

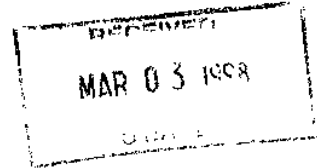
STATE BAR ASSOCIATION OF NORTH DAKOTA

COPY

ETHICS COMMITTEE

OPINION NUMBER 98-01

DATE: February 23, 1998



The Ethics Committee received a request for an opinion concerning disqualification which poses the following question:

Should a law firm be disqualified from representing a client if that firm hires a secretarial employee from a law firm which represents a party with adverse interests to the client and there is pending litigation between the parties?

Facts

The requesting attorney represents a client in a lawsuit against her former employer and one of its employees. The requesting attorney's partner has offered a job to a legal secretary who has been employed most recently as the legal secretary to the attorney representing the two defendants in the aforementioned lawsuit. Although the legal secretary has submitted an affidavit indicating that she cannot recall confidential client information, she admits that she may have interviewed potential witnesses and sat in on an attorney conference involving the case. The affidavits of the attorney who formerly employed the legal secretary and the his client indicate that the legal secretary typed memoranda and letters containing confidential communications and also had access to other confidential information. The attorney who wishes to hire the legal secretary has performed no work on the lawsuit in question and proposes to screen the legal secretary from all discussions and work on the file through very detailed screening procedures:

- 1) That the file in question be kept in a separate filing cabinet and located in a separate room from the main filing cabinet;
- 2) That the firm circulate a memorandum to all employees, agents, assigns, and associates, including retained or co-counsel, instructing them that the legal secretary is not to work on the file in question nor are they to have any discussions with her about it;
- 3) That the firm will place brightly colored stickers or labels on the file and all discovery documents, indicating that they are part of the file and are confidential;
- 4) That the firm will instruct the legal secretary that she is not to share any confidential client information she possesses regarding the case with any employee, agent, assign or associate, including retained or co-counsel; and
- 5) That the legal secretary will sign a confidentiality

agreement, approved by the Court, agreeing not to disclose any confidential client information with regard to the case to any person and to immediately report to the Court if any employee, agent, assign, or associate of the firm questions her regarding her knowledge of the case.

The requesting attorney has previously filed with the trial court a motion seeking an order establishing the absence of the need for disqualification or approving screening procedures to allow the legal secretary to commence work without disqualification resulting. The trial court determined that the legal secretary was directly and substantially involved in the lawsuit in question during the course of her employment with the attorney representing the defendants. The trial court did not question the honesty or trustworthiness of the legal secretary or any member of the requesting attorney's firm, but determined that screening would not be adequate to ensure confidentiality and the integrity of client information, relying upon Heringer v. Haskell, 536 N.W.2d 362 (N.D. 1995). Thus, the trial court rejected the request to approve screening procedures and indicated that the requesting attorney's firm would be disqualified if the legal secretary's employment started before the case was concluded.

The Committee recognizes it is unusual for the Committee to render an opinion on an issue on which a court has entered a decision in a pending case. However, the Committee believes it is appropriate for this opinion to be issued in this instance because of the need to provide guidance on this question. Although the Committee has received frequent inquiries about this topic in the past, requesters have decided not to request opinions because their hiring decisions could not be delayed while the opinion process went forward.

Discussion

At the outset, the Committee notes that the matter of disqualification of the requesting attorney from representation of the plaintiff in the pending litigation is one for the trial court. The Committee's function is limited to determinations of whether a requesting attorney's conduct would violate the Rules of Professional Conduct. Accordingly, the issue addressed by the Committee is whether the requesting attorney's firm would be precluded by the Rules of Professional Conduct from continuing its representation of the plaintiff in the lawsuit in question if the legal secretary begins her employment with the firm before the case is concluded.

The analysis in this case begins with the text of North Dakota Rules of Professional Conduct Rule 1.10, which provides:

(a) Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would

be prohibited from doing so by these rules, except as provided by Rule 1.11 or Rule 1.12.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person when:

(1) The lawyer had previously represented a nongovernmental client whose interests are materially adverse to that person;

(2) The matter is the same or is substantially related to that in which the lawyer represented the client; and

(3) The lawyer had acquired material information protected by Rule 1.6 while associated with a prior firm.

(c) When a lawyer has terminated an association with a firm, the firm may not thereafter knowingly represent a person when:

(1) The person has interests materially adverse to those of a nongovernmental client represented by the formerly associated lawyer;

(2) The matter is the same or is substantially related to that in which the formerly associated lawyer represented the client; and

(3) Any lawyer remaining in the firm has material information protected by Rule 1.6.

(d) A disqualification prescribed by this rule may be waived by the affected client's consent after consultation.

There has been no waiver, so a determination must be made of whether disqualification is required.

Rule 1.10 provides for imputed disqualification when a lawyer has acquired material information protected by Rule 1.6. The Court's opinion in Heringer, makes it clear that a lawyer is deemed to have confidential information when he or she has had access to such information. 536 N.W.2d at 366. There is no question under the facts presented that the legal secretary had access to confidential information. Moreover there is no question about the adversarial relationship between the firms in connection with the ongoing litigation. Thus, the question is whether the disqualification standards set forth in Rule 1.10 should be applied to the legal secretary, who is not a lawyer.

