STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 03-01
July 1, 2003

The Ethics Committee has been asked to issue an opinion on whether the requesting attorney has a conflict of interest in bringing a derivative/class action lawsuit against an organization when the requesting attorney's law firm had previously performed some legal work for an affiliate of the organization.

ASSUMED FACTS

A. Present Legal Matter.

This opinion will use the hypothetical corporate names contained in the written request for an Ethics Committee opinion.

North Dakota Cotton Growers' Association ("CGA") is a North Dakota corporation. CGA's promotes the cotton industry. Its membership is made up of two classes of stockholders: voting stockholders and non-voting stockholders. To be a voting stockholder one must actually grow cotton. CGA is operated by a Board of Directors composed of 12 members who have to be voting members. In other words, all of the Board of Directors are cotton growers.

A number of years ago CGA created Lewis and Clark Mutual Insurance Company ("Lewis and Clark"), a mutual insurance company. Over the years, the same Board of Directors of CGA served as the Board of Directors of Lewis and Clark. The By-Laws of Lewis and Clark provided as follows: "[T]he Board of Directors shall consist of 11 persons who shall be a CGA Board member and a current policyholder in good-standing." Thus, CGA and Lewis and Clark had identical Board of Directors with the exception of one.

In recent years, CGA has received a "royalty fee" from Lewis and Clark. Those royalty fee payments have apparently been quite substantial.

Corporate officers and managers of Lewis and Clark protested the royalty payments, without success. Certain corporate officers and managers of Lewis and Clark urged the North Dakota Insurance Commissioner to take over the affairs of Lewis and Clark, based in part on the royalty payments, as well as alleged certain retaliatory actions taken against Lewis and Clark officers and managers who protested such payments. Ultimately, the Insurance Commissioner took administrative control of Lewis and Clark.

The requesting attorney was approached by a policyholder of Lewis and Clark regarding the activity of CGA and the combined Boards of CGA and Lewis and Clark. The policyholder sought advice on possible remedies available to the policyholders of Lewis and Clark. Thereafter, the requesting attorney wrote a letter to Lewis and Clark requesting the present Board Members of Lewis and Clark to bring an action against the following: current and/or former Board Members of Lewis and Clark who authorized the royalty payments; CGA; and, all other parties or entities involved in the royalty payments. Such notice is required under North Dakota law. Phillip-Van Heusen Corp. v. Shark Bros., Inc., 289 N.W.2d 16 (N.D. 1980) (providing demand must be made on corporation for action before suit is instigated).

An attorney representing Lewis and Clark responded to that letter indicating that he believes the requesting attorney and the requesting attorney's firm have a conflict of interest because of a 1999 opinion letter on insurance issues provided by the requesting attorney's law firm to Lewis and Clark. The requesting attorney seeks an opinion from this Committee as to whether a conflict of interest exists.

B. Former Legal Matter.

The requesting attorney's law firm ("Law Firm") has not routinely represented CGA, CGA's subsidiary, or Lewis and Clark. However, in 1999, the Secretary and General Counsel for Lewis and Clark sought an opinion from one of the members of the Law Firm primarily regarding Lewis and Clark's officers and directors ("O&D") liability insurance policy. An attorney with the Law Firm reviewed the O&D liability insurance policy and North Dakota law answered the specific questions raised. The attorney first answered the specific questions by way of a letter dated November 2, 1999. (hereinafter "Coverage Letter"). That attorney also orally presented the opinions set forth in the letter at a meeting of the Board of Directors of Lewis and Clark.

The requesting attorney advises that the Law Firm's attorney who provided the Coverage Letter and attended the Board of Directors meeting has no specific recall of anything being discussed other than the opinions and information set forth in the letter. The Law Firm no longer has a copy of the insurance policy in its file. The requesting attorney assumes that the policy was sent to the Law Firm and then returned. The Law Firm has no notes or memoranda regarding the file and no member of the Law Firm can recall receiving any background facts. The requesting attorney is confident, however, that no conversations took place regarding the royalty payments being made between Lewis and Clark and CGA and that no conversations or facts were provided to the Law Firm about any actual breach of a fiduciary duty.

