

**State Bar of South Dakota**

**Ethics Opinion 2003-7**

- **Rules: 1.7; 1.9(a); 1.10(b)(c)**
- **Subject: Conflict of Interest**
- **Summary: Absent consent after consultation, an attorney may not represent a client whose interest is adverse to a former client.**

**FACTS**

Law Firm employed an associate lawyer. Associate left Law Firm and began practicing law elsewhere. Prior to Associate leaving Law Firm, a dispute arose between two existing clients of Law Firm, Y and Z. When Associate left Law Firm, he/she continued to represent client Y against Z. Z is still a client of Law Firm.

Lawyer asks whether Law Firm may continue to represent Z in a dispute against former client Y, who is being represented by former Associate. Lawyer also asks whether former Associate may represent Y against his/her former Law Firm's client, Z.

The Ethics Committee Guidelines restrict this committee from opining on the conduct of a lawyer other than the requesting lawyer. Accordingly, this opinion is limited to the conduct of the requesting lawyer only.

**DISCUSSION**

Rule 1.9(a) provides:

A lawyer who formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that persons interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Rule 1.10(b) and (c) provide:

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, not currently represented by the firm, unless:

(1) The matter is the same or is substantially related to that in which a formerly associated lawyer represented the client;

(2) Any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

The reference to "conditions" stated in Rule 1.7 permits such representation if the client consents to the representation after consultation. As of January 1, 2004, Rule 1.7 will require that each affected client give informed consent to the lawyer confirmed in writing.

Ethics Opinion 88-8 states that, "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to a client."

It is unclear from the facts whether the underlying dispute involves "information protected by Rules 1.6 and 1.9(c) that is material" to the subject matter of the dispute. The only discussions between Law Firm and former Associate regarding his/her representation of Y against Z, appear to be limited to the propriety of his/her representation of Y. Rule 1.10(b)(1) prohibits Law Firm from representing Z against Y. Rule 1.10(c) provides that this disqualification may be waived if the client consents to the representation. Rule 1.7 does not clearly indicate which client's (or both) consent must be waived. See EO 99-4 and 98-7 for discussion of whether matters are substantially related.

It is the opinion of the Committee that Law Firm must obtain a waiver from former client, Y, and existing client, Z, before Law Firm may continue representing Z in the same or substantially related matter adverse to Y.

***Brad A. Schreiber***  
***Chair, Ethics Committee***