

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-07

June 4, 1993

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED], ND. The opinion requests an advisory opinion on whether N.D.R. Prof. Conduct 1.8(j)(1), in light of N. D. Cent. Code §40-18-15.1, would preclude an attorney who is a part time municipal prosecutor from defending cases in County Court in situations where the County Court prosecution does not involve the enforcement of the municipal ordinances of the municipality in which the attorney holds the prosecutorial appointment.

Rule 1.8(j) provides in relevant part:

A part-time prosecutor or judge 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 has charged or expects to be charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment; and,
- (2) If the lawyer is a part-time judge, in;
 - (i) The Court in which the Judge holds appointment; or,
 - (ii) Any court from which appeals may be brought to the court in which the judge holds appointment.

The Committee notes that Rule 1.8(j) utilizes the term "jurisdiction" when describing the limitations on part time prosecutors, and then uses the term "court" in defining the limitations on part time judges. In order to define the limitations placed on part time prosecutors under Rule 1.8(j)(1), it is necessary to determine what is the "jurisdiction" of a part time municipal prosecutor.

Under N. D. Cent. Code §40-18-01(1), the jurisdiction of a municipal court is limited to hearing, trying and determining offenses against the ordinances of the City. A municipal prosecutor is responsible for the prosecution of violations of the ordinances of the City in which the attorney holds the prosecutorial appointment. Such violations are first charged in the Municipal Court. The Committee is of the view that with respect to a municipal prosecutor, the phrase "jurisdiction in which the lawyer holds the prosecutorial appointment" means cases arising out of or involving the prosecution of the ordinances of the City in which the attorney is the prosecutor.

Under North Dakota law, municipal cases may be tried or appealed to the County Court of the County in which the City is located. For example, under N. D. Cent. Code §40-18-15, appeals from adverse decisions in the Municipal Court are taken to the County Court of the County wherein the City is located. Further, under N. D. Cent. Code §40-18-15.1, prosecution of City ordinances which would constitute a misdemeanor and entitle the defendant to a jury trial may be transferred to the County Court for trial.

Appeals from County Court involving the prosecution of municipal ordinances may be taken to the North Dakota Supreme Court.

It is the Committee's opinion that Rule 1.8(j)(1) would preclude a part time municipal prosecutor, and any member of his/her firm, from defending cases involving the prosecution of the ordinances of the City in which the attorney holds the prosecutorial appointment regardless of which court the case may be tried or appealed. On the other hand, the fact that municipal prosecutions may be tried in the first instance or appealed to County Court or the Supreme Court, does not bar the part time City prosecutor, or members of the attorney's firm, from defending in any other State court those cases which do not involve the prosecution of violations of the ordinances of the City in which the attorney holds the prosecutorial appointment. In the latter case, the prosecution would not involve the jurisdiction in which the attorney holds the prosecutorial appointment.

Even though the Committee is of the opinion that Rule 1.8(j)(1) should not be construed as precluding a part time municipal prosecutor from defending cases not involving City ordinance violations in other courts, the part time prosecutor may be required to decline the representation if the matter "involved parties or issues with which the part-time official had had any involvement as a judge or prosecutor." See, Comments to Rule 1.8(j). For example, a case initially charged in municipal court but dismissed without prejudice under N. D. Cent. Code §40-18-01(3) and then charged in County Court, could not be defended by the part time municipal prosecutor, or any member of the attorney's firm.

In such a case, the prosecutor would have had some involvement in the matter even though it was later dismissed without prejudice and would now be prosecuted by the States Attorney for the applicable County. Further, as stated in the comments to Rule 1.8(j), individual issues involved in a case may require a part time prosecutor to decline defending particular cases.

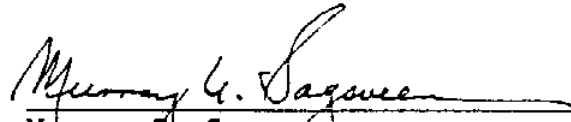
The Committee would like to point out that in accepting the defense of cases not involving the enforcement of city ordinances, the part time prosecutor must adhere to other Rules of Professional Conduct which may be applicable. This is in line with the comments to Rule 1.8(j) which indicate that particular matters and issues involved in a case may require that the part time prosecutor decline defending a particular case. Accordingly, the other rules must be reviewed in each case prior to accepting the defense of the matter.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule provides:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Paul F. Richard and was unanimously approved by the Ethics Committee on June 4, 1993. The

foregoing opinion reverses a prior informal opinion letter issued
on May 9, 1990.


