State Bar Association of North Dakota
Ethics Committee
Opinion Number 02-04

December 16, 2002

The Ethics Committee received a request dated September 17, 2002, for an opinion regarding a potential conflict of interest.

FACTS

In 1997, Attorney A began doing legal work for Company One, Inc. At the time, Fred and Wilma One owned, operated, and managed Company One, Inc. In 1999, Fred and Wilma One sold Company One, Inc., to Parent Company Two, Inc. Attorney A provided no services to any of the parties regarding this transaction, and did not do any "corporate work" for Company One, Inc., at any time. The Committee understands that by "corporate work," Attorney A means work related to the organizational structure, bylaws and meetings, etc., of Company One, Inc. It is Attorney A's belief that Parent Company Two, Inc., purchased the stock, assets, and accounts receivable from Fred and Wilma One. Attorney A is not aware of how either Company One, Inc., or Parent Company Two, Inc., is presently managed. Attorney A is aware, however, that Parent Company Two, Inc., continues to operate Company One, Inc., as a wholly-owned subsidiary. Further, Parent Company Two, Inc., continued to employ Fred and Wilma One as "partners" after this transaction.

In June 2002, Parent Company Two, Inc., terminated Fred and Wilma One's employment allegedly "for cause." This termination resulted in the negation of a one-year severance package for Fred and Wilma One. The new manager of Company One, Inc., continued to employ Attorney A's services in one case which had begun prior to June 2002. Attorney A's services were terminated in this matter in August of 2002. At no time has Attorney A provided any services directly to Parent Company Two, Inc.

Fred and Wilma One have retained Attorney A in regard to their termination of employment, and a possible claim against Parent Company Two, Inc. The assistant general counsel for Parent Company Two, Inc., has accused Attorney A of having a conflict of interest in this representation.

Finally, Fred and Wilma One lease property to Company One, Inc. Fred and Wilma One have requested that Attorney A provide services to sue for back rent on this lease, should the same become necessary. Attorney A states that he was not involved in the preparation of the lease, did not do any general corporate work for Company One, Inc., and gained no knowledge from his prior representation of Company One, Inc., that would impact either the termination action or any lease issues.

Attorney A inquires as to whether he has a conflict of interest and is, therefore, precluded from representing Fred and Wilma One. Specifically, Attorney A asks:

1. Is Attorney A prohibited from representing Fred and Wilma One against Parent Company Two, Inc., in regard to Fred and Wilma One's termination of employment, because of Attorney A's prior representation of Company One, Inc.?

2. Is Attorney A prohibited from representing Fred and Wilma One in regard to any breaches of the lease with Company One, Inc., because of Attorney A's prior representation of Company One, Inc.?

APPLICABLE RULES OF PROFESSIONAL CONDUCT

Rule 1.6 -- Confidentiality of Information.

Rule 1.9 -- Conflict of Interest -- Former Client.

Rule 1.13 -- Organization as Client.

DISCUSSION

Rule 1.9 of the North Dakota Rules of Professional Conduct 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.

N.D.R. Prof. Conduct 1.9. In this case, the first step is to determine the identity of the former client. Rule 1.13 of the North Dakota Rules of Professional Conduct provides, in part: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Id. at 1.13(a). The comment to this rule makes it clear that shareholders are constituents of the organizational client. Id. at comment. Absent some other circumstances, however, the fact of corporate affiliation alone will generally not create an attorney-client relationship for purposes of conflict of interest. ABA FORMAL OP. 95-390 (January 25, 1995) (entitled: "Conflicts of Interest in the Corporate Family Context"); ILLINOIS STATE BAR ASS'N ADVISORY OP. 95-15 (May 17, 1996) (entitled: "Conflict of Interest; Corporate Affiliations"); CALIFORNIA STATE BAR STANDING COMM. ON PROFESSIONAL RESPONSIBILITY AND CONDUCT FORMAL OP. 1989-113 (1989) (entitled: "Is It Ethically Permissible for an Attorney to Undertake a Representation Adverse to a Wholly-Owned Subsidiary of an Existing Corporate Client?"). Thus, the mere fact that an attorney represents a wholly-owned subsidiary will not automatically result in a conflict of interest which prohibits the attorney from representing a claimant against the parent company. See Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court, 60 Cal. App. 4th 248, 70 Cal. Rptr. 2d 419 (Cal. Ct. App. 1997).

In this instance, Attorney A has indicated Fred and Wilma One wish to retain his services to pursue a claim against Parent Company Two, Inc., the parent corporation of Company One, Inc., in regard to the termination of employment of Fred and Wilma One. Neither this Committee, nor the North Dakota Supreme Court, has previously provided any guidance on the scope of the client, for purposes of conflict of interest, in the corporate family situation. The American Bar Association has opined that where one corporation is the alter ego of the other, both may be considered clients. In the ABA Formal Opinion 95-390, it states:

> In determining whether there is a sufficient unity of interests to require an attorney to disregard separate corporate entities for conflict purposes, the attorney should evaluate whether corporate formalities are observed, the extent to which each entity has distinct and independent managements and boards of directors, and whether, for legal purposes, one entity could be considered the alter ego of the other . . . .
>
> The fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client.

ABA FORMAL OP. 95-390 (citations omitted). The Committee has not been presented with facts to determine if Parent Company Two, Inc., may be considered a prior client of Attorney A's, for purposes of conflict of interest.

If the facts are such that Parent Company Two, Inc., was not a former client of Attorney A, then Rule 1.9 does not prohibit the representation. If, however, the facts are ultimately such that Parent Company Two, Inc., may be considered a prior client of Attorney A, then the provisions of Rule 1.9 of the North Dakota Rules of Professional Conduct come into play. See N.D.R. Prof. Conduct 1.9. Subsection (a) of Rule 1.9 prevents representation in the "same matter" if the interests of the prior client and the prospective client are materially adverse. Id. at 1.9(a). The present situation does not involve representation in the "same matter," however. Therefore, subsection (a) would not prohibit the representation.

