

STATE BAR ASSOCIATION OF NORTH DAKOTA APR 1999

ETHICS COMMITTEE

Opinion No. 99-01

March 29, 1999



The Ethics Committee received a request for an opinion concerning a possible disqualifying conflict of interest. The issue raised by the request is:

Should a law firm be disqualified from representing a client when a former member of the firm previously represented a person aligned with the adverse party on the same or a similar issue under circumstances where the attorney representing the client was not with the firm when the person aligned with the adverse party sought representation and any file materials pertaining to the representation of the person aligned with the adverse party were destroyed prior to any contact with the client?

FACTS

In 1991, a divorce judgment was entered between Husband and Wife in which Husband was awarded custody of the parties' minor child. Neither party was represented by the Law Firm. Later that year, Wife's father (Maternal Grandfather) consulted Lawyer A, a member of Law Firm, concerning the possibility of challenging, appealing or otherwise reversing the divorce judgment. During the course of the consultation, Lawyer A met once with Wife. Lawyer A concluded that he could be of no further assistance to Maternal Grandfather. No legal action was taken and a bill for approximately \$200.00 in legal services was submitted to the Maternal Grandfather.

Sometime between 1991 and 1996, the file the Law Firm had regarding the Maternal Grandfather's representation was transferred to off-site storage. Lawyer B joined the Law Firm in 1996. In 1997 the Law Firm's files in the off-site storage facility,

including the file related to the Maternal Grandfather's representation, were destroyed in a fire.

On October 1, 1998, Lawyer A left the Law Firm. Subsequently, Lawyer B was retained by Husband's parents (Paternal Grandparents) to represent them in a case involving the custody of the minor child who was the subject of the 1991 custody order. The Law Firm's conflict checking system indicated that the Law Firm had previously represented the Maternal Grandfather, but suggested that the representation was on an unrelated matter. The Maternal Grandparents are not parties to this action, but they are aligned with the adverse party. During the post-judgment litigation, the Maternal Grandfather informed Lawyer B of the potential conflict of interest and requested that he withdraw.

DISCUSSION

This situation raises a question under Rule 1.10 regarding imputed disqualification.

Rule 1.10(c) addresses imputed disqualification after a lawyer has terminated his or her relationship with a firm. Rule 1.10(c) provides:

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 non-governmental 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.

The comments to the Rule suggest that there are two key interests which must be addressed in determining an imputed disqualification issue. First a law firm is to avoid positions adverse to a former client. Second, a law firm must preserve the confidentiality of client information. With these principles in mind, we turn to the facts of the present case.

Under the fact presented, the first two factors in the imputed disqualification test must be answered yes. First, the Firm now represents a person whose interests are materially adverse to a client of the firm represented by a formerly associated lawyer. Prior to leaving the Firm, Lawyer A consulted with the Maternal Grandparents related to the custody of the child that is the subject of the dispute in which Lawyer B of the Firm is now representing the Paternal Grandparents. Second, the subject matters of the present and former representations are substantially related.

The third factor of the test is therefore critical. Rule 1.10(c)(3) requires disqualification where any lawyer remaining in the firm has material information protected by Rule 1.6. Material information is that information considered to be confidential which a lawyer learns while representing a client. Access to confidential information is the key factor in the analysis of the third step. See Heringer v. Haskell, 536 N.W.2d 362, 365 (N.D. 1995).

Heringer v. Haskell is helpful to this Committee's determination of this matter. In Heringer, the Supreme Court found that even though a file had been transferred to another law firm and the attorney who had represented the former client had left the firm prior to the adverse party's contact with the firm, the firm was disqualified because other lawyers in the firm had access to confidential information related to the adverse party. Id. at 367. The Court noted that the file had been kept in a place where other lawyers in the firm had access to it and that lawyers in the firm would sometimes discuss matters with one another. Id. at 366. Under the circumstances, the Court held that the lawyer was disqualified because he likely had access to confidential information of the now adverse party.

The situation appears to be different in the present circumstance. The representation of the Maternal Grandfather took place seven years ago, in 1991. The representation appears to have been relatively short, and concluded without any legal action being commenced. The file related to the matter was transferred to storage sometime thereafter. The file in the matter was off-site at the time Lawyer B joined the Firm. Prior to undertaking the representation of the Paternal Grandparents, whatever file that existed related to the Maternal Grandfather had been destroyed by fire. After the file had been destroyed by fire and Lawyer A had left the Firm, the Paternal Grandparents retained Lawyer B to represent them. Under these circumstances, it seems highly unlikely that Lawyer B or the Firm generally had access to material, confidential

information protected by Rule 1.6. It should be noted, however, that Lawyer B and the Firm should satisfy themselves that they do not possess or have access to any material information protected by Rule 1.6. In doing so, the Firm should review the matter with its paralegals and other staff that may have had access to material information.

