

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 01-02**

MAY 24, 2001

The Ethics Committee received a request dated January 4, 2001, for an opinion regarding the scope of activities that may be performed by a suspended lawyer.

FACTS

The North Dakota Supreme Court suspended Attorney A from the practice of law. Attorney A has inquired whether Attorney A can perform certain duties during the period of suspension without running afoul of the Rules of Professional Responsibility. Specifically, Attorney A asks:

1. May a suspended lawyer act as a paralegal, legal assistant, or other type of support staff to a licensed lawyer;
2. May a suspended lawyer act as in-house counsel or an employee of a company acting at the behest of executives of the company;
3. May a suspended lawyer act as a guardian ad litem; and
4. May a suspended lawyer act as a mediator?

DISCUSSION

All of Attorney A's inquiries go to the same basic question, which is: "From what activities must a suspended lawyer refrain during that lawyer's period of suspension in order not to run afoul of the unauthorized practice of law prohibition?" See In re Disciplinary Action Against Larson, 485 N.W.2d 345, 350 (N.D. 1992) (stating: "A suspended attorney must refrain from all facets of the practice of law."). The starting points for analysis are section 27-11-01 of the North Dakota Century Code and Rule 5.5 of the North Dakota Rules of Professional Responsibility. The statute provides:

Except as otherwise provided by state law or supreme court rule, a person may not practice law, act as an attorney or counselor at law in this state, or commence, conduct, or defend in any court of record of this state, any action or proceeding in which he is not a party concerned, nor may a person be qualified to serve on a court of record unless he has:

1. Secured from the supreme court a certificate of admission to the bar of the state; and
2. Secured an annual license therefor from the state bar board.

Any person who violates this section is guilty of a Class A misdemeanor.

N.D. Cent. Code § 27-11-01. The rule provides as follows:

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

N.D.R. Prof. Conduct 5.5. With this framework in mind, the specific questions of Attorney A are addressed.

1. A suspended lawyer may act as a legal assistant under certain restrictions.

The seminal case in this area is In re Application of Christianson, 215 N.W.2d 920 (N.D. 1974). In this case, the North Dakota Supreme Court noted the need for a line to be drawn between the two extremes of depriving a suspended lawyer from doing anything a layman could do and of allowing a suspended lawyer to do everything as a law clerk a lawyer could do except appear in the courtroom. Id. at 924. Citing California precedent, the North Dakota Supreme Court outlined those bounds as follows:

The court held that the petitioner had not attempted by these actions to practice law indirectly and thus evade the effect of his disbarment in light of the fact the evidence failed to show that he was:

1. Obtaining clients;
2. Retaining his former clients;

3. Serving clients with the connivance of another attorney and through the use of another attorney's name; or
4. Receiving a law clerk's salary as a surrogate for legal fees.¹

A disbarred attorney who is ostensibly employed as a clerk in the office of a licensed attorney engages in the practice of law when he retains his own clients, acts independently of the licensed attorney in matters regarding legal advice, and handles legal matters in toto, in that the alleged attorney-employer has knowledge of the existence of such matters but does not supervise or manage their progress and disposition.

Id. at 926-27 (footnote added). The Committee has applied this standard in the past. See L.O. 92-07 (stating suspended lawyer may act as paid paralegal "provided you act under the supervision of the transferee attorney and comply with the guidelines explained in Application of Christianson"). The Committee is of the opinion that if Attorney A acts as a paralegal, legal assistant or legal support staff in the same office in which Attorney A had practiced law, the situation is fraught with danger for both Attorney A and the law firm.

Recently, the North Dakota Supreme Court has given more guidance on the proper scope of a legal assistant, through the Rules of Professional Conduct. See N.D.R. Prof. Conduct 5.3.

Rule 5.3 provides, in pertinent part:

(d) In addition to paragraphs (a), (b) and (c), the following apply with respect to a legal assistant employed or retained by or associated with a lawyer:

(1) A lawyer may delegate to a legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, or these rules.

(2) A lawyer may not delegate to a legal assistant:

(i) Responsibility for establishing an attorney-client relationship;

(ii) Responsibility for establishing the amount of a fee to be charged for a legal service;

¹ If the suspended lawyer/legal assistant and the supervising attorney were to share fees (as opposed to a salary or a wage situation), the fee sharing prohibitions of Rule 5.4 would come into play. N.D.R. Prof. Conduct 5.4.

