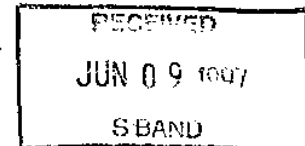


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STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 97- 04
April 29, 1997



The Ethics Committee received a request for an opinion from an attorney who is concerned about a potential conflict of interest.

Facts

The requesting attorney asked the following (the request is paraphrased to protect the identities of the parties).

I joined a law firm in January 1997. In March, an injured person retained me concerning a potential action against the driver of a vehicle and other potential defendants.

Another member of the law firm recently represented the driver of the vehicle in a divorce action. The action has been completed, but the law firm communicated with the divorce client in March 1997 concerning the disposition of documents in the file. I have no knowledge of the details of the divorce action and have not reviewed the file.

I have advised my new client of the firm's former representation of the driver in the divorce action and have requested that she expressly consent before proceeding further. In addition, as a matter of courtesy, we are advising the driver, our former client, of our intent to represent the new client.

My question:

1. Can I, as a member of the law firm, represent the estate of the deceased husband and surviving spouse in an action against the former client?
2. Can other members or employees of the firm who worked at the law firm during the divorce action assist with an action against the former client?

Discussion

The primary issue appears to be governed by Rules 1.9 and 1.10(a), ND Rules of Professional Conduct (NDRPC)¹ which states:

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1. The letter indicates the divorce "was concluded" and suggests the divorce client was a "former client," but it is unclear from the letter whether the attorney-client relationship between the firm and the divorce client was in fact terminated before the lawyer was retained by the new client. Rule 1.7 NDRPC may apply if there were an ongoing relationship between the firm and the divorce client at the time of the contact with the new client.

Rule 1.9. Conflict of Interest: Former Client.

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) Represent another person in the same matter in which that person's interests are materially adverse to the interests of the former client; or
- (b) Represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
- (c) Use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as Rule 1.6 would require or permit with respect to a client.

Rule 1.10 Imputed Disqualifications: General Rule.

- (a) Lawyers associated in a firm may not knowingly represent a client when any one of them alone would be prohibited from doing so by these rules...

The comment accompanying Rule 1.9 states, in part:

The term "matter" is defined by Rule 1.7(e).² The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client...The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter of question.

The comment also cautions:

Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client in the same or a substantially related matter except as Rule 1.6 would require or permit. Rule 1.6(h) would permit a lawyer to use generally known information about a former client when representing another client.

Rule 1.6 would also apply. As a general rule, it precludes the revelation or use to the disadvantage of a client, of confidential information obtained in the divorce in the course of representation of the client. The comment to Rule 1.6 specifically states that "[t]he duty of confidentiality continues after the client-lawyer relationship has

2. "Matter" is defined by Rule 1.7(e) to include: "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."

terminated."

In this situation, the requesting lawyer has been retained to represent the new client against a former client of her law firm concerning a dissimilar problem. The personal injury action is not the same or a "substantially related matter" within the meaning of Rule 1.9. Thus, Rule 1.9 does not prohibit the lawyer from representing the new client.³ In making this determination, it is of no import that the lawyer has no knowledge of the divorce action and has not reviewed the file because of the general rule of imputed disqualification contained in Rule 1.10. These facts are important in other respects.

In the course of representing the divorce client, it is likely the law firm obtained confidential information, including but not limited to information relating to the client's financial circumstances. In representing the new client, the lawyer and her firm are bound by the provisions of Rules 1.6 and 1.9 (c) which preclude the use of confidential information to the disadvantage of a client or former client. In order to ensure compliance with these provisions, the Committee would recommend that the lawyer refrain from reviewing the divorce file or from otherwise attempting to obtain information from the law firm, including through discussions about the client with other members of the firm.

Other members or employees of the law firm who worked at the firm during the divorce matter are not precluded from participating in the new action by virtue of their association with the firm while representing the divorce client. However, in determining whether or not a particular member of the firm or employee should become involved in the new action, the lawyer and the law firm should be mindful of their responsibilities with regard to confidential information obtained in the course of representing the divorce client.

Conclusion

Based upon the facts presented, the Committee has concluded that the requesting attorney's representation of the new client against the former client would not violate Rule 1.9 NDRPC.

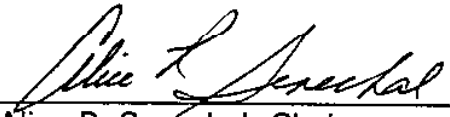
The opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer

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3. If the attorney-client relationship was not terminated before the firm was retained by the new client, the lawyer and the law firm should consider whether representation would be precluded under Rule 1.7. The comment to Rule 1.7 indicates that a lawyer ordinarily may not act as an advocate against a client that the lawyer represents in some matter, even if the matter is wholly unrelated, but that there are circumstances in which representation may be allowed. The Committee is of the view that if a file remains open for a limited time for the purpose of taking administrative action incident to terminating the attorney-client relationship, such as returning documents to a client, that this would not necessarily preclude representation of a new client in an action against the existing client.

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 Murray G. Sagsveen and Pamela J. Hermes, and was unanimously approved by the Ethics Committee.



Alice R. Senechal, Chair

Second Draft
May 8, 1997

[REDACTED]

March 24, 1997



Ethics Committee
State Bar Association
P.O. Box 2136
Bismarck, ND 58502

RE: Request for Ethics Opinion
OUR FILE: [REDACTED]

Dear Committee:

Our firm has been presented with a matter which may give the appearance of a conflict of interest, and we would like an ethics opinion before this becomes an issue.

I became a member of this firm on January 1997.

I had been contacted by an individual injured in a motor vehicle/pedestrian accident sometime shortly thereafter relating to her injuries. I pursued some pro bono work on her behalf relating to other matters.

I was officially retained by that individual on March 5, 1997, to represent her in a cause of action against the driver of the vehicle and other potential defendants. When I notified the other members of the firm of the new case in the office, I was advised that one of the other firm members had represented the driver of the vehicle in his divorce action the year prior to my joining the firm, and that the firm had communication with that client as recently as March 1997 on a matter relating to the disposition of papers in the divorce file.

I had no prior knowledge of this representation; I have not reviewed the divorce file.

My questions for the Ethics Committee are:

1. Can I, as a member of the [REDACTED] firm, represent the estate of the deceased husband and the surviving spouse in her action against the driver?

2. Can other members or employees of the firm who worked here during the divorce matter participate with me in this new action?

Rule 1.9 of the Professional Rules of Conduct sets out conflicts of interest rules with regard to former clients. I do not believe that rule applies in this instance as the accident and the divorce are totally unrelated matters. Moreover the divorce action was concluded prior to my becoming a member of the firm or being retained by the individual, except for a few follow-up letters relating to ministerial actions regarding documents in the file after the decree was entered. It is my understanding that an attorney's representation of an individual in a divorce action terminates at the conclusion of the divorce. Thomas v. Thomas, 382 NW2d 639 (ND 1986).

I have advised my new client of the firm's former representation of the driver in the divorce case, and have requested her explicit consent for us to represent her and her husband's estate regarding the accident. In addition, as a matter of courtesy, we are advising the driver, our former client, of our intent to undertake this representation.

I would appreciate the Committee's immediate attention to our request for an opinion.

Thank you.

Sincerely,

A large, irregular black redaction mark covering the signature and any text that might have been present below the "Sincerely," line.