Murray G. Sagsveen,
Chair

[REDACTED]

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[REDACTED]

April 21, 1993

Mr. Murray G. Sagsveen, Chairman
SBAND Ethics Committee
P.O. Box 1695
Bismarck, ND 58502-1695

Re: Interpretation of Rule 1.8(j)(1) of the North Dakota Rules of Professional Conduct

Dear Mr. Sagsveen:

I write to request a formal opinion of the Ethics Committee on the interpretation of Rule 1.8(j)(1) of the North Dakota Rules of Professional Conduct. A similar question was previously the subject of an Advisory Opinion issued by the Ethics Committee on May 9, 1990, a copy of which is attached for reference. The factual circumstances giving rise to this request are as follows:

1. Members of my law firm serve as part-time prosecutors for the City of [REDACTED] and otherwise engage in a broad civil practice;
 2. I am not personally involved in the Municipal prosecutions for the City of [REDACTED];
 3. A part of my practice is, however, criminal defense in cases other than those prosecuted by the City of [REDACTED];
 4. I do not accept cases arising out of [REDACTED], nor represent individuals charged with violations of [REDACTED] municipal ordinances; and
 5. As a part of my criminal defense practice, I do represent individuals before the [REDACTED] County Court.
- [REDACTED]

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The question presented is whether Rule 1.8(j)(1) prohibits me, as an attorney whose partners are part-time municipal prosecutors, from appearing before the [REDACTED] County Court in defense of individuals charged with misdemeanors triable in the [REDACTED] County Court where such cases are prosecuted by the State or municipalities other than the City of [REDACTED]?

Based upon my review of the Rules of Professional Conduct, the answer to this question is that no ethical violation should occur under these circumstances. Before discussing at greater length the reasons supporting this conclusion, it may be useful to outline those issues addressed in the Advisory Opinion upon which I believe there is no dispute.

Initially, I fully recognize the imputed disqualification rule set forth in Rule 1.10 of the North Dakota Rules of Professional Conduct which essentially states I cannot act in any area where my law partner would be ethically prohibited from acting. Further, I also recognize and fully agree with the proposition that Rule 1.8(j)(1), in conjunction with Rule 1.10, prohibits my representation of anyone charged with a crime that is being prosecuted by the City of [REDACTED] regardless of the Court in which such a prosecution occurs. I do not, however, agree with the broad scope of the prohibition espoused in the Advisory Opinion.

My disagreement with the previous Advisory Opinion stems from the interpretation of the impact of Section 40-18-15.1 of the North Dakota Century Code upon the ethical prohibitions set forth in Rule 1.8(j)(1) of the North Dakota Rules of Professional Conduct. In the Advisory Opinion it was concluded Section 40-18-15.1 "does extend the reach of Rule 1.8(j)(1)" because as a result of the enactment of that statute the County Court "comes within the definition of 'in the jurisdiction in which the lawyer holds the prosecutorial appointment.'" Advisory Opinion, May 9, 1990. I respectfully submit the previous Advisory Opinion confuses "Court" with "jurisdiction."

Rule 1.8(j)(1) provides in relevant part, as follows:

(j) 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 crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment; . . .
- [REDACTED]

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N.D.R. Prof. Conduct 1.8(j)(1) (emphasis added).

The primary thrust of Rule 1.8(j)(1) is to prevent the appearance of a compromise of the prosecutorial function where members of the same law firm would be both prosecuting and defending in the same case. It is significant the word "jurisdiction" is used in Rule 1.8(j)(1) while the word "Court" does not appear until the discussion of part-time Judges (in connection with Rule 1.8(j)(2) of the North Dakota Rules of Professional Conduct).

A Municipal Judge, sitting in a Municipal Court, only has jurisdiction to "hear, try, and determine offenses against the ordinances of the City." N.D. Cent. Code § 40-18-01(1). The city prosecutor is responsible for prosecuting on behalf of the City all violations of Municipal ordinances. All such ordinance violations are initially charged in the Municipal Court. Appeals from adverse verdicts in Municipal Court may be taken by a defendant to the County Court (in the case of [REDACTED], the [REDACTED] County Court). Id. § 40-18-15. Further, since 1987, in misdemeanor cases in which a right to trial by jury exists, the case may be transferred from the Municipal Court to the County Court. Id. § 40-18-15.1. Appeals from the County Court may then be taken to the Supreme Court of North Dakota. Id. § 27-07.1-21; N.D.R. App. P. 1 & 3.