The issues for which the Law Firm advised Lewis and Clark in 1999 were the following:

1. Whether Lewis and Clark's O&D liability insurance policy covered intentional acts?

2. Whether defamation is an intentional act under North Dakota law?

3. Whether the current O&D liability insurance policy covered criminal acts?

4. Whether breach of a fiduciary obligation under North Dakota law is a criminal act or civil act exposing a director to personal liability? And

5. Whether breach of a fiduciary obligation or criminal acts by an individual Board member is sufficient basis for removal of that Board member?

The Coverage Letter contains no facts or set of hypothetical facts, but rather discusses the pertinent insurance policy provisions and/or North Dakota law that govern the specific questions. The Law Firm's opinion letter, however, does provide that:

> It is opinion that a breach of a fiduciary obligation, in and of itself, does not constitute a criminal act under North Dakota law. . . . With respect to the officers and director of (Lewis and Clark}, we believe that breach of their fiduciary duties to the company would only expose an officer or director to personal civil liability. Based o the above stated definition of "wrongful acts," your current O&D liability policy does generally provide coverage for claims based on a breach of a director's fiduciary duty. However, this general coverage is subject o several specific exclusions, including, but not limited to, claims based on a director "gaining any profit or advantage to which they were not legally entitled," See Section IV(B), and claims based on "fraudulent dishonest" acts, See Section IV(D). A claim for breach of a director's fiduciary duty may be based on one or more of these "excluded" acts, and therefore, the policy would not provide coverage.
>
> It should also be noted that Section IV(K) of the policy specifically excludes coverage for claims brought 'by or at the behest of the Company,' and Section IV (L) specifically excludes claim 'by any security holder of the Company' whether directly or derivatively, unless such claim is brought completely independently and without any assistance from the Company or its directors or officers. Thus, a claim by Lewis and Clark or a derivative action brought by a policyholder against a director for breach of his/her fiduciary duty would not be covered under the policy. Since these are the likely parties to initiate a claim against a director for breach of his/her fiduciary duty, in many situations, your O&D liability policy will not provide coverage to a director against a claim for breach of his/her fiduciary duty.

Accordingly, the Law Firm's Coverage Letter did discuss whether the O&D liability policy provides coverage for lawsuits, including derivative actions, arising from a board member's breach of fiduciary duty.

DISCUSSION

Rule 1.9 of the North Dakota Rules of Professional Conduct primarily covers questions on whether an attorney has a conflict of interest in representing a client involved in litigation which also involves a former client. Rule 1.9 provides as follows:

A lawyer who has formally 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 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 substantially related matter, except as Rule 1.6 would require or permit with respect to a client.

N.D.R.Prof. Conduct 1.9 (2003). Before applying that rule to the presumed facts, the Committee will briefly address whether a "Chinese wall" can be constructed around the attorney who provided the insurance coverage information so as to prevent any conflict of interest from arising.

A. <u>Imputed Disqualification under Rule 1.10.</u>

Attorneys may consider screening another attorney in a law firm from a matter so as to avoid a conflict of interest from arising as a result of the screened attorney's involvement in a prior matter. Such a screening is often called a "Chinese wall."

Rule 1.10 of the North Dakota Rules of Professional Responsibility provides, in relevant part, as follows:

> 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 (which addresses successive government and private employment) or Rule 1.12 (which addresses former judge, arbitrator, adjudicative officer and law clerks).

As explained in the official comment to Rule 1.10:

> The rule of imputed disqualification stated in ¶(a) gives affect to the principle of loyalty to the client as it applies to lawyers who practice in the law firm. Such

> situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligations of loyalty owed by each lawyer with whom the lawyer is associated.

In Heringer v. Haskel, 536 N.W.2d 362 (N.D. 1995) the North Dakota Supreme Court addressed imputed disqualification under Rule 1.10 and whether a "Chinese wall" can be constructed to preclude a disqualified attorney from working on a matter such that his or her partners may still be involved. The Supreme Court explained that a law partner's access to confidential information justifies disqualification of the partner because the partner is imputed with all knowledge in the firm's files, and such access to confidential information is imputed to other attorneys in the firm. Id. at 366. In other words, if the requesting attorney had access to his partner's file containing the insurance coverage opinion given to Lewis and Clark the requesting attorney is imputed with all knowledge in that file even if the attorney did not actually view it. Accordingly, if the requesting attorney's partner is disqualified because of information learned and contained in the file so too is the requesting attorney. The requesting attorney has not suggested that members of his Law Firm do not have access to each other's files. If that assumption is correct, then a "Chinese wall" cannot be constructed around the attorney who provided the Coverage Letter and coverage advise so as to allow the requesting attorney to avoid any conflict of interest arising from the prior representation of Lewis and Clark by the Law Firm.

