

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 99-04
December 14, 1999**

The Ethics Committee has received a request for an opinion from an attorney on the question of whether that attorney is disqualified from representing a plaintiff in a medical malpractice action against a doctor who was named as a shareholder in a corporation previously formed by another member of the requesting attorney's law firm.

FACTS

The attorney requesting the opinion commenced a medical malpractice case against a doctor. Some time before commencing that litigation another attorney in the same firm was engaged by another individual to form a corporation, the primary purpose for which was the lease of a particular piece of medical equipment. The defendant in the medical malpractice action was named as a shareholder in the documents forming the corporation; but no one in or at the law firm ever met with, spoke to, or otherwise received any information from the doctor either directly or indirectly. The corporate documents were filed with the Secretary of State's office and a certificate of incorporation was issued several months before the medical malpractice litigation was commenced.

The attorney forming the corporation has expressed his view that his professional engagement ended upon the filing of the aforementioned documents. He also indicated that he was advised shortly thereafter that the purpose for the incorporation had not come to fruition and that the corporation would not likely be conducting any future business. He indicated still further that his charges for the work done in its formation were not submitted to the corporation and that he never considered the doctor to be his client.

A little more than a month before the medical malpractice action was commenced the attorney forming the corporation was contacted by the individual who had initially requested his assistance in forming the corporation asking that the attorney assist in accomplishing the substitution of another person in his place as an officer of that corporation because of a conflict of interest issue. Upon learning of the commencement of the medical malpractice action on the date thereof, the attorney forming the corporation recommended to that person that it would be best for them to find another attorney because of the fact of that medical malpractice action. The materials do not indicate that any steps were undertaken by that attorney in the interim period.

Roughly nine months after the medical malpractice action was

commenced, the defendant doctor asserted the existence of a conflict and indicated that he will likely ask that the law firm of the attorney requesting the opinion be disqualified from representing the plaintiff in that action.

DISCUSSION

The primary question appears to be that of whether an attorney client relationship was created between the law firm of the attorney requesting the opinion and the doctor by virtue of the fact that he was named as a shareholder in the corporation formed with the assistance of another attorney in the law firm.

If so, additional questions would include: whether that relationship continues or has been renewed; whether that matter is the same matter or substantially related to the present matter such that representation of the plaintiff in the medical malpractice against the doctor may be prohibited; and whether safeguards must be taken to avoid the disclosure or use of confidential information. Rules which govern, if applicable, include Rule 1.9, Rule 1.10 and Rule 1.13, N.D.R. Prof. Conduct.

Rule 1.9 provides:

"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 1.10 concerning imputed disqualification provides, in relevant part, that :

"(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."

Rule 1.13 provides as follows:

"(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer reasonably believes that the organization's interests are or are likely to become adverse to those of the constituents with whom the lawyer is dealing.

(c) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate constituent of the organization other than the individual who is to be represented."

In SBAND Ethics Committee Opinion No 97-02(April 29, 1997) the Committee addressed the issue of whether an attorney representing a closely held corporation had an attorney client relationship with its husband and wife shareholders which would

preclude representation by another member of the firm of one of them in a divorce action. The conclusion of the Committee in that Opinion was that when it came to closely held corporations an attorney representing the corporation may also be considered to have an attorney client relationship with the shareholders as well; but that such would have to be determined on a case by case basis. One factor that was recited by that Opinion as important in that type of "case by case" evaluation was whether there could be a reasonable belief that the attorney was representing the shareholder. The facts here don't support such a belief.

The facts are further distinguishable in that one of the attorneys in that instance was representing an existing corporation. In this instance it does not appear that any attorney client relationship was ever created between a member of the law firm and the corporation formed, but that the other member of the law firm represented the individual which perhaps should be denominated as one of the incorporators.

Even if the attorney involved in the incorporation did represent the corporation, it does not necessarily follow from Rule 1.13 N.D.R. Prof. Conduct that an attorney representing a corporation also represents its shareholders or officers. That Rule contemplates that, while such may be permissible, it is

permissible only when the conditions set forth in Rule 1.7, N.D.R. Prof. Conduct can be satisfied. Since individual incorporators or prospective shareholders could very likely have differing interests, the rule provides no presumption of such a relationship in the absence of facts thereof. No such facts appear here.

Furthermore, it is clear that the medical malpractice action is not "the same matter" as the incorporation or "substantially related" thereto. Therefore, even if an attorney client relationship had been established at the time of the incorporation, such would not preclude representation of the plaintiff in the medical malpractice action by the attorney requesting the opinion unless the Committee concludes that such representation had been renewed by the recent request for assistance in the substitution of corporate officers. The facts available do not support that conclusion.

Another of this Committee's opinions that bears consideration is SBAND Ethics Committee Opinion No. 94-03(March 24, 1994), which addresses the possibility that an attorney client relationship may be created under principles of agency or fiduciary relationship or be "derivative" of some other representation.

While the facts available here do not absolutely foreclose

the possibility that the incorporating client who saw the other attorney was acting as an agent for the doctor or that some sort of derivative representation was created, the known facts do not support such a conclusion.

Based upon the facts available, it is the conclusion of the Committee that no attorney client relationship was created between the law firm of the attorney requesting the opinion and the doctor by virtue of the fact that he was to be a shareholder in the corporation formed with the assistance of another attorney in the law firm or the fact that the attorney forming the corporation was asked, but declined, to assist in substituting one corporate officer for another. Therefore, there is no need to decide whether any safeguards must be taken to avoid the disclosure or use of confidential information.

CONCLUSION

It is the opinion of the Committee that the attorney requesting the opinion is not disqualified from representing the plaintiff in the medical malpractice action and that it is not a violation of the North Dakota Rules of Professional Conduct for him to do so.

This opinion is provided pursuant to Rule 1.2(B) of the 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 Dann Greenwood and was approved by a unanimous vote of the Committee on December 14, 1999.

Mark Hansen, Chair