

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-13

August 17, 1993

The Ethics Committee has received a request for an opinion from [REDACTED] of [REDACTED] [REDACTED] is representing a defendant in litigation. [REDACTED] believes that his law partner may be called as a witness at trial. In addition, [REDACTED] believes that the plaintiff's attorney may also be called as a witness at the same trial. He poses the following questions:

1. Due to the fact that a member of this firm is a likely witness in this case, can I continue representing my client?
2. Due to the fact that counsel for plaintiff is a potential witness whom I consider to be of great importance to my client's case and who will, in my opinion, have to be called to trial; can that attorney continue representing the plaintiff?
3. If he cannot and does continue his representation, do I have an ethical obligation to report him for possibly violating the Rules of Professional Conduct?

With respect to Question No. 1, this would appear to be resolved by Rule 3.7 which provides in part that "(a) lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by a conflict of interest." The comment to this rule provides in part as follows:

Whether the combination of roles involves improper conflict of interest with respect to the client is determined by the application of the rules concerning conflict of interest, most importantly, Rules 1.7, 1.8 and 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.

Rule 1.7 provides in part that "(e)xcept as required or permitted by Rule 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation."

The North Dakota Supreme Court very recently addressed this issue in Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993). The defendant had made a motion to disqualify the plaintiff's law firm on the grounds that a member of that firm would be called as a witness at trial, asserting that the attorney's testimony would create a substantial conflict of interest between him and his client, requiring imputed disqualification of the entire law firm. It was noted that the attorney to be called as a witness did not try the case for the plaintiff, as another member of the firm served as trial counsel. In reviewing Rule 3.7 the Court noted that if the conflict rules would preclude the testifying lawyer from acting as both advocate and witness, then no member of his firm could serve as an advocate in the case, citing Rule 1.10(a). The Court stated that "(a) conflict of interest arises when an

attorney's testimony would prejudicially contradict or undermine his client's factual assertions." The Court affirmed the trial court's decision that disqualification was not warranted.

The Committee is of the opinion that you may continue representation of your client as long as a conflict of interest does not exist. This Committee cannot determine whether or not you or your law partner have a conflict of interest. As noted in the Comment to Rule 3.7, that determination is primarily the responsibility of the lawyer involved. However, if your law partner does have a conflict of interest, then you would as well.

In the same manner, this Committee cannot opine as to whether the plaintiff's attorney has a conflict of interest or other duty to withdraw as counsel. That also is his determination to make. Rule 3.7(a)(3) provides that a lawyer shall not act as an advocate at trial in which the lawyer is likely to be a necessary witness except where disqualification of the lawyer would work substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case. The Court in Sargent County Bank held that when an attorney is to be called other than on behalf of his client, a motion for disqualification must be supported by a showing that the lawyer will give evidence material to the determination of the issues being litigated, that such evidence is not obtainable elsewhere, and that the lawyer's testimony is or may be prejudicial to his client.

In addition, this Committee cannot substitute its judgment for that of the requesting attorney as to whether you have an ethical obligation to report plaintiff's attorney for possibly violating the

Rules of Professional Conduct. The determination of whether a duty to report may exist is for you to make being guided by Rules 8.3 and 8.4. Based upon the situation which you have described, it appears you feel that the plaintiff's attorney may have a conflict of interest based upon a statement he made to your client. Thus, this is not a case where the plaintiff's attorney has an obvious conflict by virtue of having previously represented the defendant in a related matter, but rather is solely between he and his client. You have not indicated whether you have any knowledge as to whether the plaintiff and his attorney have discussed this matter, including whether the plaintiff may have waived any potential conflict of interest. The Committee would point out, as noted in the Sargent County Bank case, that disqualification may be an appropriate alternative should such a conflict exist.

The Committee notes that this opinion is consistent with a prior opinion of the Committee. This information is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance upon 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 Brian R. Bjella and was unanimously approved by the Ethics Committee on August 17, 1993.


