

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 12-10

A Nebraska lawyer’s duties to former clients do not allow representing someone with interests materially adverse to the former client where the conflicting representations happen in the same or a substantially related matter.

QUESTIONS PRESENTED:

1. Whether the requesting attorney represented a former client in a matter that is “substantially related” to a lawsuit where the requesting attorney represents new clients that are suing the former client.
2. Whether the former client’s partial waiver of the claimed conflict of interest (limited to allowing the requesting attorney to continue representation for settlement negotiations but not in the lawsuit itself) operates as a complete waiver of conflict—both for settlement negotiations and for the litigation.

FACTS

A real estate developer planned a rural subdivision in the late 1990’s. He had a plat filed with large lots, secured necessary zoning, prepared restrictive covenants to insure high quality homes, established a sanitary improvement district for utilities, and began selling lots to develop the subdivision. A Nebraska attorney helped in this process but is not the attorney that requested this advisory opinion.

Over the years, the subdivision developed into a nice neighborhood with high quality and uniform homes. The developer used and enforced the covenants to accomplish the project. Now it turns out that the covenants were never recorded before the lots were sold to and developed by separate individuals. The developer blames the first attorney for never recording them.

After about fifteen years of development, the requesting attorney began representing the developer in a drainage dispute between the subdivision’s sanitary improvement district and the county. The requesting attorney was never involved with the developer during the beginning fifteen years of development. The requesting attorney has also represented the developer in other matters involving the developer’s role in managing the neighborhood. The requesting

attorney's file includes a telephone memo of a call from the developer with questions the developer had about the covenants, and the firm billed the developer for attorney staff time to retype the covenants. The developer also has a copy of a letter written on the attorney's letterhead. That letter was sent to all residents in the subdivision asking them to sign the covenants. The reason to send the covenants was that the requesting attorney's firm advised the developer that, if all landowners signed them and the newly signed covenants were recorded, they would become binding on those landowners.

Now the requesting attorney has filed a lawsuit against the developer on behalf of some residents claiming that the developer himself is violating the covenants that turn out never to have been recorded. The lawsuit alleges that the covenants are implied to be valid and enforceable against the developer regardless of whether they were recorded. It also includes claims of promissory estoppel, of private nuisance, and of zoning violations. The case asks for both money damages and injunctive relief. The developer has a third attorney to defend this case against him. The developer's third attorney e-mailed the requesting attorney and stated in the e-mail that the developer agrees to waive any conflict for the purpose of settlement negotiations but claims a conflict and does not agree to waive any conflict in the lawsuit itself.

APPLICABLE RULE AND COMMENT

Neb. Ct. R. of Prof. Cond. § 3-501.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client gives informed consent in writing.

COMMENT

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[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. Similarly, a lawyer who

has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. 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. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; 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.

DISCUSSION

The Law

A Nebraska attorney can sue a former client. However, an attorney's duties of confidentiality and loyalty prohibit taking any matter adverse to a former client if it is the "same or substantially related" matter. Questions about this rule often take the form of proceedings in a case to disqualify an attorney. Other times, the question is one posed to an advisory ethics committee. In Nebraska, both forms of proceedings have happened. In a case to disqualify an attorney, the Nebraska Supreme Court discussed the rule in *State ex rel. Wal-Mart Stores, Inc., v. Kortum*, 251 Neb. 805, 559 N.W.2d 496 (1997). In a request for an advisory opinion, this committee discussed the rule in *Nebraska Ethics Advisory Opinion for Lawyers. No. 09-06*.

The *Wal-Mart* opinion was written eight years before Nebraska adopted the ABA Model Rules of Professional Conduct and comments, which are quoted above. In that case, Wal-Mart was sued for personal injuries by a lady that fell when she stepped into a hole in the Wal-Mart

parking lot. The injured lady's lawyer had represented Wal-Mart in personal injury cases at least four times before filing this case against Wal-Mart. Two of the past cases were false arrest and malicious prosecution cases. The third suit involved a fall inside the store, and the fourth suit was for an assault that happened inside the store. While defending Wal-Mart, the plaintiff's lawyer had become familiar with Wal-Mart's general defense strategies and internal policies. He also had access to Wal-Mart procedure manuals, lists, and sales information.

Wal-Mart tried to disqualify this attorney with an original action requesting a writ of mandamus, and the Supreme Court denied the writ. It ruled that the prior representations were not substantially related to the lady's case, and the factual and legal issues in the prior representations were not so similar as to create a genuine threat that confidential information from the prior lawsuits could be used against Wal-Mart in the present action.

The Supreme Court had previously ruled that an attorney could not take a matter adverse to a former client involving "the same subject-matter" or when the "matters are so closely allied thereto as to be, in effect, a part thereof." *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 987, 458 N.W.2d 245, 249-250 (1990). Then, three years later, in *State ex rel. FirstTier Bank v. Buckley*, 244 Neb. 36, 45, 503 N.W.2d 838, 844 (1993), the Supreme Court stated that the test for disqualification is not how "closely allied" the two matters were but require that the matters, both prior and current, be either the same or "substantially related."

The *Wal-Mart* opinion explains that the analysis does not involve "the appearance of impropriety" and does not depend upon establishing Chinese Walls. What counts is whether the two matters are "substantially related." The court also explained that many factors may be used to discern if two matters are substantially related. The Supreme Court's conclusion was that the pleadings in the slip and fall inside the store and the slip and fall in a hole in the parking lot were similar. However, that does not make the two cases substantially related. The court also concluded that Wal-Mart policies, procedures, and practices in litigation did not include any trade secrets or things that were not discoverable. Since defense strategies are commonplace and routine, any outside counsel would also know of things the former Wal-Mart attorney knew.

