

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 09-07**

November 12, 2009

The Ethics Committee received a request regarding whether representation of a potential client would be a conflict of interest.

FACTS PROVIDED

Corporation's assets were owned by an employee stock ownership plan (ESOP). Corporation decided to sell. During the sales talks, Attorney X represented the Purchasing Company; Attorney Y represented the ESOP, which owned Corporation. Although complications occurred during the sale, the transaction did ultimately close.

After the sale closed, Attorney X filed an ethical complaint against Attorney Y based on the sales transaction. Attorney Y contacted Firm about representing him in the disciplinary matter. Attorney X left a voice mail with Firm indicating a conflict of interest prevented Firm from representing Attorney Y in the disciplinary proceeding. The alleged conflict is due to Firm's former representation of Corporation.

Firm's former representation of Corporation was limited to collection actions. Firm represented Corporation in a collection action against a former key employee of Corporation. Attorney X was substituted as counsel in the collection matter when Purchasing Company purchased Corporation. Firm did not represent Corporation in the creation of the ESOP plan or the sales transaction between the Purchasing Company and Corporation.¹

QUESTION PRESENTED

Is it a conflict of interest for Firm to represent Attorney Y in the disciplinary proceeding?

DISCUSSION

Rule 1.9 of the North Dakota Rules of Professional Conduct addresses lawyers' duties to former clients. It provides, in pertinent part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter

¹ The Firm correctly does not distinguish between which lawyer(s) in Firm represented Corporation and which lawyer(s) in Firm would represent Attorney Y since one lawyer's disqualification would be imputed to the Firm. See N.D. Rules of Prof'l Conduct 1.10(a); Opinion No. 05-01 at 2.

in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing.

....

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as these Rules would require or permit with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Id.

Under Rule 1.9, the issue presented is whether the Firm's former representation of Corporation in collection matters was "the same or a substantially related matter" as the disciplinary proceeding of Attorney Y.

The Firm unequivocally states it did not represent Corporation in the creation of the ESOP plan or the sales transaction between the Purchasing Company and Corporation. Regarding the sale of Corporation, Firm states it "was not involved in that matter at all." Accepting Firm's representation, the Ethics Committee concludes Firm did not represent its former client, Corporation, in the same matter as requested by Attorney Y.

Whether matters are "substantially related" depends of the facts and "is usually determined on a case-by-case basis." Opinion No. 03-01, at 11. "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." N.D. Rules of Prof'l Conduct 1.9, cmt. 3; see also Continental Res., Inc. v. Schmalenberger, 2003 ND 26, ¶¶ 20-24, 656 N.W.2d 730.

There is no indication from the information provided by Firm that information obtained in Firm's collection actions for Corporation would materially advance Attorney Y's position in the disciplinary proceeding. Generally information obtained in a collection matter would not be material to allegations of unprofessional conduct by an attorney in an unrelated sales transaction. Based on the facts provided by Firm, the Ethics Committee finds Firm's past representation of Corporation is not substantially related to its desired representation of Attorney Y in his disciplinary proceeding. This is emphasized by Firm's assertion it was in no way involved in the transaction between Corporation and Purchasing Company, which is the basis of Attorney Y's disciplinary complaint.

It is noted that the Ethics Committee's finding is based on the limited information provided by Firm and confidential information typically obtained during collection actions. Because this issue is fact dependent, if the collection actions did in fact include confidential information which would materially advance Attorney Y's position in the disciplinary proceedings, an impermissible conflict exists under Rule 1.9(a).

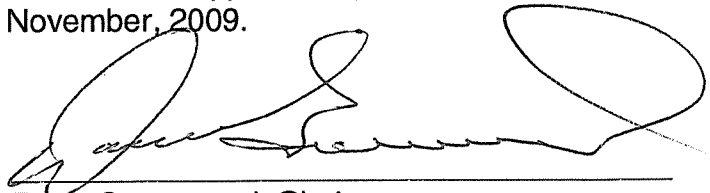
CONCLUSION

Based on the facts presented by Firm, the Ethics Committee finds Rule 1.9 does not prohibit Firm from representing Attorney Y in his disciplinary proceedings. Although the Ethics Committee finds Rule 1.9 does not prohibit Firm from representing Attorney Y in his disciplinary proceedings, the Firm is reminded of the requirements of Rule 1.6(a) and Rule 1.9(c)(2). Those rules prohibit Firm from revealing information relating to its former representation of Corporation absent consent, except as permitted or required by the Rules of Professional Conduct.

This opinion is provided pursuant to rule 1.2(B) of the 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 North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

The opinion was prepared by Douglas A. Bahr and approved by a unanimous vote of the Ethics Committee on the 12th day of November, 2009.

A handwritten signature in black ink, appearing to read 'Dann Greenwood', is written over a horizontal line.

Dann Greenwood, Chair