MICHAEL J. MAUS
Chairperson

July 7, 1993

Michel W. Stefonowicz
Attorney at Law &
Chairman of Disciplinary Board
P. O. Box 289
Crosby, ND 58730-0298

Re: Request for Ethical Opinion

Dear Mr. Stefonowicz:

I am an attorney licensed to practice in the State of North Dakota. I am unclear as to my ethical responsibilities in the representation of one of my clients. To insure that I act in accordance with the Rules of Professional Conduct, I am requesting an opinion as to the appropriate actions I must take.

The facts in this case are a bit convoluted and extend over a number of years. This lawsuit involves a husband and wife as Plaintiffs and another husband and wife as Defendants. To simplify my explanation, I will refer to the two male parties only, as this is essentially their disagreement.

The dealings between my client and the Plaintiff originally revolved around some farm leases and some rents owed. My client and the Plaintiff in this case were quite close. There were a number of business dealings between the two of them; some were for investment purposes, some involved buying insurance. Basically, the Plaintiff contends my client owed him \$22,000.00 and my client contends this \$22,000.00 offset money which the Plaintiff owed him.

My client is a very peaceful man. The Plaintiff in this case is a very excitable man who resorted to threats of violence and financial ruin. The threats of violence included hiring a hit man to have my client bumped off. As a result of the threats, my client went to the Plaintiff's attorney and an agreement was executed. My client had informed the Plaintiff's attorney that the threats were taking place and he just couldn't take it any more, therefore the agreement was signed. My client has testified in a recent deposition that the only reason he signed the agreement was the assurance of the Plaintiff's

attorney that he would see that the agreed upon settlement was lowered at a later date as his clients were only being greedy. Evidently my client secretly taped Plaintiff's attorney during most of this conversation. This agreement was signed just to pacify the Plaintiff who was in a wild and greedy mood until a more appropriate agreement could be worked out in the near future.

The Plaintiff's attorney then was the same person who is now representing them in the action I am concerned with. The Plaintiff is suing for collection of the note executed with the settlement agreement. At the time the note was executed, I was not a member of this firm. My employer, [REDACTED], notarized our client's signature after advising him that he felt this agreement may not be in his best interests. [REDACTED] in no way participated in negotiations, but only gave this advice as a personal friend to our client. Our client acted on his own in regard to this settlement.

A suit has been initiated to collect the underling note for approximately \$22,000.00 plus interest. I have put forth as a counterclaim, the allegations of a R.I.C.O. violation, due to the death threats and other items. Claims for defamation and emotional distress were also put forth along with a request to amend the counterclaim to include an anticipated claim for exemplary damages.

Some discovery, in the form of interrogatories and depositions of my client and [REDACTED] has taken place. I have determined from this that both [REDACTED] and Plaintiff's present attorney are very likely witnesses who will need to be called at trial.

I have three questions:

1. Due to the fact that a member of this firm is a likely witness in this case, can I continue representing my client?
2. Due to the fact that counsel for Plaintiff is a potential witness whom I consider to be of great importance to my client's case and who will, in my opinion, have to be called at trial; can that attorney continue representing the Plaintiffs?
3. If he cannot and does continue his representation, do I have an ethical obligation to report him for possibly violating the Rules of Professional Conduct?

I will hold off taking the deposition of Plaintiffs' counsel, despite the fact that I feel it is necessary, until I hear from you. I have advised my client of this situation and explained to him that if your opinion is that I may continue representing him, I will take the deposition of Plaintiffs' counsel. If I cannot continue to represent my client, I will assist him in locating substitute counsel.

As both my client and I will have to make some decisions regarding this case in the very near future, I respectfully request your prompt

response to these questions. If you need any further information from me, please do not hesitate to contact me at the above address or telephone number. If you need to contact me during evenings or weekends, please feel free to contact me at my home telephone number which is [REDACTED]

Thank you for your consideration.

Sincerely,

