

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 97-07
Date: August 1, 1997

COPY

The Ethics Committee has received a request for an opinion from an attorney which raises the following questions involving conflicts of interest:

Whether the representation of the settlor of a testamentary trust and his wife by the firm earlier in the estate planning, or in the probate proceeding, or as to various prior matters, involved any matters which are now at issue between the family members, which could create a conflict with the continuing representation of the trustee; or

Whether acting as an intermediary on behalf of the trust to seek a resolution to the current controversy among the widow and trust beneficiaries created a conflict which would prevent him from continuing to represent the trustee.

FACTS

Members of the firm represented the settlor of a testamentary trust, including estate planning for the settlor and his wife. Members of the firm probated the settlor's estate and continued to represent the widow and children on various matters. The firm has also represented the trustee of the testamentary trust from the time the trust was established at the death of the settlor. The trustee is the trust department of a local financial institution.

When some controversy developed recently among two of the children regarding their farming of assets owned by the trust, the attorney who had

represented the settlor and the family met with the widow and the children in an attempt to resolve the differences, but the matters have not been resolved and the widow and one child have retained a separate attorney to represent them. This attorney has now raised the issue of whether the requesting firm has a conflict of interest under Rules 1.7 and 1.9 NDRPC, and is prohibited from continuing to represent the trustee.

The requesting attorney states that the previous representation of the widow and other beneficiaries was "on other unrelated matters." The only contact with the widow and the beneficiaries related to the pending controversy was the meeting held with all the parties in an attempt to resolve the controversy.

The requesting attorney has stated that the firm has not represented any of the beneficiaries on the pending controversy.

APPLICABLE RULES

The primary issues appear to be governed by Rules 1.6, 1.7, 1.9, 2.2, and 4.3, North Dakota Rules of Professional Conduct (NDRPC).

Rule 1.6. Confidentiality of information.

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this rule.

None of the exceptions stated in Rule 1.6 apply to this fact situation. The last comment to Rule 1.6 clearly indicates that the duty of confidentiality continues after the client-lawyer relationship is terminated and that the use by a lawyer of

confidential information to the disadvantage of the client is equivalent to revelation under this Rule.¹

RULE 1.7 Conflict of interest: General rule.

(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. ...

(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 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.

¹ Ethics Committee Opinion No. 95-11 concluded that the confidential information concerning the attorney's preparation of a deceased client's will, arising under Rule 1.6, could not be disclosed to the relative without a court order.

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 2.2. Intermediary.

(a) A lawyer may act as an intermediary between clients with potentially conflicting interests under conditions if ...

RULE 4.3 Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

DISCUSSION

Whether the requesting attorney has a conflict of interest that would prevent continued representation of the trustee over the objection of the widow and beneficiaries of the trust must be decided by determining what application these five cited rules of professional conduct have on the facts related by the requesting

attorney's letter. The letter indicates that the firm's representation of the widow and children was on other unrelated matters in the past. The Committee cannot determine from the letter whether the matters involved in the pending controversy are unrelated to the prior representation of the wife in the estate planning process, or in the probate proceedings, or in the representation of the widow and children in various prior matters. Whether the matters are the same or substantially related is a factual issue which the Committee cannot resolve, and must be resolved by the attorney.

If the facts establish that the confidentiality existing earlier in the client-attorney relationship with the widow is in any way related to the issues in the current controversy, the confidentiality would continue after the client-lawyer relationship is terminated and possible use of that information to the disadvantage of the client would constitute a violation of Rule 1.6 and Rule 1.9(c).

The question of whether the use of information relating to the prior representation of the widow and children may constitute a violation of Rule 1.6 is likewise dependent upon whether the prior representation was substantially related to the matters now in controversy and whether information from prior representations of the widow and children which substantially relate to the present controversy. A comment to Rule 1.9 indicates that the term "matter" is defined by Rule 1.7(e), as previously stated.

It appears from the requesting attorney's letter that the meeting held by a member of his firm as counsel for the trustee with all of the parties in the present controversy, may have made that attorney an intermediary between the trust and other clients of the firm under Rule 2.2. Whether the lawyer took the necessary steps to act as an intermediary as required by Rule 2.2, and as required in dealing with unrepresented parties under Rule 4.3, cannot be determined by the facts stated in the letter. However, if that attorney's action constituted an intermediation under Rule 2.2, then subparagraph (c) of that rule clearly requires the lawyer to withdraw if any of the clients so request. Thereafter, he cannot represent any of the clients in the matter that was the subject of the intermediation.

As former clients, the consent by the widow and the children to represent parties adverse to their present interests is apparently not available under the provisions of Rule 1.7(c) and (d) since the challenge has come from the attorney for the widow and one of the children.