(iii) Responsibility for a legal opinion rendered to a client;

(iv) Responsibility for the work product.

(3) The lawyer shall make reasonable efforts to ensure that clients, courts, and other lawyers are aware that a legal assistant is not licensed to practice law.

Id. at 5.3(d).

Because the In re Application of Christianson decision deals expressly with the situation of a disbarred or suspended lawyer acting as a paralegal and the more recent rule of professional conduct deals only with paralegals in general, the Committee is of the opinion that no parts of the rule can be read to expand any prohibitions on conduct found in In re Application of Christianson. In other words, the provisions of Rule 5.3(d)(1) on what a legal assistant **may** do will not supersede any prohibitions of conduct found in In re Application of Christianson. So long as Attorney A abides by the decision and the rule in this respect, Attorney A may act as a legal assistant for a duly admitted attorney.

2. A suspended lawyer may not act as in-house counsel or otherwise provide legal services to a corporation.

Attorney A's question in this regard implies, but does not specifically limit itself to, the provision of legal services for a corporation. Attorney A may, of course, be an employee of a corporation and not provide services of a legal nature for that corporation. For example, Attorney A could be employed as a sales person for a corporation without necessarily running afoul of the Rules of Professional Responsibility.

In regard to the provision of legal services for a corporation, there is no direct case law in North Dakota on point. However, this Committee has issued prior decisions which would prohibit the provision of such services. See L.O. 92-07. In this opinion, this Committee stated:

C. Can you, as a pro se owner and president of Sun Well Service, Inc., do legal work for the company, as long as you do not represent yourself to be an attorney? No. Corporations are considered “persons” under state law, so providing legal work for the corporation would be the same as providing legal work to another individual.

Id. (emphasis in original). This appears to be in line with decisions from other states that have reached this issue. For example, in Blaustein v. Sassower, 232 A.D. 516, 649 N.Y.S.2d 30 (N.Y. App. Div. 1996), because attorney Sassower had been suspended from the practice of law, she was not able to represent her professional corporation in a legal malpractice action. Id. at 517, 649 N.Y.S.2d at 31. Similarly, in In re Depew, 560 P.2d 886 (Idaho 1977), attorney Depew was found to have violated his suspension by committing the unauthorized practice of law by purporting to represent a corporation in a suit, not as its attorney, but as an officer of the corporation. Id. at 887-88.

Finally, this Committee has previously held that providing services short of representation in suit for a corporation does constitute the practice of law. See N.D. Ethics Op. 93-04. In that opinion, the services provided were described as follows:

However, I am frequently required to communicate information to various entities, including state insurance departments, outside counsel, or our branch managers and other employees, on behalf of all of our affiliated companies, including (redacted). Additionally, I am periodically asked to serve as the contact person for receipt of legal documents affecting (redacted), which may occasionally be sent by officials of North Dakota. Because our parent company is licensed in all 50 states, I am also periodically required to research the laws of each state, and provided [sic] guidance concerning the legal obligations or limitations imposed upon our companies by those laws and regulations. This would include communicating to the management of (redacted) factual information about the statutory and regulatory provisions of North Dakota’s laws.

Id. at 1 (emphasis in original). The Committee stated: “[a]ccordingly, the activities that you mentioned would constitute the ‘practice of law.’” Id. at 3. The Committee is of the opinion, therefore, that Attorney A may not act as in-house counsel or otherwise as an employee to a

corporation to the extent that Attorney A is involved, in any manner, in the provision of legal services to the corporation.

3. A suspended lawyer may not act as a guardian ad litem without alternate qualifications.

The Committee has found no specific authority on point either in North Dakota or in any jurisdiction as to this question. The question appears, therefore, to be one of first impression anywhere in the nation. Thus, to begin the analysis, it is helpful to turn to North Dakota's seminal case, In re Application of Christianson, and the rationale underpinning that decision. The most cogent explanation of the guiding principle of that case was described by the North Dakota Supreme Court as follows:

A suspended lawyer is not the same as a layman. The public knows that he has a legal education, that he has engaged in the practice of law, and that his work and his opinions are presumably more valuable on that account. We cannot accept the argument that a disbarred or suspended lawyer may engage in all activities which nonlawyers also perform. On the other hand, we are not willing to foreclose him from acts which he is permitted to perform by reason of alternate qualifications, such as a real estate broker's license. In the case of In re Peterson, 175 N.W.2d 132 (N.D. 1970), the petitioner made his living during suspension as an abstractor without being criticized for so doing. **A suspended lawyer may engage in some activities if he is otherwise qualified to do so, but not if his qualifications come from having been a lawyer.**

In re Application of Christianson, 215 N.W.2d at 925-26 (emphasis added); accord In re Katz, 35 A.D.2d 159, 160, 315 N.Y.S.2d 97, 98 (N.Y. App. Div. 1970) (holding suspended attorney should not act as city marshal because position was so closely aligned with courts and judicial proceedings).

