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July 17, 1991

State of North Dakota
Department of Justice

Mr. Paul Richard
10 Roberts Street
P.O. Box 6017
Fargo, ND 58108-6017

RE: Request for Opinion/Hearing on Ethical Question

Dear Mr. Richard:

I am writing to you to ask for an opinion or decision regarding an ethical issue arising from the following facts.

As of July 1, 1991, I am working under contract for the [REDACTED] Judicial District to do felony indigent defense work. I've enclosed a copy of the contract for your information. At the very time that this contract was accepted, I was approached by a number of persons from [REDACTED] asking me to submit an application for the position of [REDACTED] City Prosecutor. I had sent the City Auditor a letter declining to apply mainly because I believed that my felony contract would ethically prohibit me from also prosecuting.

It appears that [REDACTED] has just rejected all bids for its city prosecutor position, and will try again to fill the position. Since I had just recently started up my own practice after having been the [REDACTED] County Assistant States Attorney for the past six years, I would have enough time to perform my defense contract duties and assume the responsibilities of the [REDACTED] City Prosecutor position.

I learned today that your committee had issued an opinion on March 22, 1991, to the effect that a part-time states attorney could also do criminal defense work in other counties. My fact situation is similar, but not as simple as perhaps the situation you addressed in that opinion. It is to be expected that there will be some potential conflicts where a person is charged in both [REDACTED] Municipal Court with a minor violation, and also in District Court with a felony. I believe that most if not all of these potential conflicts can be avoided by having the felony charges in such situations assigned to one of the other felony contract counsel, or by arranging with the [REDACTED] County States Attorney to have his office handle the municipal prosecution, a job they have assumed over the past several months while [REDACTED] has attempted to fill this position.

I will not take any action in this matter until I receive some word, one way or the other, on this matter from your committee. I would appreciate a prompt response because I believe [REDACTED] will be acting promptly to fill their prosecutor position. Please call me if you have any questions.

Sincerely,

[REDACTED]

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August 15, 1991

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[REDACTED]

Dear [REDACTED]

RE: Request for Opinion/Hearing on Ethical Question

The Ethics Committee of the State Bar Association of North Dakota has addressed and discussed the questions raised in your letter of July 17, 1991.

The Committee was of the opinion that Rule 1.8(j) would permit you to hold the position of prosecutor for the City of [REDACTED] and also act as a defense counsel for [REDACTED] County. We would point out, however, that the Rule would not permit you to take on the representation of an individual if the representation will or probably will require any pleading or appearance on the client's behalf in the Court for which you hold the prosecutorial appointment. As pointed out in the comments to Rule 1.8, "[t]here is no compromise of the public function when a part-time municipal prosecutor or judge defends persons charged with crime to be tried in another Court . . .". Of course, other considerations may require you to decline representation or prosecution of a particular individual on a case by case basis.

Again, as noted in the comments to the Rule, "[o]ther considerations may prohibit a part-time judge or prosecutor, or another lawyer associated with the part-time official and practice, from accepting or combining representations not specifically prohibited by this Rule; for instance, even though a matter will be defended in a Court other than the one which the part-time official serves, and thus would not be forbidden by this Rule, that matter could still not be undertaken if it involved parties or issues with


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which the part-time official had any involvement as a judge or prosecutor." In your letter you suggested various ways in which these type of conflicts could be avoided and we would assume that you will assess those on a case by case basis.

This letter opinion is issued to you for advisory purposes only and is not binding on you, the Courts of North Dakota, disciplinary board, grievance committees, or any other member of the Bar of the State of North Dakota.

Very truly yours,

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

cc: Sherry King