

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 05-01

February 2, 2005

The Ethics Committee was asked whether the requesting law firm may represent Farmer X in a personal injury action against Corporation. Law Firm performed various legal services for Corporation over the years from 1996 through 2002, but not since then. Corporation is also a borrower from Bank which is also a client of Law Firm.

Background Provided by Requestor

Requestor, Law Firm, has three general partners and maintains offices in two towns. Partner A lives and practices in one community, while Partner B and Partner C live and practice in the other.

As a result of a vehicle collision Partner C has been asked to represent Farmer X in a personal injury action against Corporation. Farmer X is a longstanding client of Partner C. The liability of Corporation is not at issue. Law Firm expects damages to exceed Corporation's insurance policy limits if the personal injury action goes to trial. Corporation's assets would be pursued to satisfy a judgment.

Between 1992 and 2002, Partner A, a lawyer who does not participate in litigation, performed legal services for Corporation and its two majority shareholders. These services included preparing gravel leases, deeds for the sale and purchase of real property and a buy sell agreement. Partner A obtained no financial information at the time and has no financial information in his files. Partner A has not performed legal services for Corporation or its majority shareholders since 2002. However, Law Firm did not formally terminate its client relationship with Corporation and assumes without the Law Firm's involvement in the personal injury action, Corporation "might have" again contacted Partner A in the future to again perform transactional services. Partner A will not personally participate in either the prosecution or defense of the personal injury action and has so advised Corporation in writing.

Partner A is also a shareholder, director, and legal counsel for a local Bank. Corporation is a borrower from Bank and has pledged its assets as collateral to secure repayment of the Bank loans.¹ Partner A has advised Bank that he will excuse himself from any Bank board of director discussions concerning Corporation or its shareholders. If the personal injury action is not settled, Law Firm intends to hire other counsel to handle the execution of the judgment.

Question Presented

Law Firm asks whether it may represent Farmer X in his personal injury action against Corporation.

¹ Since Law Firm has no financial information of Corporation in its files, it is not clear how Law Firm obtained this information about Corporation.

Discussion

The situation which has been presented requires an analysis of Law Firm's responsibilities to Farmer X, Bank, and Corporation.

A client is a client of a law firm as well as the individual lawyer who performs legal services for the client. Conflicts of interest which preclude representation of a client or potential client by an individual lawyer within a law firm are imputed to all lawyers in the firm under Rule 1.10(a) N.D.R.Prof.Conduct which states: "Lawyers associated in a firm may not knowingly represent a client when any one of them practicing along would be prohibited from doing so by these rules, except as provided by Rule 1.11 or Rule 1.12." The exceptions do not apply here. If the interests of Farmer X, Corporation or Bank are actually adverse so that Partner A is precluded from representing Farmer X in his personal injury action, Partner C is also precluded from representing Farmer X in that action. It is immaterial that Partner A works from a different office than does Partner C, that Partner A will not provide legal services to Farmer X or to Bank regarding Corporation and its shareholders, or that Law Firm would screen Partner A to impede the flow of information that he has as counsel to and a director of Bank.

The issue as it pertains to Corporation is whether Corporation is a former client of Law Firm. In the absence of a formal conclusion to a client relationship, there isn't a precise time period after which a client becomes a "former" client. A determination of whether a client for which no legal services have been recently performed has become a former client is highly fact dependent and rests, in part, on the Corporation's perception about its status as a client of Law Firm and the reasonableness of that perception. The question is more difficult and closer because Law Firm has represented Corporation on several transactional matters over a period of many years and because Corporation likely would have returned to Law Firm for future legal services.

When a law firm represents a client over several years on various matters, the client may assume the attorney client relationship continues unless the lawyer actually advises the client of the lawyer's withdrawal. Rule 1.3 N.D.R. Prof. Conduct, Comment. However, here, at the latest, Law Firm's services to Corporation were concluded in 2002. Additionally, it seems that Corporation has neither communicated with nor retained any lawyer in Law Firm on any matter since then. In the face of a total absence of communication from Corporation to Law Firm for more than two years, it would be unreasonable for Corporation to consider itself to be a current client of Law Firm or for Law Firm to be required to treat Corporation as a current client. See ABA/BNA Lawyers' Manual On Professional Conduct at 51:217, citing Rhode Island Ethics Op. 2001-08 (2001).

The subject of undertaking representation on a matter which is adverse to the interests of a former client is covered by Rules 1.9(a) and 1.9(b) N.D.R.Prof.Conduct which provide:

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.

Because Law Firm's representation of Farmer X in a personal injury action against Corporation, a former client, is neither the same nor substantially related to the matters upon which Law Firm previously represented Corporation, the proscriptions of Rule 1.9 do not apply to bar Law Firm from bringing the personal injury law suit against Corporation. SBAND Opinion 97-04.

