

final draft
LO 88-01

ZUGER & BUCKLIN .

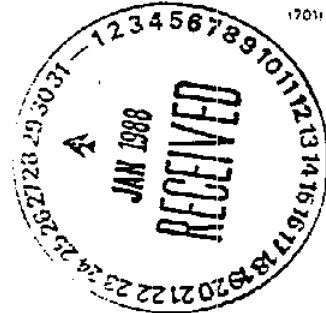
COUNSELORS AND ATTORNEYS AT LAW

JOHN A. ZUGER, P.C.
EDWARD H. BUCKLIN, P.C.
LYLE W. KIRMIS
ROBERT V. BOLINSKE
THOMAS D. SMITH, P.C.
MURRAY G. SAGSVEEN, P.C.
LANCE D. SCHREINER, P.C.
JAMES S. HILL, P.C.
PATRICK J. WARD
REBECCA THIEM BENSON, P.C.

MICHAEL G. FIERGOLA
CHARLES T. EDIN
DANIEL S. KUNTZ
MICHAEL G. LIFFRIG
JON E. STRINDEN
BRENDA L. BLAZER

ETHAN ROSSER
PROVIDENT LIFE BUILDING
PO BOX 1695
BISMARCK, N.D. 58502-1695
701/223-2711

January 28, 1988



[REDACTED]
[REDACTED]
Re: Request for Ethics Advice

Dear [REDACTED]

This letter is in response to your letter of January 20, 1988, in which you requested an advisory letter from the Ethics Committee of the State Bar Association of North Dakota to assist you in resolving the ethical question you posed regarding Rule 3.7 of the North Dakota Rules of Professional Conduct relating to an attorney serving as counsel and a witness in litigation.

Advisory letters are provided upon request by lawyers and are confidential unless released by the requesting lawyer. It is important to note that opinions and advisory letters issued by the Ethics Committee are advisory only and are not binding upon Grievance Committees, the Disciplinary Board, or courts presented with disqualification motions. Enclosed for your information and future reference is a copy of the policies and procedures of the Ethics Committee as revised on May 6, 1985.

The question you have presented is whether you are required to withdraw as counsel for the City of [REDACTED] if you are to be called as a witness in light of the provisions of Rule 3.7 of the North Dakota Rules of Professional Conduct.

Rule 3.7 provides as follows:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) The testimony relates to an uncontested issue;
 - (2) The testimony relates to the nature and value of legal services rendered in the case; or

- (3) Disqualification of the lawyer would work substantial hardship on the client because of the distinctive value of the lawyer or the lawyer's firm as counsel in the particular case.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by a conflict of interest.

We are assuming for purposes of this letter that you have already determined that you are "likely" to be a "necessary" witness in the proceedings. You must determine if you are a "necessary" witness in the proceedings. ^{cR} That being the case, Rule 3.7(a) is a general prohibition to an attorney not to act as an advocate at a trial in which an attorney is likely to be a necessary witness.

It is, therefore, necessary to consider the three exceptions to Rule 3.7(a). Exception (1) allows an attorney to act as a witness and advocate if the testimony relates to an uncontested issue. Based on information available to us, it appears that the testimony would relate to a contested issue and, therefore, that exception is not available.

Exception (2) permits an attorney to act as the advocate and a witness where the testimony relates to the nature and value of legal services rendered in the case. We cannot tell from the information available to us whether that provision applies and if the testimony you may be required to give is in regard to the nature and value of legal services rendered. You will need to review that provision carefully in making a determination whether to withdraw.

Exception (3) requires you to make a determination as to whether it would work a "substantial hardship" on your client because of the "distinctive value" of you or your firm as counsel to the City in the particular case. We do not have sufficient information on the questions of "substantial hardship" and "distinctive value" to assist you in that matter but would suggest that you give careful consideration to whether that exception applies.

We have also reviewed the applicability of Rule 3.7(b). We believe your resolution of that question depends upon whether you are the person likely to be called as a witness and another member of the firm will try the case or whether you will try the case and another member of your firm will be


Page 3
1/18/88

called as a witness. If you determine that the matter falls under Rule 3.7(b) you must then consider the applicability of the conflict of interest provisions in Rule 1.7, and the inapplicability of Rule 1.10.