CONCLUSION

Based upon the facts presented in the letter, the Committee cannot determine whether each of the rules considered would be violated by continued representation of the trustee. The Committee concludes that the requesting attorney's continued representation of the trustee would result in a disqualifying conflict of interest arising to the widow and children as present or former clients under Rule 1.7 and 1.9, if it is determined that the representation of the wife in the

estate planning process, or in the probating of the settlor's estate, or in the prior representation of the widow and children on various matters, involved matters that may be related to the pending controversy.

Additionally, the Committee concludes that, even if the member of the firm complied with all the requirements of Rules 2.2 and 4.3 by advising the other parties that he was not acting as their counsel and obtained their consent to an intermediation, as Rule 2.2 requires, the lawyer of the firm would be required to withdraw and the firm would no longer be able to represent any of the clients in the matter that was the subject of the intermediation under Rule 2.2 and therefore would not be able to continue representing the trustee in the current matter.

If the attorney did not clearly state that he was not representing the widow and children in an intermediation, or if they believed that he was representing them, then there would be a conflict of interest under Rule 1.7 and Rule 1.9 as well. Even if he did clearly articulate his non-representation status, he would still have to consider the confidentiality requirements of Rule 1.6, conflict of interest requirements of Rule 1.7, and the conflict of interest with his former client under Rule 1.9, as previously set forth in this opinion.

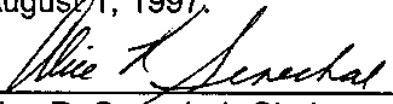
The facts stated in this letter are insufficient to allow this Committee to make those determinations, but the requesting attorney must also determine whether communications received from the widow or the children, while representing them in these unrelated matters, would be used to their disadvantage

under the provisions of Rule 1.6.

The opinion is provided pursuant to Rule 1.2(b), North Dakota Rules of Lawyer Discipline, which states:

A lawyer who acts in 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 Albert A. Wolf and was unanimously approved by the Committee on August 1, 1997.

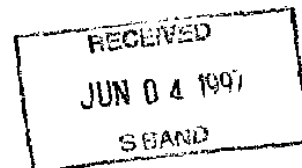


Alice R. Senechal, Chair

JUN 11 1997

97-07

May 30, 1997



Ms. Alice Senechal
Chair, Ethics Committee
P. O. Box 5576
Grand Forks, ND 58206-5576

Dear Alice:

A situation has recently arisen in our practice which we believe necessitates an advisory opinion from the Ethics Committee. The facts are as follows:

One of the attorneys in this firm for many years represented the Settlor in a Testamentary Trust, including estate planning for him and his wife. We also probated the Settlor's Estate when the Settlor died many years ago and this firm continued to represent the widow and children on various matters. In addition, we have represented the Trustee of the Testamentary Trust from the time the trust was established upon the death of the Settlor. The Trustee is the Trust Department of a local financial institution.

Recently, some controversy developed among two of the children regarding their farming of assets owned by the Trust. The attorney in our office who had represented the Settlor and the family met with the widow and children in an attempt to resolve the differences and, at the conclusion of that meeting, it appeared that a resolution was reached. However, we were subsequently informed that the controversy had not been resolved, and that the widow and one child had retained a separate attorney to represent them. When the other child asked this firm to represent him, we declined. We have continued to represent the Trustee.

The new attorney for the widow and one child has now raised the issue of whether this law firm has a conflict of interest under Rules 1.7 and 1.9 of the Rules of Professional Conduct, and is therefore prohibited from continuing to represent the Trustee in this matter.

Ms. Alice Senechal
May 30, 1997
Page Two

We do not believe that our continued representation of the Trustee is a conflict. We represent none of the beneficiaries in this matter. While we represented the widow and other beneficiaries on other unrelated matters in the past, the only communication with the widow and those beneficiaries relating to the pending controversy was the meeting held with all of the parties in an attempt to resolve the controversy before it escalated. That meeting was held because of our understanding that as attorney for the Trustee, we have a duty to carry out the intention of the Settlor and, if necessary, work with all of the beneficiaries to accomplish that purpose. Our only client in this matter is the Trustee. We do not feel that our representation of the Trustee is adversely affected by any responsibilities to other clients, as none of the other parties involved in this controversy are clients at this time. In addition, while we have represented the beneficiaries on other unrelated matters, we have represented none of them in this matter.

Finally, it is our position that our responsibility as attorney for the Trustee is to carry out the Trust as established by the Settlor, and that that interest is not materially adverse to the interest of any of the beneficiaries, to the exclusion of any others.

We would appreciate the opinion of the Ethics Committee on this matter so that we can advise the Trustee of whether we may continue to represent them in this matter. Your prompt assistance in this matter would be appreciated.

Sincerely,

