

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-01**

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

Attorney was employed with a law firm from August 2013 until December 2014. Attorney signed a variety of fee agreements on behalf of the firm. The fee agreements were between the law firm and the clients, but Attorney signed most of them as an attorney.

Attorney parted ways with the law firm in early January 2015. Attorney received a cease and desist letter stating that he was not to contact any former clients and also to turn over any client contact information in his possession.

Thereafter, the firm sent a letter to all of Attorney's former clients, giving them the option to continue with the firm, hire attorney, or retain another attorney. Four of these clients opted to continue representation by Attorney.

The Ethics Committee has been asked to render its opinion on: (1) Whether Attorney automatically has an attorney-client relationship with the four former clients? (2) Whether Attorney can represent the four former clients? (3) Whether Attorney can execute new fee agreements due to a different fee structure at his new firm?

OPINION

Based on the facts presented below, Attorney does not have an automatic attorney-client relationship, but could represent the four clients who chose to follow Attorney to his new firm with the requirement that new fee agreements be signed.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.9, N.D.R. Prof. Conduct: Duties to Former Client [4]

FACTS PRESENTED

Attorney performed various legal services for law firm from August 2013 through December 2014. During this time Attorney signed fee agreements with clients on behalf of law firm. Attorney left law firm for new law firm in January 2015. Following Attorney's departure, law firm instructed Attorney by letter to "cease and desist" any contact with clients belonging to law firm and to return any client information in his possession. Thereafter, law firm sent a letter to Attorney's former clients giving them a choice to remain with the law firm, follow Attorney, or retain another attorney. Four of Attorney's former clients chose to follow him to the new law firm.

DISCUSSION

Based on the facts presented, Attorney does not have an attorney-client relationship with the four former clients based on his employment with and the services he provided at the law firm. The law firm drew a bright line between the Attorney and any clients that had contracted with the law firm with its cease and desist letter to Attorney, making it clear any clients Attorney had worked with were former clients. Moreover, the law firm's letter to the clients informed them they could continue with the firm, retain Attorney, or retain another attorney. By choosing to retain Attorney, the clients chose to discontinue their relationship with the law firm and to enter a new attorney-client relationship with Attorney.

Based on the facts presented, Attorney can represent the four former clients. The relevant rule addressing former clients is Rule 1.9, N.D.R. Prof. Conduct: Duties to former client. Comments 4 and 7 address lawyers moving between firms. Comment four states: "When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised."

In this case, the letter the law firm sent to the clients establishes this duty of loyalty because it clearly articulates that it is the client's choice whether to continue with the law firm, follow Attorney, or retain another attorney.

Comment 4 continues: "Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel." This again is accomplished with the law firm's letter indicating the client has absolute control over the client's choice of representation.

Next, Comment 4 provides: "Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association." Here, is where the Attorney receives clarification of his ability to engage the four clients who wish to remain under his representation. The rule states an understanding that many lawyers are members of law firms and that many lawyers will be members of several firms throughout their legal careers. It would stifle an attorney's ability or freedom to move about the legal community and follow opportunities for advancement if every client ever served by a former law firm were automatically disqualified from his or her representation.

Therefore, pursuant to Rule 1.9, N.D.R. Prof. Conduct the Attorney is free to associate with Attorney's former clients left behind at the law firm, and to enter new fee arrangements and contracts independent of the law firm.

Based on the facts presented, the Attorney can accept the four clients, have them execute new fee agreements in accordance with the new law firm's policy, and proceed to represent them with no conflict.

CONCLUSION

Attorney does not automatically have an attorney-client relationship with clients he represented when employed by his former law firm. Absent conflicts not raised or addressed in this opinion, the former clients can retain Attorney to represent them and Attorney can require the clients execute new fee agreements in accordance with Attorney's new law firm's policy.

This opinion was drafted by Ward K. Johnson, III and was unanimously approved by the Ethics Committee on the 24th day of April, 2015.


Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which 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.