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DOUGLAS E. CHRISTENSEN
OFFICE MANAGER

February 7, 1990

[REDACTED]



Dear [REDACTED]

The Ethics Committee of the State Bar Association of North Dakota has addressed and discussed the questions raised in your letter of January 22, 1990.

As indicated when I spoke to you on the phone following the Committee meeting, the Committee was of the opinion that there is nothing in the Rules of Professional Responsibility which would preclude you, as an individual, from running for the Legislature. Membership in the Legislature, however, would have a direct impact on your individual ability and your firm's ability to represent clients before the Legislature and its committees. The Committee would like to point out that the restrictions which would be placed upon you as a legislator-lawyer may severely impact your ability to represent the interest of your constituency. If you are obligated to disqualify yourself every time your firm is representing a client for the Legislature or a committee, a serious question would arise as to whether you are representing the interest of the people who elected you. That is not really a question which falls under the North Dakota Code of Professional Responsibility, but the Committee did want to point this out to you because it may very well be a basis for public criticism.

Assuming that you run for the Legislature and are elected, it is the opinion of the Committee that your firm would be disqualified from lobbying the Legislature on behalf of clients unless there is a constitutional or statutory provision or legislative rule which expressly or by necessary implication recognizes the propriety of

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a lawyer appearing before a Legislative committee, or otherwise lobbying in the Legislature for a client where a member of his firm or associate was at the time a member of the Legislature, or where provision has been made permitting a member of the Legislature to disqualify himself from voting on or participating in the discussion of the matter involved. In essence, the Committee's view corresponds with that taken by the American Bar Association in its Ethics Opinions 296 and 306, copies of which are enclosed. We also enclose a copy of the ABA Ethics Opinion 1087 which was issued in 1969 and reaffirms the concepts set out in opinions 296 and 306.

As you can see from the enclosed ABA opinions, the first opinion of the Committee issued in 1959, stated that the firm was actually prohibited from lobbying a legislature or committee of the legislature where a member of the firm was a member of the legislature or committee. The ABA modified that opinion in 1962 indicating that the firm could represent clients before the legislature or committee as long that there was a formally adopted conflict of interest rule or provision in the constitution or statute. We did do some checking as to whether or not North Dakota does have a constitutional provision similar to that cited in ABA Ethics Opinion 306. Former Article IV, Section 21 was almost the mirror image of the Texas provision cited in opinion 306. That provision was repealed in 1986. To our knowledge it was replaced with the improper influences section. We cannot find a statutory provision dealing with a legislator's conflict of interest problems. You will have to determine whether the Legislature by rule has adopted some formal disqualification/conflict of interest procedure. It is implicit in the ABA opinion that the rule must be formally adopted. If no such legislative rule exists, then it would be the opinion of the Committee that your firm would be precluded from lobbying the Legislature and its committees if you are a member of the Legislature.

The Committee would like to point out that if there is a legislative rule which does address how members of the Legislature are to deal with conflicts which allows them to disqualify themselves from the discussion and vote on a particular legislative measure, it would be insufficient for you to simply declare your conflict and then have the Legislature vote to allow you to participate in the discussion and the vote. It was the Committee's view that as a lawyer-legislator, once the conflict is present, you may not partake in the discussion or vote even if the Legislative body would vote to allow you to partake in the discussion and vote. It is the Committee's opinion that you would be absolutely prohibited from partaking in the discussion or vote when a conflict arises. Of course, as indicated previously, this does raise the question of the duty you would owe to your


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constituents and how your self disqualification as a result of your firm's lobbying efforts adversely affects your ability to represent your constituents.

During the Committee's deliberations, a question did arise as to whether the interpretation of the rules regarding professional ethics under the old rules were equally applicable to the new rules of professional responsibility which have been adopted in North Dakota. We would refer you to Rule 3.9, North Dakota Rules of Professional Conduct. Rule 3.9 addresses the situation of a lawyer representing a client before non-adjudicative proceedings. The comments to the Model Rules essentially indicated that a lawyer appearing before a non-adjudicative body must conduct himself as if he was appearing before an adjudicative tribunal. In other words, your firm members would have to conduct themselves in the same manner that they would deal with a court or administrative agency. As you are aware, if your firm was involved in a situation where one of your partners was a judge, i.e. municipal judge, the rest of the firm could not appear before that judge to represent clients. In essence, that same rule applies to your firms lobbying efforts on behalf of a client when one of its members is a member of the Legislature. The comments appear to indicate that the Model Rules were not intended to change the prior interpretations with respect to representing clients before non-adjudicative bodies. Consequently, it is the opinion of the Committee that the prohibitions recognized by the ABA under the prior rules would be equally applicable to your firm's representing clients before the Legislature.

