

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 2020-01

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

Is maternity leave a physical condition that impairs an attorney's ability to represent a client and withdraw from court cases while on maternity leave for 7 months?

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Several of the North Dakota Rules of Professional Conduct are applicable to this inquiry including Rule 1.1 on competence, 1.3 on diligence, 1.4 on communication, and 1.16 on declining or terminating representation.

Rule 1.1 on competence states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." N.D.R.PROF.CONDUCT Rule 1.1. The applicable comments provide direction in retaining and contracting with other lawyers:

Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

N.D.R.PROF.CONDUCT Rule 1.1 (cmt. 7,8)

Rule 1.3 on diligence requires a lawyer to act with reasonable diligence and promptness in representing a client. N.D.R.PROF.CONDUCT Rule 1.3.

Also applicable to this inquiry is the lawyer's duties of communication including making reasonable efforts to keep the client reasonably informed about the status of a matter, and

promptly comply with the client's reasonable requests for information. N.D.R.PROF.CONDUCT Rule 1.4(a)(3-4).

Lastly, Rule 1.16, declining or terminating representation, should be addressed focusing on whether declining or terminating representation is either mandatory or permissive with the facts presented. N.D.R.PROF.CONDUCT Rule 1.16. Subsection (a)(2) is the specific rule raised by the attorney, which would require mandatory withdrawal, states: "Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client." N.D.R.PROF.CONDUCT Rule 1.16(a)(2). Permissive withdrawal is also applicable to this attorney's request under 1.16(b), the applicable portion which states: "...a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interest of the client; or other good cause for withdrawal exists." N.D.R.PROF.CONDUCT Rule 1.16(b)(1,7).

FACTS PRESENTED

The attorney practices immigration law in another state, but is licensed in North Dakota. She indicates that she intends to take a leave of absence/maternity leave for 7 months following the birth of her child.

DISCUSSION

Taking maternity leave for an extended period of time is not a physical condition that impairs an attorney from representing clients and requires her to withdraw under North Dakota Rule of Professional Conduct Rule 1.16. See Crowston v. Jamestown Public School Dist. No. 1, 335 N.W.2d 775, 779 (N.D. 1983)(upholding trial court finding that maternal leave is to further the maternal bonding process between mother and child and if mother is relatively healthy and has an uncomplicated delivery she may be able to perform a sedentary job within two weeks after giving birth). However, this lawyer has several ethical duties to clients that should be considered prior to her absence and may require withdrawal in the event she is not able to find an attorney to handle her existing matters, or the client does not consent to another attorney handling their legal matters during the attorney's maternity leave.

Prior to taking the leave of absence, the lawyer should take caution in accepting new cases to limit her case load during her absence. A lawyer's work load must be controlled so that each matter can be handled competently. N.D.R.PROF.CONDUCT Rule 1.3 (cmt. 2). A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and to completion. Id. at 1.16 (citing Rules 1.2(c) and 6.5; Rule 1.3 at cmt. 4).

In accepting new cases, the lawyer should explain the upcoming leave of absence and obtain consent for another attorney to represent the client during the lawyer's leave. See id. at cmt. 6 ("An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.").

The lawyer also has a duty to communicate to existing clients that the lawyer intends to take a leave of absence and that she will not be reasonably available to respond to the client's requests during that period of time. Id. at 1.16 (cmt. 1).

It is assumed for purposes of this opinion that the lawyer does not have another attorney in her firm that is licensed in North Dakota, although this is not stated by the lawyer. The attorney should retain or contract with other lawyers outside her firm that are licensed in North Dakota during her absence to handle her North Dakota case load. Id. at 1.1 (cmt. 7, 8). Comments 7 and 8 to Rule 1.1 of the North Dakota Rules of Professional Conduct are instructive on retaining or contracting with other lawyers outside the lawyer's own firm. The lawyer must obtain the client's consent and reasonably believe the other lawyer's services will contribute to the competent and ethical representation of the client. Id. at cmt. 7. The lawyer's discussions with the client and the other attorney include should the scope of the representation, communications with the client, fee sharing, confidentiality and the other professional obligations. Id. In particular, the lawyers should consult regarding the scope of their respective obligations and allocation of responsibility, including matters before a tribunal which may have additional obligations beyond the scope of the Rules of Professional Responsibility. Id. at cmt. 8.

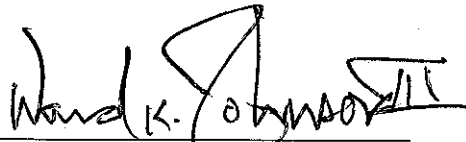
Only if a lawyer is unable to find another lawyer licensed under North Dakota law to assume her North Dakota case load, or is unable to obtain her client's consent, and the lawyer will be unable to fulfill her professional duties to the client, then the lawyer may withdraw from representation of the client if it can be accomplished without causing a material adverse effect on the client's interests or if other good cause for withdrawal exists. Id. at 1.16(b)(1,7). If the lawyer is not permitted to withdraw by order of a tribunal or if there would be a material adverse effect on the client's interests, the lawyer must continue the representation of the client notwithstanding good cause for termination. Id. at 1.16(c). If the lawyer is permitted to withdraw, then the lawyer must take reasonable steps to protect the client's interests, allowing for the reasonable notice to the client, time to employ other counsel, surrendering of papers and property and refunding the advance payment of fees or expenses not earned or incurred. Id. at 1.16(e).

If the lawyer fails to adequately communicate with her clients, fails to arrange for other counsel, fails to obtain her client's consent to refer the client's matter to another attorney, or fails to withdraw from representation of the client during her absence then there would be violations to the Rules of Professional Conduct. Failing to adequately communicate with clients, failure to appear at a hearing, failure to adequately prepare and respond to motions violated the rules of professional conduct requiring attorney to provide competent representation, to abide by clients' decisions, to consult with client, to act with reasonable diligence, to reasonably consult with client, to promptly comply with clients' reasonable requests for information. Matter of Disciplinary Action Against Bruhn, 2018 ND 186, 915 N.W.2d 850 (citing N.D. R. Prof. Conduct 1.1, 1.2(a), 1.3, 1.4, 3.3). Similarly, the failure to obtain the clients' informed consent prior to referring the client to another attorney can result in violation of the rules of professional conduct. Id.

CONCLUSION

A leave of absence for maternity leave is not a physical condition that materially impairs the lawyer's ability to represent the client. However, a lawyer must ensure that the lawyer effectively communicates with her clients that she will not be available during her maternity leave. She should make arrangements with other counsel licensed in North Dakota to handle her North Dakota matters while she is unable to assist those clients. She must obtain the informed consent of her clients for another attorney to handle her clients' North Dakota legal matters in her absence. If she is unable to either obtain her client's consent for another attorney licensed in North Dakota to handle her North Dakota case load or is unable to obtain another attorney licensed in North Dakota to handle her case load, she may seek to withdraw from representation of the clients, only if withdrawing from representation would not cause a material adverse effect on the client or with permission of the tribunal.

This opinion was drafted by Katrina Turman Lang and was unanimously approved by the Ethics Committee on the 27th day of October, 2020.

A handwritten signature in black ink, appearing to read "Wand K. Johnson", written over a horizontal line.

Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules of 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.