

State Bar of South Dakota

Ethics Opinion 99-5

July 21, 1999

- **Rules: 1.8(b), 1.9(a)**
- **Subject: Conflict of interest; Spouse of client**
- **Summary: Attorney may not represent client against client's spouse without consent of spouse of client or matter must not be substantially related to prior representation of client if spouse is also a former client.**

**FACTS**

Attorney represented Client in a domestic issue involving a child, not the product of Client's marriage. Attorney also represented Client in gaining custody of the child. In the course of these representations, attorney discussed the matters with Client's spouse present and privately with Client's spouse, "particularly when Client was unavailable. ..."

Client and spouse are now getting divorced. Spouse has hired counsel and objected to Attorney's possible representation of Client. Attorney believes "the issues in the divorce [are] limited to property related issues" and neither "custody of their child, . . . nor [fault] will be at issue." Attorney further believes that the spouse was never Attorney's client.

Attorney seeks the Ethics Committee's opinion as to whether Attorney can ethically represent Client over the objection of Client's spouse.

**DISCUSSION**

It appears that Attorney's question turns first on resolution of the accuracy of Attorney's belief that "Client's [spouse] was [never attorney's] client. . . ." That issue is a factual dispute beyond the authority of this Committee to finally resolve. See Ethics Committee Guidelines.

The answer to whether the spouse was a client, however, is not simply answered by Attorney's belief that Attorney never represented Client's spouse. This Committee examined the question of discussion with a spouse creating an attorney-client relationship in Ethics Opinion 93-15 and felt that SDCL 19-13-2(1) contained the definition of client. The South Dakota Supreme Court also examined the question of who is or may claim to be clients. *State v. Catch the Bear*, 352 NW2d 640 (SD 1984). The Court likewise utilized SDCL 19-13-2(1) to define client as "a person, public officer, or corporation or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services. ..." (emphasis added). *Catch the Bear*, 352 NW2d at 645, n.1. The Court made clear that the lawyer's perception of who is client is "not controlling evidence." *Catch the Bear*, 352 NW2d at 646. The question "hinges not on the lawyer's perception of the relationship but on the client's belief that [he or she] is consulting a lawyer to obtain professional legal services." *Catch the Bear*, 352 NW2d at 645.

Resolution of the issue whether Client's spouse can make a claim to be another client leads to the ethical questions. If the spouse can claim she in fact consulted Attorney in the prior matters, "with a view to obtaining professional legal services," she may be a former client. Rule 1.9(a) precludes representation adverse to a former client "in the same or a substantially related matter" without the former client's consent. The former client, if the spouse is so deemed, will not consent.

This Committee has opined that matters are substantially related if there are "similar issues involved or if the former representation involved confidential information that is useful or germane to any issue in the matter you are now considering." Ethics Opinion 99-4. For more definitive discussion of what may be "substantially related", see Ethics Opinions 98-7 and 94-14. In addition, Rule 1.8(b) precludes use of information relating to representation. . .to the detriment of a client. ..."

Resolution of Attorney's question involves determining whether spouse is a "former client." If not, no ethical problem arises from handling the divorce. Even if spouse is a "former client," Attorney may ethically handle the divorce if it is not a "substantially related" matter, or the spouse does consent.

***Lonnie R. Braun***  
**Chair, Ethics Committee**