In North Dakota, there are many statutory provisions dealing with guardians ad litem, including the following:

1. Section 12.1-20-16 (dealing with a minor or developmentally disabled witness in a sex offense prosecution);
2. Section 14-07.1-05.1 (dealing with a minor in a custody, support, or visitation proceeding);
3. Section 14-09-06.4 (dealing with a minor in an annulment, divorce, or legal separation proceeding or contested custody proceeding);

4. Section 14-10-04 (dealing with a minor in a civil action);
5. Section 14-15.1-03 (dealing with a minor in a relinquishment of parental rights proceeding);
6. Section 14-17-08 (dealing with a minor in a Uniform Parentage Act proceeding);
7. Section 25-03.3-07 (dealing with a minor witness in a proceeding for a commitment of a sexually dangerous individual);
8. Section 27-20-48 (dealing with a minor in a Uniform Juvenile Court Act proceeding);
9. Section 28-03-01 (dealing with an infant plaintiff);
10. Section 28-03-02 (dealing with a resident infant defendant);
11. Section 28-03-03 (dealing with a non-resident infant defendant);
12. Section 28-03-04 (dealing with a defendant of unsound mind);
13. Section 30.1-03-03 (dealing with a minor, an incapacitated person, the unborn, or unascertained persons or those whose identities or addresses are unknown in estate litigation);
14. Section 30.1-28-03 (dealing with an incapacitated person in guardianship proceedings);
15. Section 31-04-04.1 (dealing with a child victim in a sexual offense prosecution);
16. Section 32-28-02 (dealing with a minor in a name change proceeding);
17. Section 50-25.1-08 (dealing with a child in a child abuse or neglect proceeding); and
18. Section 59-04-11 (dealing with a minor or incompetent person in an action relating to the administration of trusts).

Under only two of the above guardian ad litem statutes are there explicit requirements that the guardian ad litem be an attorney. See N.D. Cent. Code §§ 14-09-06.4 (pursuant to Rule 8.7 of the North Dakota Rules of Court, a guardian ad litem under this section must be an attorney licensed in North Dakota); 30.1-28-03 (stating that the court shall “appoint an attorney to act as a guardian ad

litem”). Obviously, as to these two situations, Attorney A would be foreclosed from acting as a guardian ad litem.

Furthermore, the other sections indicate a guardian ad litem is to serve as an advocate or representative of the ward. For example, while section 12.1-20-16 states: “[t]he guardian ad litem may, but need not, be a licensed attorney . . .,” it is clear the duties of the guardian ad litem are advocacy. Id. § 12.1-20-16; see also §§ 14-07.1-05.1 (stating role of guardian ad litem is “to represent a minor”); 14-17-08 (stating child “must be represented by” guardian ad litem); 30.1-03-03 (stating court may appoint guardian ad litem “to represent the interests of” the ward); 59-04-11 (stating guardian ad litem “shall represent” the ward). In a concurring opinion in a 1994 case, Justice Levine cogently summarized this concept. Alvarez v. Carlson, 524 N.W.2d 584, 592 (N.D. 1994) (Levine, J., concurring). Justice Levine stated:

I join in the majority opinion but write to tout the proposition that ordinarily, guardians ad litem should be treated as advocates of the children or investigators for the court, and not expert witnesses.

Id.

When viewed in this context, the Committee feels that Attorney A’s appointment as a guardian ad litem may well be because of the qualifications which have come from having been an admitted and practicing lawyer. In that case, Attorney A’s service as a guardian ad litem would run afoul of the rationale expressed in the In re Application of Christianson decision. If Attorney A had alternate qualifications that did not arise out of Attorney A’s having been an admitted and practicing lawyer, then Attorney A may act as a guardian ad litem. Since the Committee has no information about Attorney A’s possible alternate qualifications, the Committee cannot express an opinion on whether Attorney A may serve as a guardian ad litem in situations other than those involving section 14-09-06.4 and 30.1-28-03 of the North Dakota Century Code.