B. Whether the Requesting Attorney is Representing the Same Client in the Present Matter as in the Previous Matter.

In order for a conflict of interest to exist, the present derivative/class action claim must be against a former client. Paragraphs (a) and (b) of Rule 1.9 describe the prohibition against an attorney representing "another person" in the same or substantially related matter against a former client. Thus, a threshold issue is whether the requesting attorney is representing the same "person" in the present derivative/class action as was represented by the attorney's Law Firm in the previous insurance coverage matter.

1. The requesting attorney is representing Lewis and Clark and one or more of its policyholders in the present matter.

The Ethics Committee has, in deciding whether a requesting attorney has a conflict of interest, reviewed and considered the substantive and procedural law in which the issue arises. See SBAND Op. 00-01 at p. 2. The requesting attorney provided the author of this opinion a copy of a draft complaint. The named plaintiffs in the draft complaint are two policyholders "individually and an behalf of Lewis and Clark and all other policy holders similarly situated." The named Defendants are CGA, another company affiliated with CGA [identified in the draft complaint as a wholly owned subsidiary of CGA), and the board of directors of Lewis and Clark "for relevant time periods in their official capacities as Directors." The draft complaint alleges a derivative action, or in the alternative a class action, for the following claims for relief:

1. Breach of Standard of Conduct (against Individual Board Defendants)
2. Conflict of Interest (against Individual Board Defendants)
3. Unauthorized dividends – violation of NDCC 26.1-12-29 and 30 (against all defendants)
4. Conversion (Against CGA)
5. Unjust Enrichment (against CGA)
6. Unfair Insurance Practices (against Individual Board Members)
7. Consumer Fraud (against Individual Board Members)
8. Exemplary Damages (reserving right to plead punitive damages as allowed under North Dakota law).

Lewis and Clark is not a defendant. Rather, the claims are brought "on behalf of Lewis and Clark" as well as the individual policyholders. It appears from the complaint that Lewis and Clark will be the entity that will recover any money that may be awarded as damages in the derivative/class action. This is confirmed by substantive law on derivative actions.

Section 10-19.1-86 of the North Dakota Century Code discusses derivative actions under the Business Corporation Act and explains that the action is "in the right of" the corporation. In Schumacher v. Schumacher, 469 N.W.2d 793, 798 (N.D. 1991), the North Dakota Supreme Court recognized that shareholders alleging an injury to the corporation may bring an action on behalf of the corporation within the context of a derivative action. The court explained that "as a matter of general corporate law, shareholders alleging injury to the corporation must bring an action on behalf of the corporation within the context of a derivative action." Id. at 798; see also. Ross v. Bernhard, 396 U.S. 531, 535 (1976) (the cause of action in a derivative action belongs to the corporation, not to the individual shareholders).

Similarly, the requesting attorney has advised the Committee, and the draft complaint shows, that in the class action Lewis and Clark will not be the defendant. Rather, the defendant in the class action will be CGA and/or the individual Board of Directors. See N.D.R. Civ.P. 23(a) (2003)

The question then arises as to whether the requesting attorney, in representing Lewis and Clark, will also be representing its Board of Directors. Pursuant to the "entity rule" an attorney who represents an organization, such as a corporation, does not also represent the organization's shareholders or officers. See, e.g., Jess v. Danforth, 169 Wis.2d 229, 485 N.W.2d 63 (1992). For example, N.D.R.Prof. Conduct 1.13 provides that: "[a] lawyer who is employed or retained by an organization represents the organization acting through its duly authorized constituents." In SBAND Ethics Op. 99-04 this Committee recognized the "entity rule" when it explained that an attorney representing a corporation does not also automatically represent the corporation's shareholders or officers and that such dual representation is permissible only if allowed under Rule 1.7 [the general conflict of interest rule].