The Committee would also like to point out that if your firm continues to represent individuals before the Legislature, it would have to conduct its representation of the clients in accord with the conflict of interest rules set forth in the North Dakota Rules of Professional Conduct, Rules 1.7-1.10. This would include limitation on the ability of yourself as the lawyer-legislator to share in any income derived from the lobbying efforts. Thus, your firm will have to study the Rules of Professional Conduct closely to determine exactly how they are to conduct themselves when appearing before the Legislature and how their representation of client in lobbying efforts may impact you as an individual member of the firm.

The Committee was of the opinion that there were numerous pitfalls inherent in a situation where a lawyer is a member of the Legislature and his firm also actively represents clients before the Legislature. As indicated previously, it is important for your firm to keep in mind Rule 8.4 dealing with professional conduct. Specifically, 8.4(c) prohibits a lawyer from stating or implying an ability to influence improperly a government agency or official. The word "imply" used in 8.4(c) raises a problem

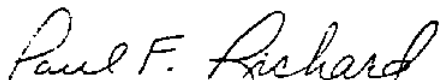
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because it certainly may be the clients perception that a firm in which one of its members sits on the Legislature may have an inside track to governmental agencies or officials. While we are sure that would not be the case, what we are speaking about is the "appearance of impropriety" which may arise. While the Committee did not believe that Rule 8.4(c) should be interpreted to absolutely prohibit the lawyer-legislator's firm from lobbying the Legislature, you should keep this rule in mind as it will require you and the firm to be ever vigilant with respect to the appearance of impropriety which may arise from the situation.

This letter opinion is issued to you for advisory purposes only and is not binding on you, the Court's of North Dakota, the Disciplinary Board, Grievance Committees, or any other member of the Bar of the State of North Dakota.

Sincerely,



Paul F. Richard
Chairman-Ethics Committee
State Bar Association of North Dakota

CLIENT IDENTIFIER: OFFICE-PFR-LRV
DATE OF REQUEST: 01/29/90
THE CURRENT DATABASE IS LS-ABAE0
YOUR QUERY:

ESP & LEGISLATOR

Citation
ABA Informal Op. 1087

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American Bar Association Informal Ethics Opinion 1087

MEMBERS OF THE ABA HOUSE OF DELEGATES ACCEPTING FEE

June 18, 1969

You have asked the following question of the Committee:

'Is it proper professional conduct for a member of the House of Delegates of the American Bar Association to accept a fee, either individually or as a partner of a law firm, from any interested group or association for lending his influence and efforts to defeat or obtain the passage of any proposal pending before the House of Delegates? The specific Canon of Ethics involved is Canon 6, which reads as follows:

'ADVERSE INFLUENCES AND CONFLICTING INTERESTS

'It is the duty of a lawyer at the time of a retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.'

In order to determine whether or not there is any conflict of interest in this matter it is important to examine carefully the position of a member of the House of Delegates in the structure of the American Bar Association.

The American Bar Association is an association of lawyers having as its objects the following:

'... to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice, and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public.'

The full power of the Association is vested in the House of Delegates. Article VI, Section I of the Association's Constitution reads as follows:

'Control and Administration of Association. The control and administration of the Association shall be vested in a House of Delegates

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representative of the profession of the law in the United States, subject to referendum pursuant to the provisions of Section II of this Article.'

The House consists of persons selected in different ways and representing different constituencies. Some members are elected by the American Bar Association members in each state and the constituency of these members is the total membership of the American Bar in that particular state. Some members are selected by state bar associations. Their constituency is the membership of the state bar association. Some members are selected by local bar associations. Their constituency is the membership of the local bar association. Some members are selected by the assembly of the American Bar Association. Their constituency is the membership of the Association as a whole. Some members are ex-officio members by virtue of their position with government or with affiliated associations. Their constituency is the membership of the particular affiliated organization or the government.