We have not been presented with sufficient information by you to make any kind of a determination under Rule 1.7 as to whether a conflict of interest exists and you have not asked for our opinion on the applicability of the provisions of Rule 1.7. Assuming Rule 1.7 does apply and must be considered, you must give careful attention to your affirmative duty of consultation. The client must make an informed decision to consent after consultation.

We hope that this letter is of some assistance to you in deciding how to proceed.

Sincerely,

Patrick J. Ward

Patrick J. Ward, Chairman
Ethics Committee, State
Bar Association of North
Dakota

PJW:gb
Enc.

cc: Ethics Committee Members
Les Torgerson


January 25, 1988

Mr. Patrick J. Ward, Chairman
SBAND Ethics Committee
P.O. Box 1695
Bismarck, ND 58502-1695

RE:

Dear Mr. Ward:

I have received a copy of Attorney [REDACTED] letter to you of January 22, 1988 and I want to comment on the portion of [REDACTED] letter relating to Rule 1.7.

Rule 1.7(c) subparagraphs (1) and (2) accurately reflect the position of our firm with respect to the [REDACTED] litigation in light of the determination by our firm that we do not have reason to believe that our representation of the City can adversely affect the City because of our own interests or the interests of other parties; further, that the City in this instance has, after consultation with respect to a possible conflict, consented to our representation in the above matter. In fact, a video tape is available to your committee with respect to the discussion that the City had concerning the possible conflict at its January 19 meeting, following which discussion the appointment of our firm replacing Attorney [REDACTED] was approved.

The determination by your committee on the question surrounding Rule 3.7 would have an immediate impact on trial preparation and, for that reason, we respectfully request notice of your finding on the Rule 3.7 question following your phone conference tomorrow, if possible.

Sincerely,

LJB/bz
1173

Enclosure: Rule 1.7

cc:

ZUGER & BUCKLIN

COUNSELORS AND ATTORNEYS AT LAW

JOHN A. ZUGER, PC.
EDWARD H. BUCKLIN, PC.
LYLE W. KIRMIS
ROBERT V. BOLINSKE
THOMAS O. SMITH, PC.
MURRAY G. SAGSVEEN, PC.
LANCE D. SCHREINER, PC.
JAMES S. HILL, PC.
PATRICK J. WARD
REBECCA THIEM BENSON, PC.

MICHAEL G. FIERGOLA
CHARLES T. EDIN
DANIEL S. KUNTZ
MICHAEL G. LIFFRIG
JON E. STRINDEN
BRENDA L. BLAZER

5TH AT ROSSER
PROVIDENT LIFE BUILDING
P.O. BOX 1695
BISMARCK, N.D. 58502-1695
(701) 223-2711

January 22, 1988

TO: MEMBERS, ETHICS COMMITTEE

Dear Committee Members:

Enclosed please find a response from City Attorney [REDACTED] to Mr. [REDACTED] request for an opinion which I forwarded to all of you on January 21, 1988.

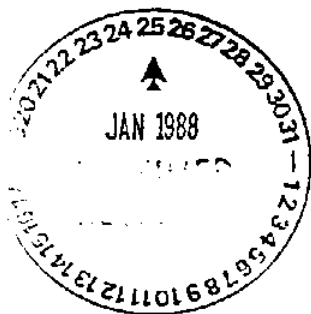
Please be prepared to discuss this letter in our telephone conference which is scheduled for January 26th.

Sincerely,

Patrick J. Ward

PJW:gb
Enc.

cc: Sherry King (w/enc.) ✓



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

January 22, 1988

Patrick J. Ward, Chairman
SBAND Ethics Committee
P. O. Box 1695
Bismarck, ND 58502

Re: [REDACTED]

Dear Mr. Ward:

[REDACTED] has asked for an advisory opinion by letter dated January 20, 1988. I do not believe [REDACTED] has fully apprised you of the problems inherent in the appointment of his firm as special counsel by the [REDACTED]. In fact, it appears that [REDACTED] misses the point entirely.