CONCLUSION

Based upon the facts presented here, so long as the Firm or Lawyer B does not possess or have access to material information protected by Rule 1.6, the requesting attorney and firm should not be precluded from continuing to represent the Paternal Grandparents in the referenced matter. It should be noted that the Committee has no authority to rule on an issue of disqualification of a firm in litigation, which is entirely in the province of the courts.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules of 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 George A. Koeck and unanimously approved by the Ethics Committee on March 29, 1999.


Alice R. Senechal
Chairperson

February 22, 1999

Sandi Tabor
State Bar Association
State of North Dakota
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FEB 23 1999

Re: Request for Ethics Opinion

Dear Ms. Tabor:

I am writing to request that the Ethics Committee of the State Bar Association of North Dakota issue an opinion as to whether a disqualifying conflict of interest exists under the following facts:

1. In 1991, a divorce judgment was entered between Husband and Wife in which Husband was awarded custody of the parties' minor child. The Law Firm represented neither party.
2. In 1991, but subsequent to entry of the judgment, Wife's father (hereafter "Maternal Grandfather") consulted with Lawyer A, then a member of the Law Firm, to inquire about whether the judgment could be appealed, challenged, or otherwise reversed. During the course of the consultation, Lawyer A met with Wife on one occasion. Apparently, Lawyer A concluded that he could be of no further assistance to the Maternal Grandfather. No legal action was taken. Legal fees of \$218.75 were billed (a copy of the statement is enclosed).
3. Sometime between 1991 and 1996, whatever file pertaining to consultation with Maternal Grandfather which may have existed was transferred into storage at a location other than the building occupied by the Law Firm.
4. In 1996, Lawyer B joined the Law Firm. At that time, Lawyer A was still a member of the Law Firm.
5. In 1997, all files stored "off-site", including whatever file may have been generated with respect to the Maternal Grandfather, were burned up in a fire resulting from a natural disaster.
6. Effective October 1, 1998, Lawyer A left the Law Firm.

7. Thereafter, Lawyer B was retained by Husband's parents (hereafter "Paternal Grandparents") to represent them in a case involving custody of the child who was the subject of the 1991 custody order. The Law Firm's conflict checking system indicated that the Law Firm had previously represented the Maternal Grandfather but suggested that the representation related to an entirely different matter. While the Maternal Grandparents are not parties to the action, they are aligned with a party who is adverse to the Paternal Grandparents.
8. During the pendency of the post-judgment litigation, counsel for the Maternal Grandfather informed Lawyer B of the potential conflict of interest and requested that he withdraw.

To summarize, a former member of the Law Firm consulted with the Maternal Grandfather pertaining to the subject matter of the pending litigation. Lawyer B was not a member of the Law Firm at the time and, indeed, Lawyer A had left the law firm before Lawyer B was contacted by the Paternal Grandparents. Moreover, any file materials that may have been generated as a result of the 1991 consultation had been destroyed prior to the original contact by the Paternal Parents in 1998.

We have reviewed the North Dakota Rules of Professional Conduct, particularly Rule 1.9, (pertaining to conflicts of interest with former clients) and Rule 1.10 (relating to imputed disqualification of a law firm). We have also considered prior opinions issued by the Ethics Committee including Opinion No. 94-03 (conflicts issue) and Opinion No. 95-12 (pertaining to imputed disqualification).

We have concluded that the matters are substantially related and that the Maternal Grandparents' interests are materially adverse to the Paternal Grandparents' interests. However, lack of any prior "material information" available to the Law Firm and Lawyer B suggest that there is not a disqualifying conflict under the circumstances of this matter. Thus, we are left with the question of whether the departure of Lawyer A from the Law Firm, along with the prior destruction of whatever file materials may have previously existed, still requires the Law Firm to withdraw.

Thank you for the Committee's consideration. Finally, I should point out that, as a member of the Ethics Committee, I do not expect to have any further participation in the Committee's deliberation except to provide a factual background if requested.

Respectfully,

A large, irregular black redaction mark covering the signature area of the letter.

cc: Alice R. Senechal