In each instance the individual member represents a particular constituency as evidenced by Rule IV-2, reading, 'Each Delegate shall see that the substance of the proceedings at each meeting of the House is reported to the organization which he represents.' (*Italics added*)

The questions presented by this inquiry are these: (1) Is there conflict of interest for a member of the House to accept a fee from an interested group or association for lending his influence and efforts to defeat or obtain the passage of any proposal pending before the House of Delegates? (2) Would it make any difference if the particular member did not receive the fee, but his partner in the practice of law did? (3) If there is a conflict of interest, is there any appropriate action that could be taken to prevent the conflict of interest? Is there any appropriate action that could be taken to prevent the conflict from being improper and a violation of the Canons of Ethics?

Conflict of Interest. The problem in context is this: Fact 1. A member of the House is selected (elected or appointed or ex-officio) by a particular constituency by the Rules of the House to represent that constituency and exercise his best judgment in voting on and in persuasion pertaining to matters coming before the House. Fact 2. Such a member or his partner, accepts a fee and represents this client so far as to influence other members of the House to affect the vote on a matter before the House in a way favorable to that client.

Query: Is the obligation to the Association and to his constituency to exercise his best efforts in an independent way or on their behalf in conflict with the added obligation to the private client?

We could find no opinions squarely in point. The closest Opinions as to whether or not a conflict exists are those dealing with the analogous cases of legislative bodies. The House of Delegates in a great many ways is the legislative body of the Association. This Committee has spoken a number of times on the conflict of interest problems arising out of lawyers in state legislatures. These have some bearing. Two are of extraordinary importance:

Formal Opinion 296 held that it was not proper for a member of a law firm to appear before a legislative committee while a member of the firm is serving in the legislature. In so holding, the Committee relied upon Canon 32, condemning efforts by powerful clients to receive more than they are entitled to from a fair consideration of the problem. This opinion was amplified in another particular in Formal Opinion 306 which will be discussed later. Formal Opinion 296 squarely holds that there is a conflict of interest under the facts

described. The Opinion also squarely holds that members of law firms are in as much conflict in this case as is the legislator himself. We conclude that there is a conflict in the situation described regardless of whether the representation was by the member of the House, personally, or by a member of his firm.

Waiver of Conflict by Disclosure or Consent. Could something be done to make the conflict one that is not a violation of the profession's ethical standards? The Canon itself is based upon the concept that there is no violation when there has been consent after full disclosure. The Canon enjoins representation except by express consent with full disclosure if a conflict exists.

The legislative cases point up the difficulty or impossibility of obtaining consent when a person represents on one hand a broad constituency and why the Opinions of this Committee have for many years very closely circumscribed persons who were employed by the public from obtaining any consent to a waiver of the conflict of interest provision or from obtaining any benefit from complete disclosure. This was what the Committee was speaking to in its Opinion 306. In this Opinion the Committee modified that flat proscription of Formal Opinion 296 and held that a constitutional, statutory provision, or legislative rule which expressly or by necessary implication recognizes the propriety of a lawyer appearing before legislative committees or otherwise lobbying in the legislature for a client, where a member of his firm or associate was at the time a member of the legislature, or where there was a provision permitting a member of the legislature to disqualify himself from voting on or participating in the discussion of the matter involved would constitute consent on the part of the public constituency and resolve the conflict of interest. In other words, the Committee recognized the legislature itself acting in behalf of the public constituency either by its own rules or

constitution of the state could provide a type of advanced waiver by admitting a person to disqualify himself from participation in the decision.

An examination of the rules of the House of Delegates discloses no effort on the part of the House to make such special provisions to take care of the conflict or provide a waiver. In fact, the House of Delegates rules specifically recognize that the person who sits in the House represents his constituency. A waiver would have to come from that constituency.

