with potential conflicts which may arise when the public interest law firm performs screening for a potential client's financial eligibility and for the type of legal services sought, but the public interest law firm declines to represent the potential client after its screening is performed.

In a recent article, a noted legal commentator stated:

The problems posed by prospective clients require consideration of two basic interests. On the one hand, a prospective client must have reasonable latitude in sounding out a lawyer or law firm about undertaking a matter. This will require describing the matter in general terms and identifying other relevant parties, including adverse parties. It may also require getting information about the law firm, its experience and special competence, and the potential fee

arrangements. Getting this information in turn will require the prospective client to supply some further details about the matter in question. For example, how could a lawyer provide an estimate of the cost of a divorce or of litigation over an intra-corporate dispute without knowing something about the attitude and the assets of the opposing party - information that can be obtained only from the prospective client?

On the other hand, a lawyer dealing with a prospective client must have reasonable latitude in gathering relevant information, without penalty of future disqualification.

The lawyer needs to determine whether the prospective matter entails representation adverse to existing clients, or to a former client in the same or a substantially related matter. The lawyer also must determine whether the matter is one that he or she or the firm can properly handle, having regard for the firm's competence and its other present commitments. He or she must consider the fee arrangement and make preliminary assessment of whether the prospective client will be good for the fee.

Geoffrey C. Hazard, Jr. "The Would-Be Client," National Law Journal Jan. 15, 1996 at A19, A20.

Since representation of the potential client was declined, analysis of the issues begins with a 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. Another commentator observes:

Under normal circumstances, disqualification should not result from an initial consultation alone, so long as the lawyer did not extend the consultation for too long a time or discuss items of confidential information irrelevant to determining whether a conflict existed. The lawyer must also have acted in good faith and may not, for example, use the initial consultation as a subterfuge to gain confidential information for the adverse use of an existing client. In order for sufficient information to be disclosed to permit a lawyer to know whether a conflict exists, there must often be some disclosure of information that is confidential. Without such disclosure, lawyers could not effectively police and prevent conflict problems. Although authority on the point seems not to exist, it must be clear that a lawyer who in good faith acquires the information needed to do a review of possible conflicts should not be barred from representing a present client adversely to the inquiring, prospective client

Charles W. Wolfram, Modern Legal Ethics 327 (1986).

Professor Hazard writes:

The place to begin analysis is the definition of a "prospective client." Simply, a prospective client is one who consults a lawyer with a view to engagement but who does not actually hire that lawyer and so never becomes a full-fledged client. As such,

a prospective client is not entitled to the protections that the rules of legal ethics accord to a client. These include the protection against a lawyer's disclosure of client confidences, which by definition protects only "clients."

Another protection afforded a client is the provision in Rule 1.7 that the lawyer may not undertake representation of a conflicting interest. Hence, the fact that a lawyer has an interview with a prospective client does not necessarily mean that his [sic] firm incurs a conflict in continuing representation adverse to that person in the same matter. A related protection also available only to clients is that provided in Rule 1.9, whereby a lawyer may not later undertake another representation that is adverse to a former client in the same or a substantially related matter.

Geoffrey C. Hazard, Jr., "The Would-Be Client II," *National Law Journal* Jan 29, 1996 at A19 [hereinafter Hazard II] (emphasis in original).

In this committee's opinion, Rule 1.9(a) should not be interpreted to prohibit representation of the party opposing a potential client whose representation has been declined, so long as the information obtained from the first potential client was limited to that necessary to determine whether representation could be undertaken.

The conclusion that Rule 1.9(a) does not prohibit the representation does not end the analysis. Even if no lawyer-client relationship was formed, the public interest law firm may have an obligation of confidentiality to the potential client under Rule 1.6, and that obligation of confidentiality may make it necessary to decline representation of the party opposing the potential client whose representation has been declined. If a lawyer's representation of a client would be adversely affected by a duty of confidentiality to another person, N.D.R. Prof. Conduct 1.7(a) would prohibit the representation.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 35B (1990) addresses confidentiality of information disclosed to a lawyer by a potential client who is seeking legal representation. The opinion concludes that Model Rule of Professional Conduct 1.6 protects information disclosed by a potential client seeking to engage the lawyer's services even though no legal services are performed and the representation is declined. Thus, the lawyer may not reveal the information or use it to the disadvantage of the potential client unless the potential client consents after consultation, or unless the information has become generally known.

