Nebraska Ethics Advisory Opinion for Lawyers
No. 09-06

THERE IS NO CONFLICT OF INTEREST IN A FIRM'S REPRESENTATION OF A CLIENT IN POST-DECREE AND BANKRUPTCY PROCEEDINGS WHERE ONE OF THE FIRM'S ASSOCIATES WAS FORMERLY ASSOCIATED WITH A FIRM THAT BRIEFLY REPRESENTED THE OPPOSING PARTY AND WHERE THE POST-DECREE AND BANKRUPTCY MATTERS ARE NOT THE SAME AS, OR SUBSTANTIALLY RELATED TO, THE PRIOR DIVORCE PROCEEDINGS.

STATEMENT OF THE FACTS

An attorney with Firm H has represented Husband at all times since Husband's wife filed for divorce. Husband's ex-wife was originally represented by Firm A. At that time, Associate was an associate with Firm A but was not involved in the divorce case. Firm A's representation of the ex-wife was terminated and Firm B began representing the ex-wife. Associate subsequently left Firm A and entered into an office-sharing arrangement with Firm H. Following the ex-wife's loss of custody in the divorce proceeding, the ex-wife attempted to disqualify Firm H on the basis of Associate's former association with Firm A and his office-sharing arrangement with Firm H. The ex-wife's motion to disqualify was denied by the trial court.

Since that time, Husband's attorney and Associate, along with a third attorney have formed a limited liability company with offices in two cities. Husband's attorney's files are not networked to the firm's computer system and cannot be accessed by other firm attorneys. Husband's attorney and Associate do not share the same office. Associate no longer has access to Firm A's files.

Firm H continues to represent Husband in post-decree proceedings as well as a bankruptcy proceeding filed by the ex-wife. Associate has never had any involvement in the divorce, post-divorce, or bankruptcy proceedings.

Finally, according to the inquiring attorney, Husband's ex-wife and her current attorney were "aware of the formation of Firm H during the prior divorce proceeding, prior to the Motion to Disqualify Firm H and following litigation. . . [and] . . . there was never any mention [by ex-wife] or her attorney of any concerns regarding conflict of interest . . ." The attorney for Firm H suggests that any claimed conflict was therefore waived and seeks confirmation of that fact from the Committee.

QUESTIONS PRESENTED

I. Whether Firm H has a conflict of interest in representing Husband in the ex-wife's bankruptcy case.

II. Whether Firm H has a conflict of interest in representing Husband in any post-decree matters.

III. In the event Firm H has a conflict of interest, whether said conflict was waived by Husband's ex-wife by not raising such conflict in prior litigation.

APPLICABLE RULES OF PROFESSIONAL CONDUCT

RULE § 3-501.9. Duties to former clients.

. . .

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed 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 except as these Rules would permit or require 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.

COMMENT:

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited.

[3] 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by

the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] 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. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer *only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c).* Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. . . . (Emphasis added).

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. . . .

DISCUSSION

I. Whether Firm H has a conflict of interest in representing Husband in ex-wife's bankruptcy case.

Based upon a review of the Rules of Professional Conduct noted above, specifically Rule § 3-501.9(b), it does not appear that the ex-wife's bankruptcy proceeding is "the same or a substantially related matter" which would preclude Firm H from representing Husband. Based upon the facts presented, the bankruptcy case involves allegations that Husband's ex-wife presented false information in the bankruptcy proceeding which took place well after the divorce decree, and certainly well after Associate's association with Firm A.

In fairness however, we note that one's financial situation may be inextricably linked to divorce and post-divorce proceedings, especially where, as here, custody (and presumably child support) are at issue. Nonetheless, for the reasons noted in our response to paragraph II below, there does not appear to be any showing that Associate acquired any knowledge of the ex-wife's finances during his association with Firm A.

We conclude that there does not appear to be a conflict of interest in Firm H representing Husband in the bankruptcy proceeding filed by Husband's ex-wife.

II. Whether Firm H has a conflict of interest in representing Husband in post-decree matters.

This question, as noted in Comment [4] to Rule 5-501.9 is indeed "more complicated" and "[t]here are several competing considerations." We are of the opinion that Rule § 3-501.9(b) governs the situation you have presented to the Committee and conclude there is no conflict. Rule § 3-501.9(b) is not inconsistent with the Nebraska Supreme Court's holding in State ex rel. Wal-Mart Stores, Inc. v. Kortum, 251 Neb. 805, 559 N.W.2d 469, (Neb. 1997), a case that was decided prior to the promulgation of the current Rules of Professional Conduct.

In Kortum, the Nebraska Supreme Court appears to have departed from prior decisions which had evolved into the adoption of a "bright line" rule favoring an irrebuttable presumption of a conflict of interest in situations similar to the one presented here. An excellent analysis of this evolution is found in "'Agonizing' over Disqualification Decisions: Fractionalizing the Nebraska 'Bright Line' Rule in State ex rel. Wal-Mart Stores, Inc. v. Kortum," 31 Creighton L. Rev. 279, (1997). For decisional history on this issue see also Baker v. Farnsworth, 117 Neb. 504, 221 N.W. 17 (Neb. 1928) (attorney disqualified from representing adversary of former client in same or inseparably related matters); Adams v. Adams, 156 Neb. 778, 58 N.W.2d 172 (Neb. 1953) (attorney not disqualified if he was only incidentally connected with interests adverse to former clients); State ex rel. Freezer Services, Inc. v. Mullen, 235 Neb. 981, 458

N.W.2d. 245 (Neb. 1990) (adopting irrebuttable presumption of attorney-firm shared confidences in cases involving the same subject matter).