There is no appearance of impropriety when a municipal prosecutor appears before the same court (County, District, or Supreme) before which one of his partners also appears, but in a separate case, with a different defendant, and prosecuted by a different municipality and prosecutor. As the Comment to Rule 1.8(j) indicates, "there is no compromise of the public function when a part-time municipal prosecutor . . . defends persons charged with crime to be tried in another Court, or when a part-time state's attorney defends a person charged with a crime to be tried in another county." N.D.R. Prof. Conduct 1.8(j) (Comment).

In other words, the Rules of Professional Conduct, and comments thereto, indicate it is not improper for the partner of the [REDACTED] municipal prosecutor to defend a person charged with crime in [REDACTED] Municipal Court. That is clearly another "Court," (and in reality a separate prosecutorial "jurisdiction") and the appearance of any impropriety is avoided. It is beyond argument that the partner of the [REDACTED] municipal prosecutor could defend this case, even if it was ultimately appealed to the North Dakota Supreme Court (and even though appeals of [REDACTED] prosecutions may also be heard by the North Dakota Supreme Court). Id. It follows, therefore, that the same case can be ethically defended by the partner of the [REDACTED] prosecutor in the County Court following either an appeal or statutory transfer.

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This point is better illustrated with the part-time State's Attorney. As the Comment to Rule 1.8(j) indicates, a part-time state's attorney in Traill County can appear as defense counsel in a criminal prosecution being conducted in Griggs County. This is the case despite the fact the same Judge, in the same District Court, may hear criminal cases in both counties. N.D.R. Prof. Conduct 1.8(j) (Comment). Interestingly, the named plaintiff in both instances is "The State of North Dakota." N.D. Cent. Code § 29-01-03. It is not the "Court" which is important to the conflict of interest issue; but rather it is the fact the part-time State's Attorney in [REDACTED] County has prosecutorial "jurisdiction" only within [REDACTED] County. He is, therefore, outside his prosecutorial "jurisdiction" when he defends the case in the [REDACTED] County "Court." Clearly the "jurisdiction" of each county State's Attorney is the distinguishing factor. See *Id.* §§ 11-16-01(1) and 11-10-02(4).

As noted above, the same analysis is applicable to appeals to the North Dakota Supreme Court. Although cases initially charged in Municipal, County or District Court may ultimately be decided by the North Dakota Supreme Court, neither Rule 1.8(j) or its Comment prohibits the criminal defense here at issue simply because entirely unrelated cases can be heard before the same "Court." Again, it is the "jurisdiction" which brought the initial charges that determines the existence of a conflict.

The enactment of Section 40-18-15.1 of the North Dakota Century Code in 1987 had no significant impact upon the conflict of interest issue. Even before this statute was enacted, appeals from the Municipal Court were taken to the County Court (or the District Court) pursuant to Section 40-18-19 of the North Dakota Century Code. Such "appeals" were actually *de novo* trials. N.D. Cent. Code § 40-18-19. This was the state of the law on November 1, 1980 when the Ethics Committee issued Informal Opinion No. 37 which provided, *inter alia* that "a partner or associate of a city prosecutor may appear as counsel in any criminal action in any Federal Court and in any state Court other than in the city in which the city prosecutor serves." Informal Opinion No. 37, November 1, 1980. Similarly, Informal Opinion No. 40, issued in June, 1984, provided only that "no [part-time Municipal Judge] shall appear as defense counsel in any criminal action in a Court in which he or she presides." Informal Opinion No. 40, June, 1984.

In my view, the prohibitions of Rule 1.8(j)(1) should properly be interpreted to provide a part-time prosecutor (or lawyers associated in their firm) shall not represent a client charged, or expected to be charged, with a crime which is, or will likely be, prosecuted by or in the name of the governmental entity for which the part-time prosecutions are performed. Under such an interpretation the "jurisdiction" prosecuting the case is always

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known with certainty, regardless of which "Court" may hear the case during its existence. Such certainty benefits clients, lawyers and the Courts while properly safeguarding the integrity of the prosecutorial function.

I respectfully request the Committee's consideration of these thoughts in arriving at its Opinion on this matter. If I can be of further assistance, please feel free to call upon me.

Very truly yours,

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