

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 92-12

October 15, 1992

The Ethics Committee received the following request for an opinion from [REDACTED], Attorney at Law, Bismarck, North Dakota:

The question is whether it is a violation of NDRPC 1.7 or 1.9 for a private practice attorney from a firm representing creditors to interview a LAND client and provide advice to such client, as part of a volunteer legal assistance program, thereby obtaining what might otherwise be confidential information about the client and the client's finances. Obtaining information about the client's finances is particularly relevant since the attorneys are required to document financial eligibility for LAND. Financial eligibility is based both on income and assets of an applicant.

The facts presented are that [REDACTED] utilizes volunteer attorneys to interview clients and provide advice and counsel to eligible clients one day per week. A former government attorney who is now in private practice in a firm that is engaged in representing creditors and a collection agency has asked to be allowed to assist [REDACTED] in this project. The issue with respect to NDRPC 1.7 is whether this factual situation falls into 1.7(a) or (c). If it is a 1.7(a) situation, representation is prohibited. If it is a 1.7(c) situation, representation is permitted after client consultation.

Rule 1.7 (a) and (c) read as follows:

(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 a third person, or by the lawyer's own interests.

(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. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 reads as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same matter in which that person's interests are materially adverse to the interests of the former client; or

(b) Represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(c) Use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as Rule 1.6 would require or permit with respect to a client.

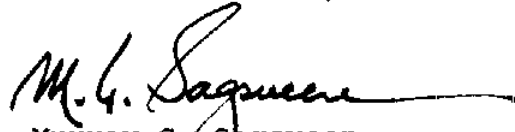
Clearly, it would be a conflict of interest and a violation of the rules for any attorney to interview a client and obtain information regarding this client's finances if that same client is a defendant in a collection action brought by the attorney's firm. The client should be screened and attorney should also inquire, before he or she obtains any information from the client, as to whether the client is a defendant in a collection action brought by his or her firm or whether the person has had any of his or her debts assigned to the collection agency represented by his or her firm.

If the conflict does not exist when the interview is conducted, the attorney is not prohibited from advising the client. The next time the issue would arise would be if the attorney or his/her firm sought to bring a collection action, or any other action which would involve the client's financial condition, against that same client. This would be a conflict of interest at that time which would disqualify the attorney and his or her firm from representing the creditor or the collection agency without the prior written consent of the original client.

The mere fact that the lawyer or his/her firm represent creditors or a collection agency does not prohibit the attorney from

representing the debtor at a time prior to any actual conflict arising.

This opinion was drafted by Michael J. Maus and unanimously approved by the Ethics Committee on October 15, 1992.


Murray G. Sagsveen
Chairman

September 22, 1992

Murray Sagsveen
Chair, Ethics Committee
P.O. Box 1695
Bismarck, ND 58502-1695

Dear Mr. Sagsveen:

One of LAND's projects, Thursday Evening Legal Assistance (TELA) is confronting a conflict of interest issue. Legal Assistance of North Dakota utilizes volunteer attorneys to interview clients and provide advice and counsel to eligible clients one day a week. This project has always been staffed by corporate and government attorneys who otherwise, by virtue of their employment, could not represent a client other than to provide advice and counsel. Although there are limited potential conflicts that might arise with a government or corporate attorney, those conflicts have been screened by the secretaries and project coordinator. Recently, however, a former government attorney who is now in private practice in a firm that is primarily engaged in legal representation of creditors and a collection agency, has asked to be able to continue his involvement in TELA. Using the same screening technique for that attorney, as with corporate and government attorneys, it would not be difficult, although somewhat time consuming, to screen out clients who had current collection actions, or were former clients of LAND in collection matters, or had been defendants in actions brought by this particular law firm for collection of a debt. A more difficult issue is that potentially any of LAND's financially-eligible clients could be a defendant in a collection action brought by this attorney's firm. Although this attorney is not the lead collection attorney for the firm, he does do some collection work for the firm.

The question then is whether it is a violation of NDRPC 1.7 or 1.9 for this attorney to interview a client and provide advice to a client, thereby obtaining what might otherwise be confidential information about the client and the client's finances. The element about the client's finances is particularly relevant since the attorneys are required to document financial eligibility for LAND. Financial eligibility is based both on income and assets of an applicant. The key to NDRPC 1.7 is whether this factual situation falls into 1.7 (a) or (c). If it is a 1.7(a) situation, representation is prohibited. If it is a 1.7 (c) situation, representation is permitted after client consultation.