Law Firm's inquiry also requires a determination whether the interests of Farmer X and Bank actually conflict or whether they are merely potentially adverse. From the facts presented, the Committee concludes the interests of Farmer X and Bank are potentially adverse. For example, if Farmer X obtains a judgment against Corporation that exceeds any available insurance limits Farmer X, along with Bank, will become a creditor of Corporation. In that event the Law Firm may be representing two clients, Bank and Farmer X, who are seeking to collect money from Corporation, resulting in a potential conflict of interest. If that event occurs, Law Firm will have to again determine if an impermissible conflict exists for Law Firm to represent either Farmer X or Bank with regard to any collection proceedings. Accordingly, because Law Firm's representation of Farmer X in the bodily injury case against Corporation might be adversely affected by the firm's representation of the Bank, for Law Firm to undertake the representation of Farmer X in the personal injury action, Law Firm must first comply with Rule 1.7 (c) N.D.R. Prof. Conduct. Rule 1.7(c) provides as follows:

(c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Subsection (c) allows a lawyer to consider and decide for herself whether she reasonably believes representation of a client will be adversely affected by the firm's responsibilities to another client. If the law firm reasonably believes that its representation of multiple clients will not compromise its representation of any of them, the law firm must, nonetheless, proceed to obtain the involved clients' consent to the multiple representations. In the instant situation, Rule 1.7(c) requires Law Firm to consider and decide that neither its representation of Farmer X nor that of Bank will be adversely affected by Law Firm's prosecution of the personal injury action against Corporation, and then to explain to Farmer X and to Bank, the implications, advantages and risks involved and, to obtain from both, written consents to Law Firm's representation of Farmer X in the personal injury action. Special care should be taken to ensure the clients' consent is fully informed in light of the complexity of Law Firm's relationships with the clients or clients' potentially adverse interests. If either Farmer X or

Bank declines to give its written consent to the dual representations, then Law Firm may not undertake representation of Farmer X in the personal injury action. Furthermore, if an actual conflict of interest develops between Farmer X and Bank, Law Firm will have to withdraw from its representations of both clients for matters in which their interests are adverse because even with client consent Rule 1.7 does not allow a law firm to represent clients with actually adverse interests.

Law Firm has also inquired about Rule 1.9 N.D.R. Prof. Conduct restrictions on the use of a former client's information. Rule 1.9 is not implicated by the facts as Law Firm has presented them. This is because Farmer X's personal injury lawsuit is not related or substantially related to any matter upon which Law Firm represented Corporation. However, Law Firm is reminded that Rule 1.6 N.D.R. Prof. Conduct protects a former client as well as current clients; while Law Firm may not be prohibited from using Corporation's information under Rule 1.9, Law Firm is prohibited from revealing Corporation's confidential information without Corporation's waiver of Rule 1.6.

Law Firm also inquires about whether it should be screening Partner A to avoid imputation of information from Bank to Law Firm. Law Firm is deemed to have and know all confidential Bank information which Partner A has and knows in his role as counsel to Bank. This information is covered by Rule 1.6 N.D.R. Prof. Conduct proscriptions against disclosure and may not be used to the disadvantage of Bank without Bank's consent. If Partner A is receiving information from Bank in his separate role as a shareholder and director of Bank, that information may not be disclosed other than as provided under state laws relating to the privacy of bank customer information. N.D.C.C. Chapter 6-08.1. Issues which arise from Partner A's involvement as counsel, director and shareholder to Bank and resolutions of those issues should be handled within the context of the informed consent which Law Firm must obtain from Bank under Rule 1.7(c) N.D.R. Prof. Conduct.

Conclusion

Regarding the obligations of Law Firm to Corporation, Farmer X and Bank the Committee concludes:

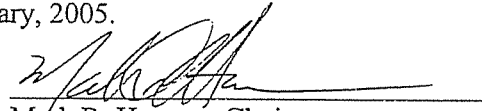
1. Because of the amount of time that has passed since Law Firm has performed services for Corporation, Law Firm may reasonably consider Corporation to be a former client. A law firm may represent a client in a new matter whose interests are adverse to a former client so long as the new matter is not related or substantially related to a matter upon which Law Firm represented the former client.
2. Because the interests of Farmer X and Bank are potentially adverse, Law Firm must comply with Rule 1.7(c) before it may undertake to represent Farmer X in a personal injury action against Corporation. Rule 1.7 (c) requires a law firm determine for itself that its representation of multiple clients will not adversely affect its representation of any of them and then to obtain written informed consent from each affected client before undertaking representation in a matter which presents a potential conflict of interest.

3. Rule 1.9 does not prohibit Law Firm from representing Farmer X in the bodily injury lawsuit against Corporation because Law Firm's representation of Farmer X is not related or substantially related to Law Firm's past representations of Corporation. Nonetheless, Corporation's confidential information is protected from disclosure under Rule 1.6.

This opinion is provided pursuant to rule 1.2(b), North Dakota Rules for Lawyer Discipline, which provides:

A lawyer who acts in 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 N.D.R.Prof. Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was prepared by Marilyn Foss and approved by a unanimous vote of the Ethics Committee on the 2nd day of February, 2005.


Mark R. Hanson, Chair