In Kortum, the Nebraska Supreme Court ultimately held that a firm which had previously represented Wal-Mart was not disqualified from representing clients in subsequent litigation against Wal-Mart because the subject matter was not substantially related, even though both matters involved slip and fall actions. Kortum, *supra*, 559 N.W.2d at 502-503.

More recently, the Nebraska Court of Appeals applied the reasoning found in Kortum in In re Interest of Tierra O., *not designated for permanent publication*, A-03-813 (2004). In that case the Nebraska Court of Appeals stated:

> The Nebraska Supreme Court has discussed an attorney's responsibility regarding the interests of former clients. In Hawkes v. Lewis, 255 Neb. 447, 586 N.W.2d 430 (1998), the Supreme Court stated that an attorney must avoid the present representation of a cause against a client that the attorney formerly represented and which cause involves a subject matter which is the same or substantially related to that formerly handled by the attorney.
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> The Supreme Court in State ex rel. Wal-Mart v. Kortum, 251 Neb. 805, 559 N.W.2d 496 (1997), explained that the subject matters of two causes are "substantially related" if the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause. The factors the court may consider in making this determination include whether issues of liability, science, or evidence are similar; whether the lawyer had interviewed witnesses who were key in both causes; the lawyer's knowledge of the former client's trial strategy, negotiation strategies, legal theories, business practices, and trade secrets; the lapse of time between the causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the former client if conflict does arise. Id.

There are no published or unpublished Nebraska cases analyzing the Kortum decision since the current Rules of Professional Conduct were enacted in September 2005. Nevertheless, taking into consideration both the Kortum decision and Rule § 3-501.9(b), we are of the opinion that no conflict of interest exists under the facts you have presented to the Committee. Rule § 3-501.9 (b) precludes your firm from representing Husband in post-decree matters only if Associate "acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter."

Comment [5] to Rule § 3-501.9 (b) provides:

> Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). *Thus, if a*

lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. . . . (Emphasis added).

This is precisely the factual scenario you presented to us.

Comment [6] to Rule § 3-501.9 (b) provides that the application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. "A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients." Your situation falls under the second "inference" found in Comment 6. Associate does not represent Husband in post-decree matters, does not have access to his post-decree files, and does not have actual knowledge of the facts of his post-decree matters. Further, Associate did not represent the ex-wife while employed by Firm A, did not have access to her files, and did not gain actual knowledge of the facts of her case.

Rule § 3-501.9 (b) seems to obviate the need for further analysis under the Kortum "substantially related" rule where the attorney moving firms gained no actual knowledge of the client's case. Nevertheless, it appears that the factors highlighted in Kortum would also support a finding that there is no conflict of interest in this case. This Committee assumes (for purposes of this opinion only) that pre- and post-decree matters between the same parties are "substantially related." When matters are substantially related the Nebraska Supreme Court has instructed us to consider whether:

> . . . the similarity of the factual and legal issues creates a genuine threat that the affected attorney may have received confidential information in the first cause that could be used against the former client in the present cause. The factors the court may consider in making this determination include whether issues of liability, science, or evidence are similar; whether the lawyer had interviewed witnesses who were key in both causes; the lawyer's knowledge of the former client's trial strategy, negotiation strategies, legal theories, business practices, and trade secrets; the lapse of time between the causes; the duration and intimacy of the lawyer's relationship with the clients; the functions being performed by the lawyer; the likelihood that actual conflict will arise; and the likely prejudice to the former client if conflict does arise.

As noted in Comment [3] to Rule 3-501.9, matters are "substantially related" for purposes of Rule 3-501.9 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.

Like Rule 3-501.9(b), Kortum focused on the lawyer's knowledge of and involvement in a case prior to moving firms. In this case, Associate's lack of knowledge of or involvement in the pre- and post-divorce case while associated with both firms, and his inability to access information from either file, support a conclusion under both Rule 3-501.9(b) and Kortum that no conflict of interest exists.

III. Assuming Firm H has a conflict of interest, whether said conflict was waived by the ex-wife failing to raise such a conflict in prior litigation.

Because of the Committee's conclusion that there exists no conflict of interest in Firm H representing Husband in the bankruptcy or post-divorce proceedings, there is no need to address the question of whether Husband's ex-wife waived any real or perceived conflict of interest by failing to raise it in earlier litigation. However, this appears to be a legal question rather than an ethical question. Legal questions are beyond the scope of the Committee's authorized duties.

CONCLUSION

Based upon the foregoing, the Committee is of the opinion that there is no conflict of interest in Firm H's representation of Husband in the post-decree and bankruptcy proceedings.