Administrative Office:

Administration
State Support Project
Private Attorney Involvement



A United Way Agency

Regional Law Offices:

Bismarck
Devils Lake
Fargo
Minot

If the Ethics Committee believes there is a NDRPC 1.7 conflict of interest, does the committee believe that this conflict could be cured by the attorney identifying himself and disclosing that he does work for a law firm that does collection work when first speaking with an applicant? I realize that under NDRPC 1.7 an attorney must take a number of factors into consideration, as set forth in the comments such as the duration and intimacy of the lawyer's relationship with the client, the functions being performed by the attorney, the likelihood that an actual conflict will arise and the likely prejudice to the client from an actual conflict. In the LAND situation, the interview and advice would be very brief; virtually all contacts are by phone, the functions would be generally elementary and non-complex; the likelihood that an actual conflict will arise could be small to moderate; and the prejudice to the client, if it does arise, is unknown. The reason I believe it is unknown is that there is a large number of defendants being sued by this law firm on a monthly basis, a comparatively small number of clients who would be advised by this attorney during the year, (possibly 50), a small number of clients that have defenses to an action for a money judgement, (and they might well be severely prejudiced) and a somewhat larger number of clients that need information and action on claims of exemptions and garnishments who could also potentially be prejudiced by speaking with the attorney. There is disagreement among the attorneys in LAND about the substantial nature of that conflict and the prejudice to the client. The comments to NDRPC 1.7 state that in applying the factors, the question is often one of proximity and degree in arriving at a conclusion. I'd appreciate your assessment of the proximity and degree. The numbers of clients actually affected could be relatively small, but the degree of impact could be significant.

Another aspect of this issue that is disturbing to at least one attorney is that virtually all low-income persons who become defendants in future collection actions will not know that the TELA attorney from that firm is also a partner in the law firm that does collection work. Therefore without disclosure on a case-by-case basis by the law firm, that one of the members provides advice and counsel to low-income debtors on an occasional basis, through TELA, the result is that defendants do not realize the collection law firm, through that attorney, might have a conflict of interest.

The committee's opinion on whether to allow this attorney to continue to do interviewing and provide advice and counsel would be extremely valuable to Legal Assistance of North Dakota. Based on the opinion, a decision would be made to either expand the advice and counsel project to utilize private attorneys more extensively or continue to limit participation to corporate and government attorneys. Thank you for your time and consideration on this matter.

Sincerely,



Linda Catalano
Executive Director

LC:AS

WHAT SERVICES ARE AVAILABLE?

GOVERNMENT BENEFITS

- Aid to Families with Dependent Children
- Food Stamps
- General Assistance
- Unemployment Compensation
- Fuel Assistance
- SSI (Supplemental Security Income)

HEALTH — primarily

- Medical Assistance
- Access to Health Care/Hill Burton

CONSUMER — primarily

- Debtor Relief
- Debtor Claim of Exemption
- Garnishment Defense
- Utility Disconnects
- Repossessions Defense

HOUSING — primarily

- HAP/Public Housing
- Landlord/Tenant Matters

FAMILY — primarily

- Divorces involving domestic violence/abuse and contested custody
- Selected related family law matters

Additional legal help is available to the **elderly** in the areas of:

- Nursing Home Issues
- Medicare
- Selected Durable Power of Attorney and Guardianship actions

THE SERVICES ARE FREE, however you may have to pay all or part of the costs such as necessary filing fees, service fees and the like. Many times there are no such charges. Donations to the program are welcome.

INDIVIDUALS APPLYING FOR LEGAL SERVICES will not be subjected to discrimination.

PLEASE NOTE THAT OUR STAFF also prepares, distributes and presents information about the legal rights of elderly, low-income, and other disadvantaged people.

Legal Assistance of North Dakota, North Dakota Legal Services, Legal Aid Association, and the Volunteer Lawyer Services Project are non-profit organizations that provide legal help to elderly or low-income North Dakotans.