It could be argued that a law partner of a House member should be permitted to act as a lawyer for or on behalf of any proposal before the House and accept fees for such representation and so be absolved of any conflict of interest by full disclosure of the name of the client and the position the client desires him to take. It might be suggested that in such a case the House should also prohibit the member of the House from voting. If there were established rules to this effect subsequent action in accordance with the rules would be proper but the wisdom of such rules would be doubtful and the constituency of the delegate would be deprived of his independent judgment on the matter. We can see no justification of rules permitting the House member himself to advocate positions on behalf of a client for a fee.

Your Committee believes that in the absence of such rules a person in the House of Delegates represents somebody who has not consented and who at the time of his selection had no notice of the opportunity on the part of the member to disclose and represent private interests. Such a member represents

either the members of the local bar association, the members of the state bar association, the members of the American Bar Association located in a given state, the total body of the American Bar Association, or the members of some other agency in the House. They are the persons who, by selecting him to the House, requested the lawyer member of the House to exercise his best independent judgment on matters before the House. Any time the exercise of that independent judgment is to be made by a person who is also an advocate of a position as a lawyer on behalf of a client, a conflict exists. Unless there is a consent by both sides of this conflict, the action of participating as an advocate, while a member of the House, is unethical. We know of no way in which it is possible to obtain a consent from most of the persons represented by members of the House and therefore would say that it is very unlikely that this would be possible.

If the American Bar Association were to adopt provisions providing that when a person had an interest, because his partner represented a client, as to any matter before the House, he should disclose this fact to the House and not vote thereon, the rule of Formal Opinion 306 would hold that the appointment or selection of such person to the House under these circumstances when this provision was in effect would constitute consent of his constituency and would eliminate the question of conflict, provided that he raised the question, disclosed his interest and did not vote upon the measure. We cannot approve conduct in which the House member himself represents private clients before the House for a fee and we do not think that House rules could cure the conflict. Opinion 306 also holds that without such a provision in the rules the mere disclosure by the lawyer of the conflict and his voluntary refusal to participate in the action of the body would not be sufficient to meet the requirement of Canon 6. This, without a provision in the rules as the Opinion points out, would be an abdication of one of his functions as a member of the House.

Therefore, it seems to the Committee that the questions propounded indicate that in each instance there is a conflict of interest and this conflict could not be eliminated by disclosure.

American Bar Association
ABA Informal Op. 1087
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January 26, 1990

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DOUGLAS E. CHRISTENSEN

OFFICE MANAGER

Dear [REDACTED]

RE: Request for Opinion Dated January 22, 1990

The Ethics Committee met and discussed your January 22, 1990, request for opinion. The Committee could not come to a decision without doing further research into the issue. The Committee is in the process of conducting additional research and will take up the request for opinion again on February 6, 1990.

If you would like to discuss this further in the interim, do not hesitate to give me a call.

Very truly yours,

SERKLAND, LUNDBERG, ERICKSON,
MARCIL & MCLEAN, LTD.,

Paul F. Richard

Paul F. Richard

PFR/tmn

[REDACTED]

Mr. Paul Richard
Attorney at Law
P.O. Box 6017
Fargo, ND 58108

[REDACTED]

TELECOPIED

Dear Mr. Richard:

In re Legislative Proposal

As we have discussed, I would like to solicit an advisory opinion from the Ethics Committee regarding my plan to run for the North Dakota Legislative Assembly, more particularly, the House of Representatives. The factual situation would be as follows:

1. I would become an elected member of the House of Representatives.
2. My law firm would be engaged from time to time to follow an occasional bill before the legislature or to make an appearance before a committee on such a bill.
3. I would not participate on the committee hearing the bill, nor would I sponsor such legislation or actively lobby for or against such legislation.
4. For any such bill which comes before the House for a vote, I would, under House rules, declare the potential conflict, at which time the chamber would vote to determine whether I would be permitted to vote.

Under such circumstances, would the North Dakota Rules of Professional Responsibility prevent me from serving as a member of the North Dakota Legislative Assembly?

Our district caucus take place on February 12, 1990 and therefore time is of some importance in this matter. I would be much obliged for prompt consideration of this question.

If your group has any questions at all regarding the circumstances of this matter, I would be pleased to respond.

Respectfully yours,

[REDACTED]

jfv