Therefore, under the facts presented, the requesting attorney will not be representing the Board of Directors of Lewis and Clark in the present derivative/class action. Rather, the requesting attorney is representing the mutual insurance company, Lewis and Clark, itself and one or more of its policy holders.

2. The requesting attorney's law firm was representing Lewis and Clark in the previous matter.

A critical question is whether the requesting attorney's Law Firm was providing legal advice to Lewis and Clark or to its Board of Directors with respect to the prior insurance coverage mater. If the advise was being provided only to Lewis and Clark and not its Board members then the present derivative/class action is not against a former client, i.e., it is not against the board members.

The requesting attorney has advised this Committee that "there are no facts, or evidence in our possession that Lewis and Clark intended anything else but to hire this firm on behalf of the organization." The SBAND Ethics Committee does not act as a factfinder, but rather renders opinions based on the facts presented by the requesting attorney. Therefore, it is assumed that the requesting attorney's rendition of the facts are correct and that the Law Firm was providing advice regarding O&D coverage to Lewis and Clark. Because, as explained above, an attorney who represents an organization does not also represent the organization's shareholders, directors or officers, the Committee concludes that the requesting attorney's Law Firm was only representing Lewis and Clark in the previous insurance coverage matter and not the Board of Directors of Lewis and Clark.

Accordingly, based on the assumed facts, as well as the nature of a derivative action and class action, the Committee concludes that the requesting attorney is representing the same client in the present derivative/class action as his Law Firm was representing in the prior matter, i.e., Lewis Clark was the client in both of those matters. Therefore, no conflict of interest exists under Rule 1.9.

C. Assuming That the Requesting Attorney was Representing the Board of Directors in the Former Matter Does a Conflict of Interest Arise?

The requesting attorney inquires as to whether he has a conflict of interest in representing the clients in the present derivative/class action assuming that his Law Firm represented the Board of Directors in the prior, insurance coverage matter. Under such a hypothetical the requesting attorney has a potential conflict of interest because he will be representing a current client, Lewis and Clark and one or more of its policyholders, in a matter adverse to a former client, a derivative/class action against Lewis and Clark's Board of Directors. Whether an impermissible conflict of interest exists in such scenario generally is a question of fact that ultimately has to be answered by the requesting attorney. The committee, however, will provide the requesting attorney some guidance in how to answer that question.

Paragraph (a) of Rule 1.9 prohibits an attorney from representing another person in the same matter in which that person's interests are materially adverse to the interests of a former client. Based upon the assumed facts, the present derivative/class action and the prior insurance coverage matter are not "the same matter." There is no indication in the information received from the requesting attorney or in the Coverage Letter itself that the prior legal work by the requesting attorney's Law Firm dealt with or addressed the alleged improper conduct by the Board of Directors that will be the subject matter of the present derivative/class action. Therefore, Paragraph (a) of Rule 1.9 does not disqualify the requesting attorney.

Paragraph (b) of Rule 1.9 applies to situations in which the attorney is representing a claim in a "substantially related" matter in which the present client's interests are materially adverse to the interests of a former client. Under such a situation the attorney can represent the current client only if the former client consents.

Neither Rule 1.9 nor its comments provide a definition or detail discussion of what is meant by a "substantially related" matter. (See SBAND Ethics OP. 00-01, at P3). The analysis is usually determined on a case-by-case basis.

In Continental Resources, Inc. v. Schmalenberger, 203 N.D. 26, 656 N.W.2d 730, the North Dakota Supreme Court addressed whether an attorney must be disqualified due to a conflict of interest arising from the attorney's representing a current client in a dispute against a former client. The Supreme Court explained that a potential conflict of interest between current and former clients involves the "delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice." Id. at ¶ 11 (citing Brown v. Eighth Judicial District Court 14 P. 3rd 1266, 1269-70 (NEV. 2000)). The Supreme Court also explained that any "doubt" with regard to whether there is a conflict of interest in representing a present client in an action against a former client "must be resolved in favor of disqualification." Id. at ¶ 14.

