

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

COPY

Opinion No. 97-06

July 14, 1997

The Committee has received a request for an opinion on a law firm's potential conflict of interest arising from its representing a party in an unrelated lawsuit against an existing client.

FACTS

Law firm (the "Firm") has represented a corporation ("Corp") in its corporate matters. Law firm has also represented Corp's owner, who is also Corp's president, in some personal matters. The Firm was subsequently contacted by outside counsel to work on a wrongful death matter representing parents of a deceased. The deceased was killed while at work, allegedly as a result of acts of two third parties, one of which is Corp.

Outside counsel for the parents consented to sufficient disclosure of the claim to Corp so it could decide whether to consent to the Firm representing the parents. A letter explaining the conflict was sent to Corp. The president of Corp, after reviewing the letter, agreed to consent to the representation as long as the loss was covered by insurance.

The president's qualified consent was conveyed to outside counsel, who discussed it with the parents. After being fully informed by outside counsel, the parents consented in writing to the representation and agreed that their recovery against Corp would be limited to the amount of the applicable insurance. The insurance limits are \$1,000,000.00.

The parents, with the assistance of the Firm, had previously entered into a settlement with the other third party tortfeasor. That settlement was in the sum of \$200,000.00.

The Firm continues to work for the Corp and the President. No information regarding the facts and circumstances of the wrongful death or the lawsuit arising therefrom has been provided to the Firm by the Corp.

It now appears that the wrongful death lawsuit will be going to trial. The Firm wants to "make sure" that any judgment in the wrongful death action will not be set aside due to a conflict of interest. The Firm believes that, at this point in the representation, it would create a problem for the parents to retain other counsel, but it would not be irresolvable. Corp has not raised the conflict of interest issue since Corp's president consented.

DISCUSSION

A. ISSUE

The Firm's letter requesting an opinion from this Committee states that it "wishes to make sure that any judgment [in the wrongful death action] will not be subject to being set aside on a conflict basis." This Committee cannot provide an opinion on whether a court will, or should, set aside a judgment due to an alleged violation of the ethical rules. The Committee does not provide opinions on whether past lawyer conduct complies with the ethics rules. The Committee only considers requests regarding issues of prospective conduct and will not address issues relating to past conduct. See SBAND Ethics Committee Procedures (December 4, 1995.)

Thus, the issue presented is:

Whether, assuming the facts presented above, the North Dakota Rules of Professional Conduct permit the Firm to continue its representation of the parents in their wrongful death action against Corp.

B. ANALYSIS

Rule 1.7 of the Rules of Professional Conduct provides 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 effected by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interest.
- (B) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely effect the representation.
- (C) A lawyer shall not represent a client if the representation of that client might be adversely effected 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 a client unless a client who would be disadvantaged consents after consultation.
- (E) As used in Rule 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.

The touchstone of Rule 1.7 is loyalty to the client. ABA Formal Op. 95-390; N.D.R. Prof.C. 1.7, comment (1997). Because of the duty of loyalty, the comments to Rule 1.7 provide that "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."

Paragraphs (a), (b) and (c) of Rule 1.7 address three separate and distinct conflict of interest situations. Id. Paragraph (a) addresses the situation where the lawyer's own interests or the lawyer's responsibilities to another client or to a third person will adversely affect the lawyer's representation of a client. Paragraph (b) addresses the situation where the lawyer's own interests are likely to adversely affect the representation. Id. If either of those conflict situations arises, the lawyer is absolutely prohibited from undertaking or continuing representation of the client.

Paragraph (c), on the other hand, addresses the situation where the lawyer's own interests or the lawyer's responsibilities to another client or to a third person might adversely affect the lawyer's representation of a client. Id. In that situation the lawyer is permitted to undertake the representation if the lawyer reasonably believes there will be no adverse effect on the representation and if the clients consent after consultation. Id.

Thus, whether there is a conflict of interest in violation of 1.7(c) depends upon whether the Firm's representation of the parents might be adversely affected by the Firm's representation of Corp or the president; whether the Firm could reasonably believe its representation of the parents would not be adversely affected; and, whether the parties consented after consultation.¹

¹. Because the Committee finds paragraph (c) to be dispositive, it will not provide a detailed analysis of paragraphs (a) or (b) of Rule 1.7.

