

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

Opinion No. 01-08

November 9, 2001

The inquiring lawyer poses a straight forward question. "Is it a conflict of interest for me to represent a client who brings suit against the State of North Dakota over an automobile accident while I am employed as the _____ County State's Attorney on a part-time basis?" No other facts are provided.

DISCUSSION

Each county elects a State's Attorney every four years. The many duties of each State's Attorney are set forth in §11-16-01, N.D.C.C. Among these duties are the following:

"The State's Attorney ... shall:

- (5) Defend all suits brought against the state or against the county . . .
- (9) Give . . . the State's Attorney's opinion in writing to the County . . . officers . . .
- (12) Act as legal advisor of the Board of County Commissioners,..."

Section 11-16-05, N.D.C.C. includes other restrictions on powers or acts of a State's Attorney. For purposes of this opinion, it is assumed that the State's Attorney serves in a county that has a population of less than 35,000, and that the county has not by resolution restricted the State's Attorney from acting as attorney or counsel for other parties. It is also assumed that the civil action does not depend on, or arise out of, a state of facts upon which a pending and undetermined criminal prosecution depends. If any of these situations were the case, the State's Attorney would not be permitted to represent the proposed client. See Section 11-16-05(4) and 11-16-05(5). N.D.C.C., and Rule 1.8(j)(1), N.D.R.P.C.

A reader of Section 11-16-01, N.D.C.C., particularly subsection five, might initially conclude that since the State's Attorney must defend all suits brought against the State, he or she is absolutely prohibited from representing this proposed client.

However, although Section 11-16-01(5) has not been amended, the duty of a State's Attorney to defend the State of North Dakota has been largely abrogated by Chapter 32-12.2, N.D.C.C. This Chapter lays out the statutory framework and requirements for claims and actions against the State of North Dakota and its employees.

As a result of this legislation, actions brought against the State of North Dakota, or against state employees acting within the scope of the employee's employment, are defended against by, or the defense is under the control of, the attorney general or the attorney general's appointee. See 32-12.2-03(6) N.D.C.C.

Therefore, in practice, it would be very unlikely that a State's Attorney would be called upon to defend the State of North Dakota in a lawsuit over an automobile accident.

Accordingly, it is the opinion of the Committee that § 11-16-01(5), as it pertains to the State's Attorney's duties to defend the State of North Dakota, is not an absolute bar to the lawyer's representation of a client bringing a claim or suit against the State of North Dakota.

The lawyer, of course, could not represent such a client, if the lawsuit will involve the county represented by the State's Attorney, or the county's officers, employees, or other elected officials. See Section 11-16-05(1), N.D.C.C.

The inquiry does not end here, however. Resolving questions of conflict of interest is primarily the responsibility of the lawyer taking the representation. The question would need to be considered on a case by case basis using the conflict of interest general rule, Rule 1.7, N.D.R.P.C.

- (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
- (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.
- (c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation . . .

As subsection 1.7(c) indicates, if the lawyer believes the representation might be adversely affected, both the county and the prospective client must consent after consultation.

Other guidance for the lawyer can be found in the Official Comment to Rule 1.8, which states "part-time prosecutors or part-time judges permitted by law to practice in addition to the part-time service must not engage in that practice in matters which compromise their public functions," or "if it involved parties or issues with which the part-time official had any involvement as a judge or prosecutor." And, finally, the lawyer should consider Rule 1.11 (a) N.D.R.P.C. which states, in part:

"Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participates personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation . . ."

CONCLUSION

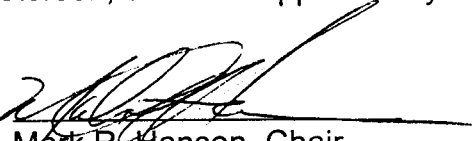
In summary, there is no statutory authority barring a part-time State's Attorney from representing a plaintiff who brings an action against the State of North Dakota arising from an automobile accident, unless it involves the elected officials, officers, or employees of the county in which the State's Attorney is elected.

The inquiring lawyer may be able to represent that plaintiff, unless prohibited to do so by Rules 1.7, 1.8, or 1.11, of the North Dakota Rules of Professional Conduct.

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

"A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee 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."

This opinion was drafted by David L. Petersen, and was approved by the Ethics Committee on November 9, 2001.


Mark R. Hanson, Chair