The *Wal-Mart* opinion clarified that analyzing former client conflict cases does not depend upon perceived appearances of impropriety. Also, the Nebraska Supreme Court adopted the same or substantially related test in such cases well before Nebraska adopted the ABA Model Code of Professional Responsibility in 2005. The ultimate question phrased in the opinion is

nearly identical to Neb. Ct. R. of Prof. Cond. § 3-501.9 and comment [3] thereto, which are quoted above.

Nebraska Ethics Advisory Opinion for Lawyers No. 09-06 followed the Wal-Mart rule twelve years after the opinion was published and four years after the Model Rules were adopted in Nebraska. In that case, the requesting attorney was an associate in a firm that represented a wife in a divorce case. Then, he moved to the firm that was representing the husband in the same matter but only had an office-sharing agreement with the new firm. After the divorce, the requesting attorney formed an L.L.C. with the firm that represented the husband. At no time had the requesting attorney been directly involved in representing the husband or the wife. Later, when there were post-decree proceedings in the divorce, the wife questioned whether the requesting attorney's new firm could continue representing the husband.

The advisory committee held that there was no reason to disqualify the requesting attorney's firm. That opinion is a bit different from this opinion because it involved an attorney that changed firms. It was governed by subdivision (b) and Comment [5] of Neb. Ct. R. of Prof. Cond. § 3-501.9. This opinion involves subdivision (a) and Comment [3] of the same rule. In Comment [5], when an attorney changes firms, there is adverse representation "only when the lawyer involved has actual knowledge of information protected by [confidentiality]." Since the requesting attorney did not directly represent either the wife or the husband and had screened himself from access to the files, the advisory opinion found no adversity and no conflict.

The topic of attorneys' representation adverse to former clients is the topic of an article in **Lawyers' Man. on Prof. Conduct**: ABA/BNA. "Representation Adverse to Former Client" [Practice Guides] 51:201-242. That article explains that the reasons for the same-or-substantially-related-matter rule include protection of client expectations of confidentiality and also notions of the duty of loyalty that attorneys owe to their clients—former and current. The purposes accomplished by the rule are both to foster open dialogue between lawyer and client and also to bolster public confidence in the legal system. The discussion in that article is extensive but remarkably similar to the discussions found in the *Wal-Mart* opinion, the advisory opinion already discussed, and the rule's text in Neb. Ct. R. of Prof. Cond. § 3-501.9 (a) and Comment [3].

The Lawyers' Manual article notes that the sheer number of decisions discussing what representations are substantially related has done little to lessen uncertainty in the topic. The

questions involved are described as “minefields,” and the subject is “one of the most fact-specific in the entire field of legal ethics.” **Lawyers’ Manual**, *supra*, at 209.

One explanation of the substantial relationship test that is commonly cited is found in *T. C. Theatre Corp. v. Warner Bros. Pictures Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). There, it was explained that the question is whether it can reasonably be said the attorney might have acquired information related to the subsequent representation in the former representation. "If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition. . ." *Id.* at 269. Thus, the substantial relationship test is used as a shortcut. Where the commonality of the two representations is substantial, the former client need not establish exactly what confidential information he gave the lawyer that will now likely be used against him. The similarity of the two matters is enough to raise a common-sense inference that what was learned in the first representation will be useful in the second.

Comment [3] to the rule explains these principles by stating one should study "the nature of the services the lawyer provided the former client." After that study, the two matters are substantially related if there 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." In other words, if there is a substantial risk, the matters are substantially related.

Committee’s opinion on substantially related matters:

It is the committee’s opinion that the representation of the former client and the lawsuit against that former client are substantially related matters. The requesting attorney had to discuss attitudes of the former client about the enforceability of the covenants during the representation answering questions about and retyping the covenants. Those attitudes and statements by the developer about the enforceability of the covenants may well be relevant in the pending litigation trying to enforce the covenants against the developer. The advice to the developer and the preparation and sending of the letter to all subdivision residents obviously resulted from the requesting attorney’s advice to the developer that the covenants were *unenforceable* on account of the failure to record them. Otherwise, it would be superfluous to ask every resident of the subdivision to sign them and record the newly-signed set of covenants.

Now, in this litigation, the attorney is trying to establish that the covenants *are enforceable*, at least in the circumstances of making them enforceable against the developer.

Committee's opinion on informed consent in writing:

The informed consent must be given in writing according to the last words of the rule. According to *Restatement of the Law Governing Lawyers*, §132 (2000) it is also advisable to get the written informed consent to continued representation from the current client. This is because, if the lawyer may need to keep former confidences, that may affect how he or she represents a new client.

The written consent must be informed, meaning that the clients should be educated about the conflict and its implications. Neb. Ct. R. of Prof. Cond. § 3-501.1 (e) says that informed consent “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” In order to get a written consent that is informed, counsel must make disclosures that inform client(s) about what the consent means.

According to *Restatement of the Law Governing Lawyers*, § 122, Comment e (2000), a consent may be partial or conditional. Thus, a limited consent cannot be extended into a general consent for all purposes. According to *Florida Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999), a wife's failure to object to her former attorney's representation of her husband in a divorce case did not amount to consent. In order to amount to waiver, as opposed to explicit consent, positions must change as a result of a failure to object. Therefore, counsel should see to it that the consent is informed, explicit, in writing, and signed by both clients (former and present). An e-mail from counsel for the former client cannot meet that standard nor be made to apply to both the limitations within the consent and to any other situations without those limitations.

CONCLUSION

Under the facts given the committee concludes that the requesting attorney's duties to his former client will not allow continued representation of present clients in the lawsuit against the former client. Further, the e-mail from the former client's present attorney does not establish informed consent in writing to allow continued representation either for the limited purpose of settlement negotiations or work in the lawsuit itself.