Subsection (b) of Rule 1.9 allows representation in a "substantially related matter" when the interests of the former client and the prospective client are materially adverse only if the client consents after consultation. Id. at 1.9(b). Because the assistant general counsel for Parent Company Two, Inc., has accused Attorney A of having a conflict of interest, it is safe to assume that Parent Company Two, Inc., has withheld, and will continue to withhold, its consent to Attorney A's representation of Fred and Wilma One. It appears to the Committee, however, that upon the facts as presented, Attorney A's prior representation of Company One, Inc., and the employment termination matter are not substantially related. Attorney A did not provide any of the legal services which resulted in the employment agreement or relationship with Fred and Wilma One. Therefore, it appears that Attorney A's representation of Fred and Wilma One in regard to the employment termination dispute is not prohibited by subsection (b) of Rule 1.9.

Attorney A must also comply with the provisions of Rule 1.9(c). Id. at 1.9(c). Subsection (c) of Rule 1.9 prohibits an attorney from using information related to the representation of a former client in the same or a substantially related matter, except as permitted by Rule 1.6 of the North Dakota Rules of Professional Conduct. Id. Because it does not appear that the employment termination dispute is the same or a substantially related matter, it does not appear that Attorney A is prohibited by Rule 1.9(c) of the North Dakota Rules of Professional Conduct from representing Fred and Wilma One in regard to their employment termination dispute with Parent Company Two, Inc.

Attorney A should also be aware that Rule 1.6 of the North Dakota Rules of Professional Conduct's requirement of confidentiality may also come into play. Rule 1.6 of the North Dakota Rules of Professional Conduct prohibits a lawyer from using or revealing, to the disadvantage of the client, information relating to the representation of the client. Id. at 1.6. The prohibition of using or revealing client confidences in Rule 1.6 is not limited to situations involving the same or a substantially related matter, as is the prohibition found in Rule 1.9(c). Further, the duty of confidentiality continues after the client-lawyer relationship has terminated. Id. Thus, if Parent Company Two, Inc., was a "client" of Attorney A's, then the full prohibition regarding the use of confidential information, as found in Rule 1.6, applies. However, Attorney A specifically states that he has "no knowledge from my representation of [Company One, Inc.] that would in any way be beneficial to [Fred and Wilma One] or harmful to [Parent Company Two, Inc.], in representing them in their termination action." Accordingly, Attorney A's representation of Fred and Wilma One would not violate Rule 1.6. On the facts as presented, therefore, the Committee is of the opinion that Attorney A is not prohibited from representing Fred and Wilma One in pursuing a claim against Parent Company Two, Inc., relating to the termination of their employment.

In regard to the representation of Fred and Wilma One against Company One, Inc., on any breaches of the lease, the analysis is much the same, only somewhat simpler. From the facts presented by Attorney A, there is no dispute that Company One, Inc., was a former client of

Attorney A's. The provisions of Rule 1.9 and 1.6 of the North Dakota Rules of Professional Conduct squarely apply. There is no need for analysis of the identity of the client in the corporate family setting on this issue.

Under subsection (a) of Rule 1.9, Attorney A would be prohibited from representing Fred and Wilma One if he had previously represented Company One, Inc., in the same matter. Attorney A states, "I had no involvement in the preparation of these leases." Subsection (a) of Rule 1.9 of the North Dakota Rules of Professional Conduct would not, therefore, prohibit this representation.

Similarly, under subsection (b) of Rule 1.9 of the North Dakota Rules of Professional Conduct, it does not appear Attorney A's representation of Fred and Wilma One against Company One, Inc., on the lease dispute would be substantially related to his prior representation. Therefore, it does not appear that Attorney A's representation of Fred and Wilma One concerning any lease disputes would be prohibited by Rule 1.9(b) of the North Dakota Rules of Professional Conduct.

Finally, it does not appear that Rule 1.9(c) of the North Dakota Rules of Professional Conduct would prohibit the representation either. Because the representation does not relate to either the same or a substantially related matter, Rule 1.9(c) of the North Dakota Rules of Professional Conduct does not come into play.

In regard to the lease dispute, Attorney A is also governed by Rule 1.6 of the North Dakota Rules of Professional Conduct. Again, the analysis is similar to the analysis of the employment termination dispute. There is no question that Company One, Inc., was the client of Attorney A. Thus, Rule 1.6's confidentiality requirements come into play. Attorney A states, however: "Until [Fred and Wilma One] mentioned the possibility of a lawsuit on the lease, I had no knowledge of the lease or information that would be either helpful to [Fred and Wilma One] or harmful to [Company One, Inc.] regarding these lease issues." Under the facts as presented, Attorney A's representation of Fred and Wilma One on the lease disputes would not violate Rule 1.6 of the North Dakota Rules of Professional Conduct.

CONCLUSION

The Committee concludes as follows:

1. On the facts as presented, Attorney A is not prohibited from representing Fred and Wilma One in pursing a claim against Parent Company Two, in regard to Fred and Wilma One's termination of employment; and

2. On the facts as presented, Attorney A is not prohibited from representing Fred and Wilma One in pursuing a claim against Company One, Inc., regarding breaches of the lease between Fred and Wilma One and Company One, Inc.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. N.D.R. Lawyer Discipline 1.2(B). This rule provides:

> 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.

Id.

This opinion was drafted by Steven E. McCullough and was unanimously approved by the Ethics Committee on December 16, 2002.

Mark R. Hanson, Chairman

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