

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 05-04

August 2, 2005

The attorney requesting the opinion asks for this committee to issue an advisory opinion addressing the question of whether, based upon the claim that the opposing party was a former client, there is a conflict of interest which requires that he withdraw as attorney for a current client in a domestic relations matter.

FACTS

Another attorney in the requesting attorney's firm, Attorney A, was requested by phone to advise John Doe, a physician, with regard to a proposed employment contract between John Doe and a medical facility. There were no face to face meetings by Attorney A with any person on that matter; but the billing indicates a single phone call from the John Doe's wife, Jane Doe. The request does not indicate anything about the substance of that phone call.

Jane Doe thereafter filed for divorce; but neither party was represented by any attorney in the requesting attorney's firm. Subsequent to commencement of the divorce action, Attorney A was contacted by phone by John Doe concerning a traffic citation received by his minor child. Although there were no face to face meetings with any person by Attorney A and no billing, Attorney A did give John Doe advice by letter and did take some action resulting in a reduced charge and fine. There was no indication that Attorney A had any contact with Jane Doe on that matter.

Sometime after that matter was concluded John Doe and Jane Doe were divorced in accordance with their written stipulation.

After the divorce was final, John Doe contacted the requesting attorney and asked that he

represent John Doe as concerns the aforementioned employment contract and the requesting attorney has since represented John Doe on that and various other matters.

More recently, the requesting attorney made an appearance on John Doe's behalf in a post judgment procedure concerning spousal support in the divorce action; and the attorney for Jane Doe has suggested that the requesting attorney has a conflict of interest based upon Jane Doe's assertion that Attorney A represented both John Doe and Jane Doe concerning the aforementioned employment contract, asserting that "the terms and longevity of that contract were for the financial well being of this entire family" and that the contract would "most certainly be a focal point of our upcoming [spousal support] dispute." The requesting attorney does not reference any specific facts asserted by Jane Doe in support of her claim that an attorney client relationship was established between herself and Attorney A.

APPLICABLE RULES

Rule 1.7 of the North Dakota Rules of Professional Conduct addresses conflicts of interest generally.

Rule 1.9 of the North Dakota Rules of Professional Conduct specifically addresses the potential of conflicts of interest arising from prior representations. It states:

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.

DISCUSSION

Because the claimed representation of Jane Doe by Attorney A dealt with the negotiation of the employment contract, and because Jane Doe asserts that such employment contract will be the “focus of our upcoming [spousal support] dispute”, whether the matters are “substantially related” is not an issue. Instead, the sole issue is one of whether there was, in fact, prior representation of Jane Doe by Attorney A was with regard thereto.

In the event Jane Doe’s claimed existence of an attorney client relationship as concerns the employment contract is accurate, Jane Doe would be a former client; and, pursuant to Rule 1.9(b) of the North Dakota Rules of Professional Conduct, the requesting attorney would be precluded from representing John Doe in the pending matter.

It is not clear what is the basis for that assertion. Possible bases for an alleged conflict of interest include: (1) an express agreement for representation; (2) a reasonable expectation of representation; or (3) some representation implied from familial circumstances.

Express agreement. The committee has not been provided with any facts which indicate that there was any express agreement between Attorney A and Jane Doe that an attorney client relationship was created as concerns the employment contract.

Reasonable expectation of representation. Apart from Jane Doe’s assertion that “the terms and longevity of that contract were for the financial well being of this entire family”, the committee has not been provided with any facts which indicate, or from which it might determine, that an attorney client relationship was created as concerns the employment contract based upon reasonable expectations of Jane Doe or which could be implied from the conduct of the parties.

However, the North Dakota Supreme Court has several times held that an attorney-client

relationship may be implied from the conduct of the parties and/or one's reasonable expectations. See, for instance, In re Disciplinary Action Against McKechnie, 2003 ND 22 ¶19, 656 N.W.2d 661, 667 wherein it is provided that:

[¶ 19] Traditionally, it has been said that the lawyer-client relationship begins when the client acknowledges the lawyer's capacity to act in his behalf and the lawyer agrees to act for the benefit and under the control of the client." *ABA/BNA Lawyers' Manual On Professional Conduct*, at 31:101 (2002) ("*ABA/BNA Manual* "). The existence of an attorney-client relationship is a fact question, necessarily dependent on the particular circumstances of the case. *Moen v. Thomas*, 2001 ND 110, ¶ 13, 628 N.W.2d 325. An attorney-client relationship may be implied from the conduct of the parties. *Stormon v. Weiss*, 65 N.W.2d 475, 520 (N.D.1954). "[I]t may arise when a putative client reasonably believes that a particular lawyer is representing him and the lawyer does not disabuse the individual of this belief." *ABA/BNA Manual*, at 31:101. See also *Moen*, at ¶ 15. The existence of the relationship does not depend on an express contract or the payment of fees. *Moen*, at ¶ 13.