On its face, Rule 1.10 applies only to lawyers. However, pursuant to Rule 5.3, a lawyer is responsible for making reasonable efforts "to put into effect measures giving reasonable assurance

that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." This rule further provides: "The lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Some courts have interpreted similar rules to require application of the rules governing imputed disqualification to nonlawyer employees. See, e.g., Ciaffone v. Eighth Judicial District Court, 948 P.2d 950, 1997 WL 606713, *2 (Nev. 1997). As the court noted in Ciaffone: "To hold otherwise would grant less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer." Id. Other courts have taken the position that less stringent standards are appropriate when analyzing the question of disqualification resulting from nonlawyer personnel, citing concerns about limitations on employment opportunities of nonlawyers and about the rights of clients to obtain counsel of their own choosing. See, e.g., Smart Industries Corp., Mfg. v. Superior Court, 876 P.2d 1176 (Ariz. App. 1994) (citing ABA Informal Opinion 88-1526 (June 22, 1998): Imputed Disqualification Arising From Change in Employment By Nonlawyer Employees). In Smart, the court analogized to the less stringent rules applicable to government lawyers, noting that unlike lawyers in private practice, "nonlawyers generally have neither a financial interest in the outcome of a particular litigation, nor the choice of which clients they serve." 876 P.2d at 1884. The court also noted that the public's perception of what is expected of lawyers compared to nonlawyers is different. Id. Thus, the court analyzed the question of disqualification from the standpoint of the lawyer's duty to supervise nonlawyer employees so as to ensure conduct compatible with the lawyer's ethical obligations. 876 P.2d at 1185. See N.D.R. Prof. Conduct 5.3.

The court in Smart determined that screening procedures could be sufficient to avoid disqualification arising from employment of nonlawyer employees, stating:

In ABA Informal Opinion, the Committee construed the lawyer's duty under Model Rule 5.3, to assure that a nonlawyer's conduct is "compatible" with a lawyer's ethical obligations. "Compatible" requirements to preserve confidentiality under Model Rule 5.3 in the supervision of the nonlawyer, but not "identical" to those imposed on lawyers under Model Rule 1.10(b), included the following:

- (a) appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client;
- (b) admonitions to be alert to all legal matters,

including lawsuits, in which any client of the former employer had an interest. The nonlawyer should be cautioned:

(1) not to disclose any information relating to the representation of a client of the former employer;

and

(2) that the employee should not work on any matter on which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer.

. . .

We conclude that the screening requirements articulated above are sufficient to satisfy a lawyer's duty under ER 5.3 to supervise a nonlawyer employee in a manner that will assure conduct "compatible" with the lawyer's ethical obligations. Thus, satisfaction of these requirements will prevent disqualification of the firm based upon a nonlawyer's potential conflict even though a stricter standard is imposed on lawyers by operation of ER 1.10(b). . . . We reach this result because we agree with the concerns of ABA Informal Opinion and the cases cited therein regarding the employment of nonlawyer assistants within the legal community, and because we perceive that, once a supervising lawyer in the employment relationship has properly instructed and screened such an employee, the danger is small of a disclosure of a former client's confidences.

876 P.2d at 1184-85 (citations omitted). The court did note, however, that the actual disclosure of a former client's confidence by a nonlawyer assistant would warrant disqualification of the new firm in any matter adverse to the client. Id. at 1185 n.8.

The Committee agrees with the position outlined in Smart, that disqualification of a lawyer is not mandated when he or she hires a nonlawyer assistant such as a legal secretary from opposing counsel, even if the assistant possesses client confidences, if the lawyer sufficiently screens the assistant from the case. As noted in SBAND Ethics Op. No. 96-02, screening procedures must be effective and factors which should be considered in determining whether screening procedures are effective when lawyers are involved include "the size of the firm, the extent of departmentalization, the location of offices (i.e., whether there are separate physical locations), access to case files and other information, sharing in profits or fees derived from the matter, policies concerning discussion of matters, and when the screening

took place, as well as the screened lawyer's prior involvement and knowledge of the cases in question." The Committee is of the view that an additional relevant factor in this case is the fact that the employee in question is a nonlawyer assistant. Given the facts in this case, the Committee is of the view that the screening procedures outlined by the requesting attorney's firm which are to be implemented before the legal secretary commences work are sufficient. Thus, the Committee believes that the Rules of Professional Conduct would not be violated by the requesting attorney's continued participation in the lawsuit in question if the nonlawyer commences work before the completion of that case, as long as the screening procedures are implemented and there is no actual disclosure of client confidences.