Funded by
LEGAL SERVICES CORPORATION
& ADMINISTRATION OF AGING
THROUGH NORTH DAKOTA
DEPARTMENT OF HUMAN SERVICES

LEGAL SERVICES

For

Elderly or

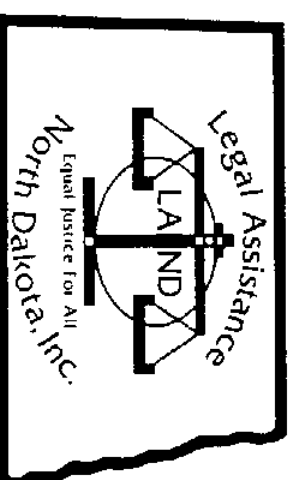
Low-Income

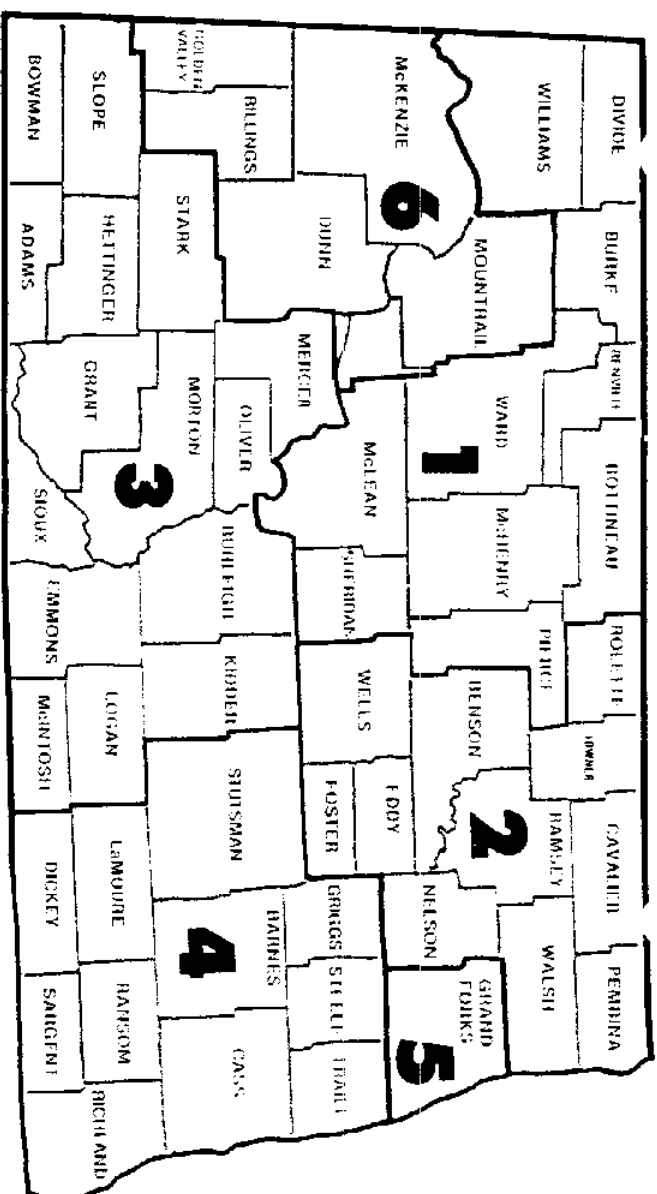
North Dakotans

Who Can't

Afford

an Attorney





HOW TO APPLY

1. Write or call the toll free number for the office in the region where you live.
2. A staff member will ask you a few questions to find out if you are financially eligible for help.
3. If you are financially eligible, the staff member will ask you a few more questions. These questions are to find out if your problem is one that the office can help you with. All conversations with our staff are strictly confidential.
4. Eligible clients can get advice right away.
5. If you need more than advice, a staff member may handle your case for you. Or, the staff member will refer you to the Volunteer Lawyer Service Project or a private attorney who works with legal aid.

IF YOU LIVE IN — REGION 1

CONTACT Legal Assistance of North Dakota
2001 8th Avenue SE, Box 177
Minot, ND 58702
PHONE: (701) 852-3870
TOLL FREE: 1-800-342-4409

IF YOU LIVE IN — REGION 2

CONTACT Legal Assistance of North Dakota
316 W. Walnut, Box 557
Devils Lake, ND 58301
PHONE: (701) 662-8123
TOLL FREE: 1-800-726-8980

IF YOU LIVE IN — REGION 3

CONTACT Legal Assistance of North Dakota
1025 Third Street North, Box 2419
Bismarck, ND 58502
PHONE: (701) 258-4270
TOLL FREE: 1-800-932-8882

IF YOU LIVE IN — REGION 4

CONTACT Legal Assistance of North Dakota
722 1st Avenue North
Fargo, ND 58102
PHONE: (701) 232-4495
TOLL FREE: 1-800-342-4696

IF YOU LIVE IN — REGION 5

CONTACT Legal Aid Association
School of Law, UND
Grand Forks, ND 58202
PHONE: (701) 777-2932

IF YOU LIVE IN — REGION 6

CONTACT North Dakota Legal Services
P.O. Box 217
New Town, ND 58763
PHONE: (701) 627-4719

★ Native Americans living on or near the Fort Totten Indian Reservation contact:

UND Legal Aid Association
Grand Forks, ND 58202
Toll Free 1-800-752-0312
777-2932 or call
786-4221
appointment.

● Native Americans living on or near the Turtle Mountain Indian Reservation contact:

Legal Assistance of ND
316 W. Walnut, Box 557
Devils Lake, ND 58301
(701) 662-8123
Toll Free: 1-800-726-8980