The Supreme Court's opinion in Schmalenberger helps to define what constitutes a "substantially related matter" under Rule 1.9(b). The Supreme Court explained that a critical question is the extent to which the attorney acquired confidential information in the course of the representation of the former client. If the attorney acquired confidential information that may be used in advocating the current client's claim against the former client then the current claim and the former matter are "substantially related" under Rule 1.9(b). DI. At ¶ 20. The Supreme Court in Schmalenberger also confirmed the obvious - that the interest of a current and former client are "materially adverse" if they are on opposites of litigation. Id. Thus, the question is whether the requesting attorney's acquiring information regarding possible insurance coverage under a D&O liability policy for derivative claims arising out of a director's breach of a fiduciary duty is "confidential information and may be useful in advocating" the present derivative/class action claims.

Confidential information under Rule 1.6 is "information relating to the representation of the client." N.D.R. Prof. Conduct 1.6(2003). A lawyer shall not reveal such information unless required or permitted to so by Rule 1.6. Id. The Committee does not believe that the insurance policy or its contents constitutes "confidential information." Liability insurance is readily discoverable in litigation. N.D.R.Civ.P. 26 (2003). Thus, the liability policy can be disclosed to comply with the law or court order. N.D.R. Prof. Conduct 1.6(g) (2003). Moreover, based on the information received form the requesting attorney, the Committee assumes that no facts regarding improper conduct by any Board of Director was received by the requesting attorney's Law Firm as part of the prior insurance coverage matter. Rather, the requesting attorney's Law Firm only answered some rather generic questions regarding coverage. Therefore, the only "possible confidential information" the law firm could have obtained during the insurance coverage matter is the portions of the policy and/or North Dakota law that apply to a derivative/class action alleging breach of fiduciary duty by a board of director. That is the "information relating to the representation of the former client" obtained by the Law Firm in the prior insurance coverage matter.

As explained in Schmalenberger if the requesting attorney's knowledge regarding the D&O policy may be used to help fashion claims against the directors of Lewis and Clark such that there was insurance coverage, then the present derivative/class action and the prior insurance coverage issue are "substantially related" under Rule 1.9(b) and the requesting attorney has an impermissible conflict of interest unless the Board of Directors consent to his representing the present clients. If, however, knowledge of the D&O liability coverage obtained by the requesting attorney as a result of the prior insurance coverage dispute is not useful in advocating the pending derivative/class action claim, for example because the D&O policy reviewed by the requesting attorneys law firm is outdated and/or no longer in affect, then the pending and prior matters are not "substantially related" and no conflict of interest exists under Rule 1.9(b).

The Supreme Court's discussion of Rule 1.9 in Schmalenberger did not end with application of the rule itself. Rather, the Supreme Court explained that:

> Although the North Dakota Rules of Professional Conduct do not use the language, the "appearance of impropriety" standard has not been wholly abandoned in spirit. Concern "about the public's perception of the legal profession, particularly as it relates to confidentiality of client information, is a relevant consideration when we examine and interpret the rules."
>
> We view a possible appearance of impropriety from the perspective of a lay person: because judges have a privileged understanding of the legal system, they may fail to find that an appearance of impropriety were one would be found by a lay person. The existence of impropriety should therefore should be determined from the perspective of a reasonable lay person.
>
> We believe a lay person "would view a law firm switching sides in a middle of a dispute to by highly objectionable." In fact, "[t]he idea of a lawyer changing sides is at the heart of the coalition" in Rule 1.9. Thus, to "preserve public confidence in the legal profession, and to insure the confidentiality and integrity of client information," lawyers and law firms "must not be allowed to "switch sides" when they have access to the former client's file."

Schmalenberger, 2003 ND at ¶ 22, 23 and 24 (Citing Heringer at 367).

The "appearance of impropriety test", to the extent it is a "new test" in addition to the specific dictates of Rule 1.9(b), is also a factual question. As with the "substantially related" question under Rule 1.9 (b), the "appearance of impropriety" analysis in the question before the

Committee hinges on whether the requesting attorney's Law Firm obtained confidential information in the insurance coverage dispute that may be used against the Board of Directors in the present derivative/class action. If so, a lay person likely would view the requesting attorney's representation of Lewis and Clark and one or more of its policy holders in the pending matter as "switching sides."