The Committee's conclusion is not inconsistent with the Supreme Court's analysis in Heringer. The Court in Heringer noted that the critical issue was whether defense counsel had confidential information as a result of their former partner's representation of the adverse client in the same matter, and determined that defense counsel's access to such information was sufficient to require disqualification. 536 N.W.2d at 365-66. The Court specifically noted that the law firm had no policy or other safeguards to restrict access to files and information among the attorneys and that the attorneys discussed their cases with each other. Id. at 367. Thus, the Court found it reasonable to infer "that each attorney had access to, and therefore knowledge of, all confidential information of the firm's clients." Id. Because the issue arose after the lawyers had access to confidential information, obviously there was no way that screening could have been implemented. The Court in Heringer did not address the issue of whether screening would suffice in a situation such as this involving lawyers -- an issue which is also beyond the scope of this opinion.¹

Conclusion

Based upon the facts presented, the Committee has concluded that under the Rules of Professional Conduct, the requesting attorney would not be precluded from continuing to represent the plaintiff in the litigation in question if her firm hires opposing counsel's former legal secretary, as long as effective screening

¹The Committee has previously noted the issue in Ethics Op. No. 96-02. In that opinion, the Committee noted that there is no authority given in Rule 1.10 to establish a screening system separating members of a private firm to handle a conflict of interest situation. However, the Committee did not specifically address the issue of whether such screening would ever be allowed, merely ruling in the specific instance presented that a screening mechanism would not be an appropriate method of resolving the conflict of interest issue.

procedures such as those outlined above are implemented and there is no actual disclosure of client confidences. The Committee reiterates that it has no authority to rule on the issue of disqualification of the firm in the pending litigation, which is entirely in the province of the courts.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Discipline. This Rule 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 unanimously approved by the Ethics Committee on February 23, 1998.

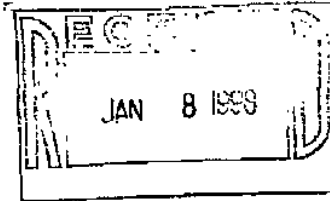
A handwritten signature in cursive script, reading "Alice R. Senechal", written over a horizontal line.

Alice R. Senechal
Chairperson

[REDACTED]

January 7, 1998

Alice Senechal
Chairperson, ND Ethic Committee
P.O. Box 5576
Grand Forks, ND 58206-5576



RE: Request for Ethics Opinion

Dear Ms. Senechal:

I am writing to request that the Committee issue an expedited opinion regarding the following question:

Should a law firm be disqualified from representing a client if that firm hires a secretarial employee from a law firm which represents a party with adverse interests to the client and there is pending litigation between the parties.

The facts of the instant situation are as follows:

I represent a client in a lawsuit against her former employer and one of its employees. The matter is scheduled to come for trial during the last week of February of this year. My firm recently lost, due to her unexpected and untimely death, a key employee with over ten years of experience as a legal assistant. She worked for one of the partners in my firm. My firm advertised for a legal secretary or legal assistant with at least five years legal experience and received seven responses. The partner in the firm offered the job to the most qualified of those applicants. That individual, however, has been employed most recently as the legal secretary to the attorney representing the two defendants in the aforementioned lawsuit.

The legal secretary at issue, whose affidavit is attached as Exhibit A, cannot recall any confidential client information. She admits that she may have interviewed two potential witnesses and sat in on one attorney conference involving the case, however, she strongly avers that she was not substantially involved in the case. Apparently, defendants' counsel utilized a legal assistant to manage this file.

I have also attached as Exhibit B the affidavit of the partner in my firm who wishes to hire the legal secretary. As you can discern from his affidavit, he performs no work on the pending file, and proposes to screen the legal secretary from all discussions and work on the matter. In addition, the law firm has hired a part-time legal assistant to perform work on litigation matters for the office and to handle all work related to my files.

Also attached for your information, as Exhibit C are the affidavits of counsel for the defendants in this matter and the affidavit of the adverse party, which set forth their positions on this matter.

Ms. Alice Senechal
January 7, 1998

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The attorney for the defendants in this case had indicated that they wished the Court to decide this issue, however, when I made a motion to the Court that disqualification was not necessary under the circumstances, the attorney argued that the Ethics Committee was the proper party to make the determination and he would be willing to be bound by the decision of the Committee. The Court ruled that disqualification was necessary, however, we disagree with that ruling and believe that should the Ethics Committee render an opinion contrary to the Court's ruling, the Court would reconsider its opinion. Attached as Exhibit D is the opinion of the Court and the written submissions of the parties' to the Court regarding the motion.

I have enclosed, for the Committee's benefit, several judicial decisions addressing the issue of imputed disqualification of a law firm when they hire a non-attorney staff member. These decisions indicate that if a state permits screening of attorneys to protect client confidences, then certainly such screening of non-attorneys is permissible. The North Dakota Rules of Professional Conduct appear to permit screening of attorneys wherein the comment to Rule 1.10 states "[t]hus if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or substantially related matters, so long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met."

- In closing, I would request that the Committee issue an opinion as quickly as possible as the legal secretary involved in this matter is currently without employment or income. This issue appears to be one of great importance for a state the size of North Dakota with a rather limited legal community. Legal support staff should know whether their job opportunities are limited based on the clients of their current employer.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Enclosures