See also, In re Disciplinary Action against Giese, 2003 ND 82 ¶17, 662 N.W.2d 250; Moen v. Thomas, 2001 ND 110, ¶13, 628 N.W.2d 325; and Stormon v. Weiss, 65 N.W.2d 475 (N.D.1954).

Furthermore, in the context of Jane Doe's assertion that "the terms and longevity of that contract were for the financial well being of this entire family", it is important to note that the North Dakota Supreme Court held in the case of In re Application for Disciplinary Action Against Hoffman, 2003 ND 161, ¶16, 670 N.W.2d 500, 503-504, that:

[¶ 16] An attorney-client relationship can be presumed in situations where a person has a reasonable belief a lawyer is protecting someone's interest. Restatement (Third) of the Law Governing Lawyers § 14 cmt. a (2000). The Restatement provides, "the various duties of lawyers and clients do not always rise simultaneously." *Id.* Even if no formal professional

relationship exists between the client and the attorney, the attorney may still owe a duty to the prospective client, or third parties. *Id.*

Further examination of that case indicates, however, that the formation of an attorney client relationship on the basis of a reasonable belief that a lawyer is protecting someone's interest is limited to situations where the attorney claims to be representing such person or the attorney's conduct reasonably causes a third party to believe the attorney is acting on behalf of that person. No such facts appear here.

As indicated in the excerpt from the McKechnie case, *supra.*, “[t]he existence of an attorney-client relationship is a fact question, necessarily dependent on the particular circumstances of the case.” This committee will not act as a fact finder. If the outcome of a question presented is dependent on deciding among conflicting facts, the committee will to the extent possible issue an opinion which addresses the ultimate findings of fact. See Ethics Committee Procedures adopted 9/23/98.

Representation implied from familial circumstances. There is some indication that Jane Doe’s claim of a conflict of interest might be based upon the familial circumstances of the parties, specifically that “the terms and longevity of that contract were for the financial well being of this entire family.”

Ethics Opinion No. 00-01(January 26, 2000) reflects the Committee’s view that, because divorce matters affect virtually all aspects of a person’s life, it would be difficult to conceive of any situation where it would not be a conflict of interest for an attorney to represent one spouse in a divorce or adverse domestic relations matter where that attorney or another member of that attorney’s firm had represented the opposing spouse on other matters.

However, Ethics Opinion No. 00-01 involved circumstance where the other matters were

family law matters that were substantially related to the representation at issue. Regardless of whether the matter of their daughter's traffic citation can be considered a "family law matter", which does not appear to be the case, it does not appear that such would be substantially related; and, therefore, would not constitute a conflict of interest which would preclude representation of one spouse.

Furthermore, under the facts involved in Ethics Opinion No. 00-01 it was clear that an attorney client relationship between the attorney and the other spouse had existed in the past.

In any event, absent the existence of a prior attorney client relationship with the other spouse on a substantially related matter, the Committee is not prepared to conclude that an attorney is precluded from representing one party in a divorce or adverse domestic relations matter simply because that attorney or another member of that attorney's firm has represented that spouse in any other matter which affects the financial well being of the other spouse or the entire family.

Potential client. Other Ethics Opinions have dealt with the obligations owing to a "potential client." See, for instance, Ethics Opinion No. 01-01. However, the critical issue in that context dealt only with an attorney's obligation to maintain the confidentiality of certain information, notwithstanding that no attorney client relationship was established. Because Jane Doe, as the potential client in this scenario, seeks to rely upon the information which might otherwise be confidential, i.e. the employment agreement, any status as a potential client is irrelevant.

Conclusion

As stated in Ethics Opinion No. 01-01:

... Since ... no attorney/client relationship appears on the facts to have been formed between Jane Doe and Attorney [A] regarding this earlier employment matter, no conflict of interest can be presumed or inferred from these uncontroverted facts.

...

By the procedural rules of the SBAND Ethics Committee dated December 4, 1995, 'the committee will not act as a fact finder. If the outcome of a question presented is dependent on deciding among conflicting facts, the committee will to the extent possible issue an opinion which addresses the ultimate findings of fact.' Here the committee has been provided with a specific recitation of underlying facts by the requesting attorney and no contradictory facts are being offered by opposing counsel who has suggested the conflict of interest but has not defined the [basis therefore]. This opinion, therefore, assumes the accuracy of the facts as presented by the facts presented by the presenting attorney.

The referenced procedural language is identical to the Ethics Committee Procedures adopted 9/23/98.

Therefore, it is the opinion of the Ethics Committee that, in the absence of evidence that an attorney client relationship was established on the basis of Jane Doe's reasonable belief that she was represented by Attorney A or that Attorney A acted for the purpose of protecting Jane Doe's interests as concerns the employment contract, the requesting attorney would not be required to withdraw as attorney for John Doe.

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 August 2, 2005.


Mark Hanson, Chair