

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

Opinion No. 01-07
October 17, 2001

FACTS

This Committee has received a request for an opinion regarding a potential issue to state's attorneys. The duties of a state's attorney include conducting prosecutions on behalf of the State for public offense. N.D.C.C. § 11-16-01(1). The duties further include instituting proceedings under chapter 25-03.1, which deal with mental health proceedings. N.D.C.C. § 11-16-01(16). The records from a commitment proceeding under chapter 25-03.1 are confidential. There are certain exceptions which are set out in section 25-03.1-43, which section states as follows:

25-03.1-43. Confidential records. All information and records obtained in the course of an investigation, evaluation, examination, or treatment under this chapter and the presence or past presence of a patient in a treatment facility must be kept confidential and not as public records, except as the requirements of a hearing under this chapter may necessitate a different procedure. All information and records are available to the court and, under regulations established by the department, may be disclosed only to:

1. Physicians and providers of health, mental health, or social and welfare services involved in caring for, treating, or rehabilitating the patient to whom the patient has given written consent to have information disclosed.
2. Individuals to whom the patient has given written consent to have information disclosed.
3. Persons legally representing the patient, including attorneys representing the patient in commitment proceedings, upon proper proof of representation.
4. Persons authorized by a court order.
5. Persons doing research or maintaining health statistics, if the anonymity of the patient is assured and the facility recognizes the project as a bona fide research or statistical undertaking.
6. The department of corrections and rehabilitation in cases in which prisoners sentenced to the state prison are patients in the state hospital on authorized transfers either by voluntary admissions or by court

- order.
7. Governmental or law enforcement agencies when necessary to secure the return of a patient who is absent without authorization from the facility where the patient was undergoing evaluation or treatment, or when necessary to report a crime committed on facility premises or against facility staff or patients, or threats to commit such a crime. The disclosures must be directly related to a patient's commission of a crime or threats to commit such a crime and are limited to the circumstances of the incident, the name and address of the patient involved, and the patient's last known whereabouts.
 8. Qualified service organizations and third-party payers to the extent necessary to perform their functions.
 9. Victims and witnesses of a crime to the extent necessary to comply with the notification requirements of subsection 16 of section 12.01-34-02.
 10. Law enforcement agencies to confirm and investigate the address of a person required to register under section 12.1-32-15.

ISSUES PRESENTED

1. Whether or not a conflict of interest is created by a state's attorney filing a petition for a commitment under chapter 25-03.1, N.D.C.C., and also prosecuting a criminal offense against the same individual for whom treatment is sought.

2. Whether or not any information obtained by the state's attorney in the commitment proceeding can be used by the state's attorney in a criminal proceeding in which the defendant is the same person against whom the commitment was sought.

DISCUSSION

The first question deals with whether or not the state's attorney has a conflict of interest when the same individual is the defendant in a criminal proceeding and also the person against whom a commitment is sought under chapter 25-03.1, N.D.C.C. Rule 1.7 N.D.R.Prof.Conduct does state the general rule for a conflict of interest. The duties of the state's attorney include the prosecution of public offenses on behalf of the State of North Dakota. N.D.C.C. § 11-16-01(1). The state's

attorney is also required to represent the State in commitment proceedings. N.D.C.C. §§ 11-16-01(16) and 25-03.1-14. In each type of proceeding, the state's attorney is representing the same client. For that reason, there is no adversarial relationship created between the client represented by the state's attorney in each case. Therefore, it is the opinion of this Committee that no conflict of interest exists when the state's attorney represents the State of North Dakota in a commitment proceeding where the person against whom the commitment is sought is also a defendant in a criminal proceeding handled by the same state's attorney.

The second issue is whether the state's attorney can use information acquired in the commitment proceeding to assist in the prosecution of the same individual for whom the commitment is sought. The records in a commitment proceeding are confidential. N.D.C.C. § 25-03.1-43. There are certain exceptions which do allow for this confidential information to be disclosed. The question to be answered deals with instances which do not fit in one of the exceptions set forth in section 25-03.1-43, N.D.C.C.

Rule 1.6 N.D.R.Prof.Conduct allows a lawyer to disclose confidential information when the lawyer believes it necessary to prevent a client from committing an act that will result in imminent death or imminent substantial bodily harm, or are likely to harm substantially the financial interest or property of another. If the information obtained by the state's attorney is confidential, but is not one of the exceptions of section 25-03.1-43, N.D.C.C., the state's attorney may still disclose and use that information to prevent the commission of a crime resulting in imminent death, imminent substantial bodily harm, or substantial harm to the financial interest or property of another.

It is the further opinion of this Committee, however, that the confidential information obtained by the state's attorney in a commitment proceeding under chapter 25-03.1 cannot be used

for past wrongdoing, but can be used to prevent future wrongdoing. *People v. Paasche*, 525 N.W.2d 914, 917-918 (Mich.App. 1994). If the confidential information may be released under section 25-03.1-43, N.D.C.C., then this information can be used for past wrongdoing.

CONCLUSION

It is the conclusion of this Committee that a state's attorney does not have a conflict of interest in prosecuting a defendant who is also an individual against whom a commitment was sought pursuant to chapter 25-03.1, N.D.C.C. It is the further opinion of this Committee that a state's attorney may use information otherwise confidential under section 25-03.1-43, N.D.C.C. to prevent imminent death, imminent substantial bodily harm, or substantial harm to the financial interest or property of another. Confidential information, under section 25-03.1-43, remains confidential for past wrongdoing, except as allowed by section 25-03.1-43, N.D.C.C.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which provides:

A lawyer who acts in 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 N.D.R.Prof.Conduct as to the conduct that is a subject of the opinion or advisory letter.

This opinion was drafted by J. Thomas Traynor, Jr., and was adopted unanimously by the Committee on October 17, 2001.



Mark R. Hanson, Chair