

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 97-08
September 4, 1997

The Ethics Committee has received a request for an opinion from an attorney concerning the following fact situation:

The requesting attorney represents the personal representative of an estate. Included in the assets of the estate is a bond issued by Entity A. The bond is in default. Entity A had conveyed proceeds from the bond sale to Entity B which, in turn, used the monies to purchase accounts receivable from various third parties. Under the arrangement, Entity B was to transfer the proceeds from collection of the accounts receivable to Entity A. However, all or a portion of the accounts receivable are uncollectible and, as a result, the bond issued by Entity A is in default.

Entity B has brought an action against Attorney C for malpractice. The lawsuit relates to Attorney C's representation of Entity B in contractual arrangements involving security interests. Attorney C is represented in the malpractice action by an attorney retained by his professional liability insurance company. The requesting attorney has always represented Attorney C. Attorney C has asked the requesting attorney to represent him, personally, at pretrial depositions in the malpractice action. Entity B has objected and has asserted a conflict of interest. Entity B has further scheduled the deposition of the requesting attorney. The requesting attorney anticipates that he will be asked questions relating to conversations he had with Attorney C that fall within the attorney-client privilege. The requesting attorney also anticipates that he will be asked questions concerning non-privileged information that he may have acquired as a result of other social and community activities.

A recovery by Entity B against Attorney C in the malpractice action could benefit Entity A.

The requesting attorney has received written permission from the personal representative of the estate to represent Attorney C.

The requesting attorney has never represented Entity B, the plaintiff in the malpractice action.

The requesting attorney asks:

- (1) Am I able to represent Attorney C in pretrial proceedings?

- (2) Do conversations between Attorney C and myself constitute communications protected by attorney-client privilege?

DISCUSSION

A. Issue #1 - Conflict of Interest.

(1) Ethics Rules

Rule 1.7 of the North Dakota Rules of Professional Conduct provides 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 interest, 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.

As noted in the comment to the rule the potential for a conflict does not always prohibit multiple representation:

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.

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. 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. 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.

Analysis

The requesting attorney has two clients, the personal representative of an estate and Attorney C. Both have consented to the dual representation. Nevertheless, the requesting attorney may not represent Attorney C if the representation of that client is likely to adversely affect his responsibilities to another client or to a third person.

Therefore, the fundamental question which must be answered is whether the estate represented by the personal representative for whom the requesting attorney is counsel and which holds bonds issued by Entity A, could be benefitted by a successful prosecution of the malpractice action against Attorney C. If so, the requesting attorney is precluded from representing Attorney C in the malpractice case. The facts suggest that, indeed, the estate for whose personal representative the requesting attorney is counsel is likely to benefit by a successful prosecution of the malpractice case against Attorney C. It appears that a recovery by Entity B would accrue to the benefit of Entity A by virtue of Entity B's responsibility to reimburse Entity A for the bonds proceeds earlier conveyed to it. In that case, it appears that Entity A would be in a position to honor all or part of the bonds, thereby benefiting the estate for which the requesting attorney's client is personal representative.

Under the circumstances presented here, it appears that the requesting attorney's ability to consider, recommend, or carry out a course of action on behalf of Attorney C will, or is likely to, adversely affect the lawyer's responsibilities to the personal representative of the estate owning bonds issued by Entity A, and vice versa. Therefore, Rule 1.7(a) precludes the requesting attorney's representation of Attorney C.

B. Issue #2 - Privilege.

Rule 1.6 of the North Dakota Rules of Professional Conduct governs confidentiality of communications between an attorney and his or her clients. Specifically, the Rule states:

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

Rule 1.6 establishes a lawyer's ethical obligation to hold *in violate* confidential

information of the client. Therefore, if Attorney C communicated with the requesting attorney in an attorney-client relationship, those communications are protected by the attorney-client privilege. The requesting attorney has indicated that he has "always represented Attorney C" and that any communication he may have had relative to Attorney C's conduct regarding the transactions at issue were in the context of attorney-client discussions. Therefore, the requesting attorney may not disclose communications with Attorney C regarding the relevant transactions. The fact that the requesting attorney does not represent Attorney C at this time does not change the conclusion. The Comment to Rule 1.6 specifically states that the duty of confidentiality continues after the client-lawyer relationship has terminated.

The requesting attorney is not precluded from testifying regarding any information or communication which he received separate and apart from his role as counsel for Attorney C. Specifically, the requesting attorney may be required to testify regarding information that he acquired through casual, community and social communications and functions.

This opinion is provided pursuant to Rule 1.2(B), 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 Jay Fiedler and was unanimously approved by the Committee on September 4, 1997.

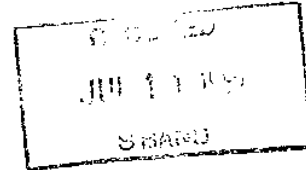


Alice R. Senechal, Chair



July 10, 1997

Ethics Committee
P.O. Box 2136
Bismarck, ND 58502-2136



Re: Ethics Opinion

Gentlemen:

I represent the personal representative of an estate, in which, included as an asset is a bond issued by Entity A. The bond is in default. I also represent another attorney - C, who is the attorney for Entity B which used proceeds from the bond to purchase assets which have now been determined to be worthless.

Entity B has brought an action against Attorney C for malpractice. Attorney C is represented in the malpractice action by an attorney from Attorney C's insurance company. I have always represented Attorney C and he has asked me to represent him personally at pretrial depositions. The Plaintiff in the action has objected alleging a conflict of interest and further alleging that I will be called as a witness at trial. The Plaintiff has scheduled me for depositions. I have received written permission from the personal representative of the estate to represent Attorney C.

Am I able to represent Attorney C in pretrial proceedings?

Do conversations between Attorney C and myself constitute communications protected by attorney-client privilege?

Very truly yours,