4. A suspended lawyer may act as a mediator without alternate qualifications.

As with guardian ad litem service, the Committee has found no specific authority on point anywhere in the nation. Much of the analysis concerning service as a mediator is similar to service as a guardian ad litem. Another quote from North Dakota's seminal case, In re Application of Christianson, is helpful. In re Application of Christianson, 215 N.W.2d at 926. The Court stated:

When professional expertise enters into the activity, and when the activity is one which is customarily performed by lawyers, then such activity is forbidden to a suspended attorney, even though under some conditions members of other professions may sometimes be allowed to perform the same acts.

Id. As with service as a guardian ad litem, it is likely that service as a mediator may well be because of the qualifications and experiences Attorney A has had as a result of having been an admitted and practicing lawyer. In that case, and subject to the analysis concerning the rosters of qualified mediators set forth herein, Attorney A's service as a guardian ad litem would run afoul of the rationale expressed in the In re Application of Christianson decision. However, if Attorney A had alternate qualifications that did not arise out of Attorney A's having been an admitted and practicing lawyer, then Attorney A may act as a mediator. Since the Committee has no information about Attorney A's possible alternate qualifications, the Committee cannot express an opinion on whether Attorney A may serve as a mediator in situations other than those in which the qualified rosters of mediators comes into play.

North Dakota has some specific statutes and rules dealing with mediators. Sections 14-09.1-03 and 14-09.1-04 provide for a roster of qualified mediators in child custody proceedings. N.D. Cent. Code §§ 14-09.1-03 & -04. Further, Rule 8.9 of the North Dakota Rules of Court provides for the creation of a civil mediation roster and a domestic relations mediator/contested child proceedings mediator roster. N.D.R.O.C. 8.9(a). The language of this rule does not expressly require that being a licensed attorney is a prerequisite to be placed on either roster. Id. at 8.9(b)(2) & (3). It may very

well be that Attorney A could be included on either of these rosters (a decision that is not within the Committee's purview and on which the Committee expresses no opinion).

If Attorney A becomes a qualified mediator listed on one or both of these rosters, then Attorney A may act as a mediator for the type of mediation on the roster which Attorney A is listed. The North Dakota Supreme Court in In re Application of Christianson clearly stated: "A suspended lawyer may engage in some such activities **if he is otherwise qualified to do so**, but not if his qualifications come from having been a lawyer." In re Application of Christianson, 215 N.W.2d at 926. Attorney A's qualifications would come not from having been a lawyer, but rather from being listed on the roster of qualified mediators. Thus, if Attorney A is listed on the roster of qualified mediators, Attorney A may serve as a mediator for that type of mediation.

CONCLUSION

The Committee concludes as follows:

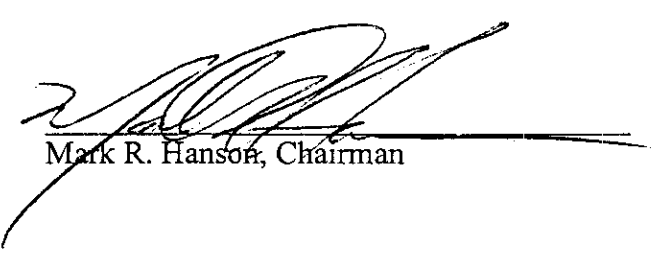
1. Attorney A may act as a paralegal, legal assistant, or other type of support staff to a licensed attorney, so long as Attorney A complies with the strictures of In re Application of Christianson, 215 N.W.2d 970 (N.D. 1974), and Rule 5.3 of the North Dakota Rules of Professional Conduct;
2. Attorney A may not act as in-house counsel or otherwise provide legal services in any manner to a corporation without violating Rule 5.5 of the North Dakota Rules of Professional Conduct;
3. Attorney A may not act as a guardian ad litem under sections 14-09-06.4 and 30.1-28-03 of the North Dakota Century Code, but the Committee is unable to answer the question of whether Attorney A may act as a guardian ad litem otherwise; and
4. Attorney A may act as a mediator if Attorney A is licensed on the roster of qualified mediators pursuant to Rule 8.9 of the North Dakota Rules of Court, but the Committee is unable to answer the question of whether Attorney A may act as a mediator otherwise.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. N.D.R. Lawyer Discipline 1.2(B). This rule provides:
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.

Id.

This opinion was drafted by Steven E. McCullough and was unanimously approved by the Ethics Committee on May 24, 2001.



Mark R. Hanson, Chairman