

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 92-16
November 23, 1992

The Ethics Committee received a request for an opinion from Mr. [REDACTED], Assistant State's Attorney for [REDACTED] County:

The issue presented is whether an Assistant State's Attorney for one county may ethically continue with his representation of a juvenile in another county in which he has an appointment as a Special Assistant State's Attorney?

The relevant portion of Rule 1.8(j) of the Rules of Professional Conduct can be summarized as follows:

A part-time prosecutor permitted by law to engage in the practice of law in addition to the part-time service shall not in that practice represent a client if the representation will or probably will require any pleading or appearance on the client's behalf:

1. If the lawyer is a part-time prosecutor and the client is charged or expects to be charged with a crime, in the jurisdiction in which the lawyer holds a prosecutorial appointment;

. . .

N.D.R.P.C. 1.8(j).

The question arises whether an appointment as a Special Assistant State's Attorney under Section 11-16-02 constitutes a "prosecutorial appointment" under the Rule. It is the opinion of the committee that a prosecutorial appointment would include formal appointment as a Special Assistant State's Attorney under North Dakota law. Therefore, [REDACTED] does have a conflict of interest in representing the juvenile in [REDACTED] County.

The Comment to Rule 1.8(j) reveals that part-time prosecutors must not engage in matters which compromise their public functions. Id. Comment. The Comment explains that the Rule simply identifies the circumstances in which the public function would be compromised. Id. The considerations outlined in the Rule are not all inclusive. Id.

The Comment goes on to explain that:

Even though a matter will be defended in a Court other than the one in 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 which the part-time official had any involvement as a judge or prosecutor.

Because [REDACTED] holds an appointment as a Special Assistant Prosecutor in [REDACTED] County, he may have involvement as a prosecutor with the [REDACTED] County State's Attorney, a party involved in the juvenile's case.

The Comment to Rule 1.8(j) specifically points out that the imputed disqualification rule in Rule 1.10 applies. The Rule explains that "persons associated in the practice of law with a part-time prosecutor or judge may not, of course, take on a representation denied to the part-time official by this Rule."

It appears that the [REDACTED] County State's Attorney has, pursuant to [REDACTED] appointment as a Special Assistant Prosecutor, prosecuted a case in [REDACTED] County. Thus, the [REDACTED] County State's Attorney could not represent the juvenile in [REDACTED] County because that matter would involve parties or issues with which the part-time official had involvement as a prosecutor.

Pursuant to Rule 1.10, lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by the Rules. *Id.* Rule 1.10. The direct citation in the Comment to Rule 1.8(j) to Rule 1.10 evidences a strong indication that the "imputed disqualification rule" in Rule 1.10, applies to attorneys in a State's Attorney's Office.

The Comment to the Rule, when read with the imputed disqualification rule outlined in Rule 1.10, leads to a conclusion that because [REDACTED] and the [REDACTED] County State's Attorney have been appointed special prosecutors in [REDACTED] County, there is a conflict of interest.

Additionally, courts have determined that preservation of public confidence in the integrity and impartiality of the criminal justice system is important. See, e.g., People v. Municipal County of San Diego Judicial District, 138 Cal.Rptr. 235 (1977); People v. Rhodes, 115 Cal.Rptr. 235 (Cal. 1974). For example, in San Diego County, the Court explained that:

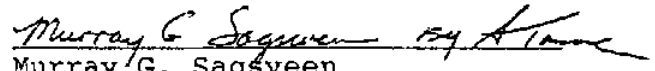
While the California Rules of Professional Conduct do not expressly prohibit members of the Bar in general from accepting employment which in fact involves no conflict of interest but which might, to the layman, appear to be improper, an ethics committee of the American Bar Association has stated:

If the [legal] profession is to occupy that position of public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but likewise avoid the appearance of evil.

Id. at 238. Thus, the concerns of public policy and the public's perception of attorneys in the legal system is of even greater importance when a public servant, such as a state's attorney, has a conflict of interest as opposed to a potential conflict of interest of an attorney in private practice.

In addressing any conflict of interest issue, Rule 1.7 of the Model Rules of Professional Conduct must not be forgotten. Rule 1.7 promulgates the general rule on conflict of interest and provides that a lawyer shall not represent a client if the lawyer's ability to so represent the client is affected by the lawyer's responsibilities to another client or third person or if the lawyer's own interests are likely to adversely affect the representation. N.D.R.P.C. 1.7(a) & (b). The above concerns may fall squarely within the general conflict of interest rule.

This opinion was drafted by [REDACTED] and unanimously approved by the Ethics Committee on November 23, 1992.


Murray G. Sagsveen
Chairperson

RECEIVED OCT 28 1992

October 27, 1992

Mr. Murray G. Sagsveen
Attorney at Law
P.O. Box 1695
Bismarck, ND 58502-1695

RE: SBAND Ethics Committee

Dear Mr. Sagsveen:

I request a written advisory opinion regarding Rule 1.8 (j) of the Rules of Professional Conduct. The following facts pertain to my situation:

1. I have been retained to represent a minor child in Juvenile Court in ██████ County.
2. I am employed as an assistant state's attorney for ██████ County.
3. The state's attorney of ██████ County is presently prosecuting a criminal case in Rolette County. ██████ derives ██████ authority from NDCC section 11-16-08. *This case has been disposed of so*
4. The ██████ County State's Attorney and myself have previously informed the ██████ County State's Attorney that both of us would be available on a case by case basis to take over a particular case. Neither the ██████ County State's Attorney nor I reside in ██████ County nor are we on salary from ██████ County (see 11-16-02). *County still attorney is not present prosecuting in ██████ County.*

Based on the above, I would appreciate a response to the following questions:

1. May I ethically continue with my representation of the minor in the ██████ County case?
2. If the case being prosecuted by the ██████ County State's Attorney in ██████ County is disposed of, may I represent the minor after that point?

Per discuss w/ John 10/30/92 AT

Mr. Murray G. Sagsveen
Page Two

Because there is a pending juvenile court case which has been continued pending resolution of these issues, it would be greatly appreciated if an opinion could be rendered as early as possible.

Sincerely

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]