I have told [REDACTED] that I do not believe he can represent the City because his actions on behalf of the city may be adversely affected by his own interests. I believe that [REDACTED] must withdraw, and should not accept the appointment, based on Rule 1.7 of the North Dakota Rules of Professional Conduct. Furthermore, I do not believe [REDACTED] may accept an appointment as special counsel (and, in fact, as lead counsel) in this case, or continue as counsel, because he is likely to be called as a witness on matters that are contested. And, no one in the firm may act as counsel for the city if [REDACTED] is a witness due to other inherent conflicts. These matters are governed by Rule 3.7. However, I believe Rule 1.7 is of greater concern than Rule 3.7.

[REDACTED] and the firm of [REDACTED] have a financial, personal and professional interest in the matters that are the subject of the lawsuit. These interests clearly, in my opinion, adversely affect their ability to adequately represent the city. In order to understand the conflict, a summary of the proceedings that led us to this point is in order.

The firm of [REDACTED] was retained by the City of [REDACTED] in 1987 to act as [REDACTED] in connection with a proposed plan to finance improvements to certain city facilities. Members of the firm, principally [REDACTED] were consulted frequently by city officials and the city's underwriters over a period of several months. A financing plan was approved by the city in September of 1987. [REDACTED]

letter to Ward
January 22, 1988
Page 2

thereafter issued a "bond counsel's opinion", wherein he stated, in standard language typical of such opinions, that the agreements executed by the city were valid and duly authorized, that the city had the authority to issue "Certificates of Participation", that the Certificates are tax-exempt, etc. Money to finance the improvements was subsequently raised by the sale of "Certificates of Participation" to private investors.

For services as bond counsel, [REDACTED] (on behalf of the firm) submitted a billing to the city. Following negotiations, the city and [REDACTED] agreed on a figure of \$70,000.00 as compensation for services as bond counsel. [REDACTED] have been paid \$40,000.00 to date; the remaining \$30,000.00 will be paid only if the legality of the financing plan is upheld. (Bond counsel fees are typically included as a cost of the bond issue).

In October of 1987 a taxpayers' lawsuit challenging the financing plan was initiated. Plaintiffs allege that the financing plan is unconstitutional, illegal and not authorized by law. They seek an injunction to prevent the city from making lease payments pursuant to an agreement made by the city to repay the principal and interest on the Certificates of Participation. The lawsuit and plaintiffs' allegations necessarily imply that bond counsel's opinion is wrong.

The city's underwriters and one of the investors who holds Certificates have intervened in the lawsuit. They are both represented by underwriters' counsel. Shortly after the lawsuit was begun, [REDACTED] engaged in conversations with one or more city officials and asked that his firm be appointed special counsel to represent the city. [REDACTED] suggested that the city needed his expertise as bond counsel in the lawsuit, and offered to assist the city at no additional charge to the city. The city commission in November of 1987 accepted this offer and appointed the firm of [REDACTED] as special counsel to assist the city attorney.

In January of 1988, following an announcement that I will leave my office in May of this year, [REDACTED] engaged in several private conversations with one or more city officials, including the city auditor, the mayor, and another city commissioner. I do not know who initiated the first conversation. Over the course of several conversations, [REDACTED] told one or more city officials that the city could not be adequately represented by me, apparently due to the fact that I will be leaving my office in May, and that the expertise of [REDACTED] and others in the firm was needed. (Trial has been scheduled for March 22, and the trial judge has stated that there will be no continuances, absent a death of one of the principal players or comparable tragedy.) [REDACTED] either suggested that his firm be appointed lead counsel or he agreed with such a proposal. It was also agreed during the course of these meetings that the firm would be compensated (at a rate of \$75.00

letter to Ward
January 22, 1988
Page 3

to \$90.00 per hour) for such services. These conversations took place without my knowledge and [REDACTED] did not advise me that he had asked to be appointed lead counsel.

Plaintiffs' counsel has advised that [REDACTED] will "likely" be called as a witness in the lawsuit concerning contested matters. However, plaintiffs' attorney has also stated that he cannot say with certainty that [REDACTED] will be a witness, and that he will be conducting further discovery (including perhaps a deposition of [REDACTED]) before he will make a final determination. This was disclosed to [REDACTED] and others in his firm in late December of 1987 (after the appointment of [REDACTED] to assist me, but before [REDACTED] agreed to be "lead counsel" to replace me).