1. The Firm's Representation Of The Parent Might Be Adversely Affected.

Ethical rules in addition to Rule 1.7 can aid in determining whether a lawyer's representation of a client might be "adversely affected" by the lawyer's relationship with another client. For example, Rule 2.1 provides that a lawyer shall exercise independent professional judgment and render candid advice. In rendering that advice, a lawyer may refer not only to the law but to other considerations, such as moral, economic, social and political factors that may be relevant to the client's situation. N.D.R. Pr.C. 2.1 (1997).

Moreover, all litigants are entitled to the single-minded representation of an advocate devoted exclusively to their interests. E.g., Alexander v. Riegert, 414 N.W.2d 636, 639 (Wis. 1987). Whether a conflict of interest affects the "ability" of a lawyer to represent his or her clients generally depends upon the specific facts. See id. As noted in the Comment to Rule 1.7:

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 the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

This Committee has previously opined that it is "at least possible" that a lawyer can represent an insured in a wrongful death action as well as the insurer in a bad faith action arising from the same lawsuit, if both consent after consultation. SBAND Ethics Committee Opinion No. 96-07. The issue presented, however, contains an additional twist to the general fact pattern in which a lawyer represents a party in an unrelated suit against an existing client.

Here, the consent given by Corp was not unencumbered. While Corp's stipulation that payment of the parents' claim be limited to the insurance proceeds may have removed any conflict the Firm had in being an advocate against Corp, it resulted in the parents giving up rights and advantages.² Specifically, the parents gave up their

². The facts presented do not allow the Committee to determine whether the Firm's representation of Corp is adversely affected by the Firm's representation of the parents. A number of potential conflict situations may arise. Issues may arise with regard to information the Firm has relative to the president and Corp. That

rights and advantages from having Corp financially responsible for the wrongful death claim. The parents gave up the right and advantage of having another resource to pay for damages in excess of the insurance limits. The parents, in effect, placed a ceiling on any settlement negotiations. The parents also gave up advantages a plaintiff has when an insured may be liable, e.g., the insured putting pressure on the insurance company to settle; alternative settlement vehicles which are advantageous to the insured and the plaintiff but not the insurer; and an assignment of a bad faith claim in the event the judgment exceeds the insurance limits.³ Thus, the Firm's representation of the parents pursuant to the Corp's qualified consent might affect the Firm's professional judgment in considering alternative causes of action for the parents.

Whether the Firm's representation of the parents poses an impermissible conflict of interest therefore depends upon the Firm's "reasonable belief" on the impact of the conflict of interest. If the Firm "reasonably believes" that the conflict will not adversely affect its representation of the parents, then Rule 1.7 was complied with if the parents consented after consultation.

2. Whether The Firm Reasonably Believes That Its Representation Will Not Adversely Affect The Parents.

Under 1.7(c), a lawyer may represent a party in an unrelated suit against an existing client if two general conditions are met: (1) the lawyer must "reasonably believe" that the client in question will not be adversely affected; and (2) the client must consent

information may be relevant to the wrongful death action. If the president or other representatives of Corp are called to testify, Corp may believe that information was used against it which was obtained by the Firm during its representation of Corp. If the information was obtained from some other independent source, it still raises an appearance of impropriety. Thus, the Firm may have tensions over its duty of loyalty to the parents vs. its duty of loyalty to the Corp. However, because the Committee finds that the Firm's representation of the parents is adversely affected, it need not address whether the Firm's representation of the Corp is also adversely affected.

³. The Committee assumes that the parents' outside counsel believes, in good faith, that the one million dollar insurance limits are sufficient to cover the parents' claim against Corp. However, the Committee is of the opinion that the extent of the insurance limits is not dispositive of the conflict of interest issue. First, there is no guarantee that the insurance limits will cover the judgment. Moreover, the parents' advantages in having the insured financially responsible are not limited to whether the insured may have to pay a judgment out of its own pocket.

after consultation. ABA- Ann. Mod. Rules of Prof. Cond. Rule 1.7, comment (1992). A lawyer's subjective judgment is not dispositive: the lawyer's belief must be a reasonable one. ABA Formal Op. 95-390; Clay v. Doebery, 608 F.Supp. 295, 302 (N.D.Ill.1985). The Comment to the ABA Model Rules of Professional Conduct, Annotated, sets forth the following standard for determining whether it is proper for a lawyer to obtain a client's consent to otherwise impermissible representations: "When a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent." ABA- Ann. Mod. Rules of Prof. Cond. Rule 1.7, comment (1992).