Professor Hazard writes:

Some modified protections are required. The underlying justification is not the protection of clients as such, however. Rather the rationale is to afford reasonable protection for the preliminaries through which lawyers and people who need them determine whether they should enter into a professional relationship. That is, the rules are to facilitate the system of free choice of lawyers on the part of clients and of independent, multi-client practice on the part of lawyers.

...

The basic rule is that general preliminary discussions are entitled only to limited confidentiality protection and are not given effect in determining conflict of interest.

Hazard II at A20.

Although North Dakota's version of Rule 1.6 differs from the model rule, the differences are not material to the issues raised in either the ABA opinion or in this committee's opinion. This committee concludes that the principles of the ABA opinion can be applied to the situation presented, even though the ABA opinion concerns declining representation of the second party to contact the law firm rather than the first party to contact the law firm.

The ABA opinion discusses measures available to avoid disqualification resulting from disclosure of information by a potential client. Those measures include: 1) identification of conflicts at the "earliest practicable point in discussions with a would-be client"; 2) limiting information from a potential client to that which is necessary to check for conflicts, 3) obtaining written waivers of confidentiality and advising the potential client that preliminary information divulged for the purpose of identifying conflicts will not be confidential; and 4) taking steps to prevent disclosure of the information to other members of the law firm.

The ABA opinion gives examples of implementation of the principles of its opinion, including an example in the context of litigation. If, after having undertaken representation of one party to litigation, the law firm is contacted by the opposing party who is seeking representation and the opposing party discloses only the identity of the opponent (in this example, the client who is already represented by the firm) and the nature of the matter involved, and the law firm declines representation of the second party after the conflict is identified, the ABA opinion concludes that the law firm may continue to represent the first party. However, the law firm may not communicate to the first party that it has been contacted by the opponent, and it may not use the information disclosed by the second party to the disadvantage of the second party unless the second party gave consent or the information became generally known.

Applying the principles of the ABA opinion to the questions presented, this committee concludes that the public interest law firm may represent the party opposing a potential client whose representation it has declined. However, the public interest law firm may not use information obtained from the first potential client absent consent from that potential client, or unless the information has become generally known.

This committee also focused on the issue in Opinion 96-05. The committee, after relying on Opinion 96-04, concluded:

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.

The facts provided by Partner A indicate that Partner B destroyed the notes of the interview with the husband and that Partner B does not recall any information provided by the husband during the

interview. However, the issue is whether the potential client disclosed to Partner B information to which a duty of confidentiality attaches, not whether B destroyed his notes or remembers any confidential information from that initial consultation. The Committee does not know whether the potential client alleges he disclosed to Partner B information to which a duty of confidentiality attaches or whether, in fact, such confidential information was disclosed at that time. If such confidential information was disclosed during the husband's consultation with Partner B, Partner A may not continue to represent the wife in the divorce action. If no confidential information was disclosed, Partner A may continue the representation of the wife.

The facts raise three subsidiary issues which deserve comment:

1. Partner A should have opened a file when he first interviewed the wife. The failure to open a file, although not a violation of the North Dakota Rules of Professional Conduct, could have easily resulted in a violation of the Rules.
2. The law firm represented the wife despite Partner B's apparent assurances to the husband that the law firm would not represent either party. The Rules do not prohibit a law firm from reversing its position about representing a client.
3. This situation emphasizes the importance of a functioning conflicts system - even in a small law firm.
4. Partner B should have retained his records of the initial consultation with the potential client. Retaining those records would have helped resolve what information was disclosed during the initial conference.

Conclusion

Based upon the facts provided by Partner A, this committee concludes that Partner A may continue to represent the wife in the divorce action if the husband did not provide any confidential information to Partner B.

This opinion is provided pursuant to Rule 1.2(B), N. D. Rules for Lawyer Discipline, which states:

A lawyer who acts with good fair 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 Murray G. Sagsveen and was unanimously approved by the Committee on May 30, 1996.


Alice R. Senechal, Chair