

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 96-11

The Ethics Committee received a request for an opinion regarding what action a lawyer should take in the following factual situation:

A lawyer represents a plaintiff in an action against two defendants. The lawyer served both defendants, but service of process was determined to be insufficient by the trial court with respect to one of the defendants. This resulted in a dismissal of the action against that defendant because the statute of limitations had run. The case will now proceed to trial against the second defendant and the discovery deadline is approaching quickly. The lawyer indicates that a full disclosure has been made to the client regarding the statute of limitations problem and of the potential conflict of interest resulting therefrom, and that the client has indicated he/she still wishes the lawyer to proceed.

The question presented is whether the lawyer is required to withdraw from representing the client on the claim against the remaining defendant.

Rule 1.7 of the North Dakota Rules of Professional Conduct governs conflicts of interest, providing in part as follows:

(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. . . .

Under Rule 1.7, when a conflict or potential conflict exists as a result of the lawyer's own interests, a determination must be made as to whether that conflict will affect, is likely to affect, or might affect the lawyer's representation of a client in an adverse manner.

If the conflict either will adversely affect the representation of the client or is likely to affect that representation, then the "lawyer shall not represent [the] client." Rule 1.7(a) and (b). However, if the representation of the client simply "might be adversely affected," then the lawyer may continue to represent the client if he or she "reasonably believes the representation will not be adversely affected; and . . . the client consents after consultation." Rule 1.7(c)(1) and (2).

As reflected in the notes to Rule 1.7, the underlying principle behind the Rule is that "[l]oyalty is an essential element in the lawyer's relationship to a client." The notes further provide:

Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, the likelihood that the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued by the client. In the situation involving the lawyer's own interests, if the conflict is likely to interfere, the lawyer is prohibited from undertaking the representation.

The facts do not clearly indicate if the insufficiency of service of process and the resulting dismissal of the action against the second defendant was the result of an error for which the lawyer is or may be responsible, or whether the dismissal is of consequence in the litigation. If there is an error on the part of the lawyer for which he or she is or may be responsible and that error is or may be of consequence in the litigation, the Committee is of the view that a conflict of interest would exist. In that event, the Committee is further of the view that the facts creating this conflict are likely to have an adverse effect on the lawyer's representation of the client. While no cases or ethics opinions directly on point were found, the Committee's determination finds support in ethics opinions issued by New York and the American Bar Association. See 1995 WL 157731 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.) (finding a non-waivable conflict of interest in somewhat similar circumstances under the New York rules); ABA Informal Op. 1010 (same under the ABA Canons of Ethics).

If the insufficiency of service of process was not the result of an error for which the lawyer is or may be responsible or if the dismissal is of no particular consequence in the litigation, then a conflict of interest may not exist or the conflict might only be such that the representation of the client might be adversely affected. If that is the case, the lawyer may continue to represent the client, but

only if he or she reasonably believes that the representation will not be adversely affected and the client consents after consultation.

The facts indicate that disclosure of the statute of limitations problem and the potential conflict have been made to the client and that the client still wishes the lawyer to proceed. Pursuant to Rule 1.7(a) and (b), where the lawyer's own interests are such that they will or that they are likely to adversely affect the representation, the lawyer involved cannot properly seek the client's consent to continuing representation, nor can the lawyer continue to provide representation on the basis of the client's consent. Thus, if the circumstances are such that they are likely to have an adverse effect on the lawyer's representation of the client, the client's consent is immaterial. If, however, the circumstances are such that there is only a possibility that the representation of the client might be affected and the lawyer reasonably believes that the representation will not be adversely affected, then the lawyer can continue his or her representation of the client if the client's consent was obtained after a full disclosure of the implications of the continuing representation. See N.D. Ethics Op. 96-07. The Committee does not have sufficient facts before it to express any view on the sufficiency of the disclosure to the client in this case.

Pursuant to Rule 1.16, a lawyer is required to seek to withdraw from representation of a client if the lawyer "reasonably believes that the representation will result in violation of the rules of professional conduct." If the circumstances are such that the lawyer's representation of the client is likely to be adversely affected as discussed above, then the lawyer's continuing representation of the client would result in violation of the Rules of Professional Conduct. In that event, the Committee believes that the lawyer must seek to withdraw under Rule 1.16. In doing so, the lawyer should be mindful of his or her obligation under Rule 1.16(e) to take steps "to the extent reasonably practicable to protect [the] client's interests."

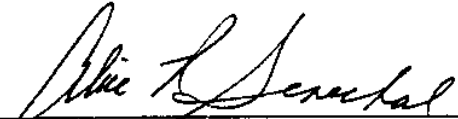
CONCLUSION

The facts presented are insufficient to allow the Committee to determine whether the circumstances are likely to adversely affect the lawyer's representation of the client or if there is merely a possibility that the representation might be affected. If the circumstances are such that the lawyer's own interests are likely to have an adverse effect on the representation of the client, then the lawyer must withdraw pursuant to Rules 1.7 and 1.16 of the Rules of Professional Conduct. If the circumstances are such that the lawyer's own interests merely give rise to the possibility that the representation might be adversely affected, then the lawyer can continue to represent the client if the lawyer reasonably believes that the representation will not be adversely affected and the client consents after full disclosure of the implications of the continuing representation.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for 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 Pamela J. Hermes and was unanimously approved by the Ethics Committee following its meeting on August 7, 1996.



Alice R. Senechal
Chairperson

VIA FACSIMILE

July 12, 1996

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Re: Request for Ethics Opinion

Dear Ms. Tabor and Ms. Senechal:

I am writing to request an ethics opinion on behalf of a client. To protect the client's identity, I will use abbreviations rather than names. Although no trial date has yet been set, the discovery deadline in the underlying case is rapidly approaching. Therefore, we would greatly appreciate a response at the earliest possible opportunity.

My client ("C") represents a plaintiff ("P") in an action against two defendants ("D1" and "D2"). C served both defendants, but unfortunately one service of process was found to be insufficient by the trial court. The trial court dismissed the case against that defendant, D1, as the statute of limitation had run. The case will now proceed to trial against the second defendant, D2.

We are requesting only an ethics opinion regarding whether C is required to withdraw from representing P on the claim against D2. Upon consultation with us, C has made a full disclosure to P of the missed statute of limitation against D1. C has also made a full disclosure that a potential conflict of interest now exists. After making this full disclosure, P said that he/she still wish for C to proceed.

I did some preliminary research regarding ethics opinions in other states. I found nothing conclusive, and we therefore decided it was most appropriate to request an ethics opinion in North Dakota

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before further advising C whether C is required to withdraw from representation. To help expedite the request, I am enclosing a copy of the only two opinions I located on point. One is an informal ABA Opinion, from 1967. The other is a 1995 New York opinion only available on Westlaw.

Please feel free to contact me at [REDACTED] if you have any additional questions regarding this request. We greatly appreciate your cooperation and consideration.

Very truly yours,
[REDACTED]

Enclosure