Any doubts about whether an impermissible conflict of interest exists under Rule 1.7 should be resolved in favor of the client who might be adversely affected by the representation. ABA Formal Op. 95-390. A lawyer should not strain to conclude that a proposed representation will not adversely affect his or her relationship with a client. Id. The Committee believes that a disinterested lawyer, under the circumstances present, would not represent the parents in the wrongful death action. The ability of the Firm to use independent professional judgment in considering alternative courses of action is limited by the fact Corp has essentially been removed as a "liable party." Accordingly, the Committee believes that the Firm should "reasonably believe" that its representation of the parents will be adversely affected because of Corp's qualified consent which flowed from the conflict of interest.

CONCLUSION

The Committee finds that the Firm's representation of the parents is a conflict of interest under Rule 1.7(c).

This opinion is provided pursuant to Rule 1.2 (B), and N.D.R. 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.

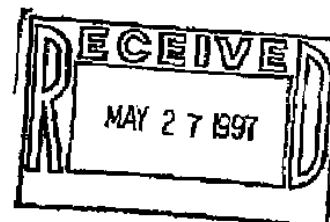
This opinion was drafted by Mark R. Hanson and was unanimously approved by the Committee on July 14, 1997.



Alice R. Senechal, Chair

97-06

May 23, 1997



Alice R. Senechal
SBAND Ethics Committee
Attorney at Law
P.O. Box 5576
Grand Forks, ND 58206-5116

RE: Request for Opinion on Waiver of a Potential Conflict of Interest

Dear Alice:

Our law firm has represented a corporation in its corporate matters (hereinafter "corporation") and its owner in some personal matters (hereinafter "president"). Our firm was subsequently contacted by outside counsel to work with him on a wrongful death matter representing parents of the deceased. The deceased was killed while at work, allegedly as a result of two third-parties, one of which is the corporation we have represented.

Outside counsel for the parents/claimants consented to sufficient disclosure of the claim to the corporation/defendant concerning a consent to representing parents/claimants. A letter explaining the conflict was sent to the corporation. The president of the corporation, after reviewing the letter, stated he would consent to the representation, as long as the loss was covered by insurance.

This information was conveyed to the outside co-counsel, who discussed it with the parents/claimants. After being fully informed by outside counsel, the parents/claimants consented in writing to the representation and agreed that they would accept as full satisfaction, regardless of an excess verdict or judgment, the insurance policy proceeds (the policy limits were \$1,000,000). They were fully informed that if a judgment in excess of the policy limits was obtained, they would be limited to the policy limits. The parents/claimants had previously entered into a settlement with the other responsible party with the assistance of our law firm and outside counsel. This settlement was in the sum of \$200,000.

Alice R. Senechal
May 23, 1997
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No information regarding this matter has been provided to our law firm by the corporation, but the corporation continues to have our law firm do some of its work, as well as some of the president's own personal work.

It now appears that the matter will probably go to trial and our law firm wishes to make sure that any judgment will not be subject to being set aside on a conflict basis and therefore is seeking an ethics opinion. At this point in the representation, it would create a problem for the parents/claimants to retain other counsel, but it would not be irresolvable. The defendant/corporation has not raised the issue since the corporation president consented.

We have carefully reviewed Rule 1.7, **Conflict of Interest**. From our review, it does not appear that it would prohibit the continued representation of the parents/claimants. The defendant/corporation will not be adversely affected because the parents/claimants have agreed to accept solely the insurance proceeds after consultation with outside counsel. The parents/claimants will not be adversely affected in the representation, as there is independent, outside counsel to review all actions taken and advise the parents/claimants if there were any adverse effects on their interest. Our firm's ability to consider, recommend or carry out a course of action on behalf of the parents/claimants is not adversely affected, as there is no adverse effect upon the defendant/corporation. Regarding Rule 1.7(c), there is a potential that it might adversely affect the lawyer's responsibility to either or both clients; but as set forth above, the defendant/corporation is protected by insurance coverage, the parents/claimants are protected by independent counsel, and both the defendant/corporation and the parents/claimants have consented after consultation. The defendant/corporation is represented in this matter, of course, by outside counsel retained by its insurance carrier. No confidential information has been transferred to the law firm from the defendant/corporation or defendant/corporation's president regarding this matter or which would be prejudicial or which could be used adversely against it.

Due to the parent's/claimant's consent after consultation with outside counsel and the consent of defendant/corporation and the lack of any adverse effect, we believe that the conflict of interest issue is resolved under Rule 1.7 and that the Rules of Professional Conduct have been complied with; however, we would like to have an opinion from the Ethics Committee.

Sincerely,