Finally, even if no conflict of interest exists, Rule 1.6(c) precludes the requesting attorney from disclosing any "confidential information" that may have been obtained during the insurance coverage matter except as allowed under Rule 1.6. Therefore, even if a conflict of interest involving a former client does not arise under Rule 1.9, Rule 1.6 continues to protect the former clients right to have his or her confidential information kept confidential.

D. Is The Requesting Attorney Disqualified By Virtue Of His Law Firm's Hiring A Former Lawyer With The North Dakota Department Of Insurance?

The requesting attorney advises the Committee that his law firm recently hired an associate attorney who was employed by the North Dakota Department of Insurance prior to joining the requesting attorney's Law Firm. While so employed the associate attorney was involved in the Insurance Department's administrative control of Lewis and Clark. The Committee assumes that within that role the associate attorney would have obtained confidential information regarding CGL, Lewis and Clark and the conduct of their directors. Even so, the Committee concludes that the associate attorney's knowledge of such confidential information does not disqualify the requesting attorney from representing Lewis and Clark and individual policyholders in the present derivative/class action assuming the associate attorney is properly screened from the present matter.

As stated above, the North Dakota Supreme Court in Haskel held that an attorney cannot avoid disqualification due to a conflict of interest by "screening" (placing a "Chinese wall" around) the lawyer's partner who has knowledge of the confidential information unless it is shown that the attorney did not have access to his partner's files. The difficulty in applying the "Chinese wall doctrine" does not, however, apply to instances where the partner's confidential information was obtained during previous government employment. Under that situation, Rule 1.11, rather then Rule 1.0 controls.

Rule 1.11 provides, in relevant part, as follows:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No Lawyer in a firm with which the lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> > (1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) Written notice is promptly given to the appropriate government agency.
>
> (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part o the fee therefrom.

N.D.R. Prof. Conduct 1.11 (2003). It appears that the Law Firm's associate attorney: (a) participated personally and substantially as a public employee in connection with the royalty payments from Lewis and Clark to CGA; and, (b) obtained confidential government information regarding that matter. Paragraphs (a) and (b) therefore likely apply. Under both paragraphs (a) and (b) the requesting attorney can still represent Lewis and Clark and one or more of the policy holders if the associate attorney is screened and the associate is apportioned no part of the fee from that representation. The prohibition against an apportionment of the fee does not prohibit the associate from receiving a salary or bonus established by prior independent agreement. See Comment to Rule 1.11 Rule 1.11 prohibits directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified. Id.

Finally, because paragraph (a) may apply the Law Firm should give written notice to the North Dakota Insurance Department of the requesting attorney's involvement in the present derivative/class action ad that the associate attorney will be screened in compliance with Rule 1.11. The requesting attorney has provided the author of this opinion a copy of a February 25, 2003 letter so advising the North Dakota Insurance Commissioner. This Committee was not asked to provide an opinion on whether that letter complies with Rule 1.11 and therefore does not do so in this Formal Opinion.

CONCLUSION

Based upon the assumed facts, the requesting attorney is representing the same client in the present derivative/class action as his law firm represented in the former insurance coverage matter. Therefore, no conflict of interest exists.

If, however, an "adverse party" in the present derivative/class action is a former client of the Law Firm's then the requesting attorney must make a determination as to whether the Law Firm acquired "confidential information" in the prior matter that may be useful in advocating the claims of the present clients against the former client. If so, the attorney has a conflict of interest under Rule 1.9(b) and must withdraw from representing the current clients unless the former client consents.

Finally, the requesting attorney's Law Firm's hiring of a former attorney of the North Dakota Insurance Department who worked on the Insurance Commissioner's administrative control of the entity in question does not preclude the requesting attorney from representing the current clients in the derivative/class action so long as the former Insurance Department attorney is properly screened from the case as required under Rule 1.11.

This Opinion is provided pursuant to a 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule states that:

> 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 a subject of the opinion or advisory letter.

This Opinion was drafted by Mark Hanson and was approved by a vote of _______ by the committee on July _____, 2003.

____

Mark R. Hanson, Chair

F:\users\mrh\ethics\opinion re CGA