On January 19, 1988, the board of city commissioners appointed [REDACTED] (and the firm of [REDACTED] as special counsel to represent the city. This was done against my advice, as I argued that [REDACTED] and his firm could not and should not accept the appointment because they have an inherent conflict, and because [REDACTED] will likely be called as a witness. I advised the board to appoint other counsel who had not been involved in the transaction to represent the city. [REDACTED] at this meeting, acknowledged that he and his firm have a conflict, but claimed that it is not an actual conflict at this time and instead is a potential conflict. As [REDACTED] sees it, the conflict will arise only if the city loses the lawsuit, in which case investors may sue everyone in sight (including bond counsel and the city) and the city may sue bond counsel, and bond counsel may sue the city. (I see a way to save bond issuers some money here. From now on, an opinion of separate, independent bond counsel will not be required unless the legality of the issue is challenged. In the absence of a challenge, the opinion of issuer's counsel will suffice.) [REDACTED] also claimed that he could accept the appointment even though he had notice he may be called as a witness because plaintiffs' counsel has not told him that he will definitely be called as a witness.

[REDACTED] and others in the firm of [REDACTED] have said that they have much more at stake in this lawsuit than just their fee. They suggest that the professional reputation of the firm and its members is at stake. The lawsuit and plaintiffs' allegations necessarily imply that the opinion of bond counsel is simply wrong. If the plaintiffs prevail, the firm's reputation and business will suffer. In other words, the plaintiffs have indirectly challenged the integrity, competence and reputation of the members of the firm.

[REDACTED] and others have also suggested that the lawsuit is important not just to the [REDACTED], but also to other cities across the state, and to underwriters, bond counsel and investors across the nation. If the obligations the city has incurred are ultimately determined to be "debt", within the

letter to Ward
January 22, 1988
Page 4

meaning of that term as used in the Constitution and laws of North Dakota (which is the issue that is at the center of this lawsuit), it would not only damage the reputation of [REDACTED] but it may prevent other municipalities in North Dakota from structuring plans in a similar fashion and even have a chilling effect on similar plans in other jurisdictions because of the precedent it would set. That would have an obvious impact on underwriters, bond counsel and others who earn a living in the world of government bonds.

It is also obvious to everyone that if the city loses this lawsuit, and the transaction is declared to be invalid and the investments ultimately determined to be taxable, the city and bond counsel could very likely end up in a lawsuit as adverse parties. Among other possible claims, the city could claim that the firm of [REDACTED] committed malpractice in connection with the issuance of bond counsel's opinion.

[REDACTED] suggestion that a conflict exists only if the city loses the lawsuit is ludicrous. A claim of that sort is not unlike a claim made by a defense attorney who suggests he has a conflict in the representation of two or more defendants in a criminal trial only in the event of a guilty verdict.

The existence of a conflict does not depend on the ultimate resolution of the lawsuit. In this case [REDACTED] and the members of his firm have a conflict because they have a financial interest and because their professional reputations are at stake. Those interests are not necessarily identical to the interests of the [REDACTED]. [REDACTED] may refuse to explore, or advise against, settlement options that may be in the interests of the city but which do not necessarily serve the financial and professional interests of [REDACTED]. Furthermore, it is possible that the ability of the city to successfully pursue claims against [REDACTED], if the city loses the lawsuit, may be affected or even foreclosed as a result of decisions made by [REDACTED] in the course of this lawsuit. For example, [REDACTED] could stipulate to certain facts, fail to object to certain evidence (even though there may be grounds for an objection) or take or refuse to take other action that results in certain findings that serve to insulate [REDACTED] from damages in a subsequent lawsuit. We can only speculate at this time as to what issues may be determined in the course of this lawsuit; however, it is not speculation to say that the city will be estopped from re-litigating any of these issues in a subsequent proceeding.

I am not suggesting that [REDACTED] or anyone else in his firm would intentionally or even knowingly act in a manner that is adverse to the interests of the city. However, when one has a conflict that conflict sometimes interferes with the ability to act in an objective and impartial manner. I believe that is the case with [REDACTED], as evidenced by his statement that he only has a conflict in this matter if he loses. That is why

letter to Ward
January 22, 1988
Page 5

I advised the city commission to appoint other counsel who has no interest in these proceedings.

Sincerely,

C: