

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 94-01

February 4, 1994

The Ethics Committee received a request for an opinion from [REDACTED] North Dakota. [REDACTED] posed several questions related to her dual employment as an investigator for the Regional Child Support Enforcement Unit (RCSEU), and as a lawyer in private practice. The specific questions are as follows:

1. A custodial parent seeks [REDACTED] representation on a motion to decrease child support. The RCSEU has a non-AFDC open file, which contains information about the non-custodial parent. May [REDACTED] represent this custodial parent?
2. A non-custodial parent seeks [REDACTED] representation to review his child support obligation, and in connection with some visitation problems. An RCSEU in another part of the state has an open non-AFDC file and a closed AFDC file. Background information, including the custodial parent's address, which the non-custodial parent does not have, is available to [REDACTED] on a state-wide computer system. Under N.D. Cent. Code § 14-09-08.4, the RCSEU will not review the child support order at this time, since it is less than 36 months old. May [REDACTED] represent this non-custodial parent?
3. A non-custodial parent seeks [REDACTED] representation, and the RCSEU is attempting to establish an order for support against that non-custodial parent, or to enforce a support order against that non-custodial parent. May [REDACTED] represent this non-custodial parent?
4. [REDACTED] is in an office sharing arrangement with another lawyer, and a non-custodial parent seeks that other lawyer's representation. The custodial parent is described as a client of the RCSEU. May the lawyer with whom [REDACTED] has an office sharing arrangement represent this non-custodial parent?

The relationship between child support enforcement agencies and the persons whom they assist is unique. The relationship has generated multiple requests for ethics opinions, both in this state and in other states. Even though [REDACTED] work with the RCSEU is not as a lawyer, some of those opinions may provide a useful background from which to consider [REDACTED] questions.

This committee has previously expressed the opinion that an RCSEU lawyer represents the state, and does not represent either the obligor or the obligee. (LO 92-01). The Committee's opinion included reservations that the persons with whom the agency deals might perceive the RCSEU lawyer as representing their interests. The South Carolina Ethics Advisory Committee, Op. 91-13, has stated that a lawyer now employed by a child support enforcement agency, who was formerly in private practice, may not, on behalf of the agency, pursue a support action against a defendant whom the lawyer represented, while in private practice, in a child support action. That opinion also states that a lawyer who, by virtue of prior employment with another government agency, has confidential government information about a defendant, may not, on behalf of the child support agency, pursue an action against that defendant.

This Committee has previously considered other questions involving a lawyer's concurrent employment as a lawyer and in a non-lawyer position. In Op. No. 92-17, this Committee expressed concern that a lawyer's dual role, as a licensed real estate broker and lawyer in a professional services corporation, may violate Rule 1.7. In Op. No. 93-08, this Committee concluded that a lawyer,

acting as an agent for a title company issuing title insurance policies when a client of the lawyer is either a seller, buyer, mortgagor, or mortgagee, must obtain client consent under Rule 1.7(c) prior to undertaking the representation.

Rules applicable to [REDACTED] questions include:

1.7(b) 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 to a third person, or by the lawyer's own interests.

1.7(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. . . .

N.D.R. Prof. Conduct 1.7(b) and (c). By virtue of [REDACTED] employment as an investigator with the RCSEU, [REDACTED] has responsibilities to a third person, i.e., the RCSEU, a public agency. The questions posed must therefore be analyzed in terms of whether the potential representations will be, or might be, adversely affected by [REDACTED] responsibilities to the RCSEU.

[REDACTED] responsibilities to the RCSEU, however, are not defined in [REDACTED] request for opinion. As an employee of the RCSEU, [REDACTED] might have a responsibility to not advocate for a legal position contrary to one which would be advantageous to the potential clients described. If so, [REDACTED] ability to represent the best interests of the potential clients [REDACTED] describes might be adversely affected by [REDACTED] responsibilities to the RCSEU. As a

public employee, [REDACTED] conduct may be governed by standards in addition to the Rules of Professional Conduct.

Rule 1.11 must also be considered:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the appropriate government agency.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom. . . .

(f) As used in this rule, the term 'confidential government information' means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Although Rule 1.11 is entitled "Successive Government and Private Employment," it would seem only logical that the same principles should apply to concurrent government and private employment. Rule 1.11 applies to any public office or employment, and is not limited to work as a lawyer. See, C. Wolfram, Modern Legal Ethics 468 (1986).

The term "matter" includes "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party." N.D.R. Prof. Conduct 1.7(e). For purposes of Rule 1.11, the term "matter" also includes "any matter covered by the conflict of interest rules of the appropriate government agency." Because of the continuing nature of a child support obligation, a file involving a particular obligor or obligee could apparently be opened and closed many times. The Committee is unaware of any authority interpreting the term "matter" for purposes of child support enforcement proceedings. The term "matter" could be interpreted to cover all proceedings involving a particular obligor or obligee. That broad interpretation would be consistent with Rule 1.11's purpose of prohibiting an attorney from exploiting a public position for the advantage of a private client. See ABA Formal Op. 342, at 6 (1975); C. Wolfram, *Modern Legal Ethics*, 472-73 (1986). See also SBAND Ethics Committee Op. No. 93-07 (part time municipal prosecutor is not precluded from defending all criminal cases not involving city ordinances in county courts, although he or she might be precluded from defending particular cases because of involvement in a particular matter as a prosecuting attorney).

For purposes of this opinion, the Committee assumes the RCSEU acquires "confidential government information," about both obligors and obligees. One who acquires "confidential government information" about an individual during the course of government

employment, whether employed as a lawyer or in any other capacity, cannot use that information, as a lawyer in private practice, to the disadvantage of the individual who is the subject of the "confidential government information." Rule 1.11(b) applies when the government employee has actual knowledge of the confidential information. See Comment, Rule 1.11. The facts ██████████ states suggest ██████████ would have access to "confidential government information" relating to the obligors and obligees ██████████ describes, though ██████████ might not have actual knowledge of that information.

On the facts presented, the Committee is not able to make a determination of whether ██████████ would be prohibited from representing the potential clients ██████████ describes. In the Committee's opinion, ██████████ should consider the following questions in each of the fact situations which ██████████ presented:

- (1) Did ██████████, or will ██████████ be required to, participate personally and substantially in a matter in ██████████ job at the RCSEU, such that representation of a private client would be prohibited under Rule 1.11(a)? If so, ██████████ must decline the representation.
- (2) Does ██████████ have actual knowledge of "confidential government information," about a person whose interests are adverse to those of ██████████ potential private client, that could be used to the material disadvantage of the subject of that information? If so, ██████████ must decline the representation under Rule 1.11(b).
- (3) Would the quality of representation of ██████████ potential client be adversely affected by ██████████ responsibilities to the RCSEU? If so, ██████████ must decline the representation under Rule 1.7(b).
- (4) Might the quality of representation of ██████████ potential client be adversely affected by ██████████ responsibilities to the RCSEU? If so, does ██████████ reasonably believe the representation will not be adversely affected, and does ██████████ potential client give informed consent to proceeding with the representation, under Rule 1.7(c)? Unless ██████████

holds that reasonable belief and the client gives informed consent, [REDACTED] must decline the representation under Rule 1.7(c).

As to the final question which [REDACTED] raises, Rule 1.10(a) provides:

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 these rules, except as provided by Rule 1.11 or Rule 1.12.

The Comment to that Rule addresses the definition of "firm" for purposes of this rule:

Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

The facts presented are not sufficient to allow this Committee to reach an opinion on whether the office-sharing arrangement of these two lawyers is to be considered a "firm" for purposes of this rule. Additionally, it is this Committee's practice to refrain from making factual determinations. The Committee cannot, therefore, express an opinion on the final question posed by [REDACTED]. The Committee notes that [REDACTED] request for an opinion was on the letterhead of the other lawyer. If these two lawyers "present themselves to the public in a way suggesting that they are a firm

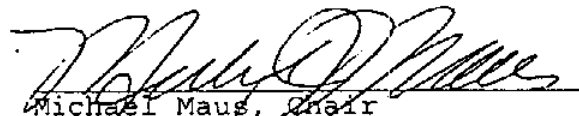
or conduct themselves as a firm," Rule 1.10(a) would prohibit the other lawyer in the office-sharing arrangement from undertaking any representation which [REDACTED] would be prohibited from undertaking, except as would be specifically allowed under Rules 1.11 and 1.12.

[REDACTED] also asks that this Committee address "any other issues" of which she should be aware. This Committee does not have enough information about [REDACTED] responsibilities at the RCSEU to envision other issues [REDACTED] might face. The Committee will follow its practice of issuing opinions only on factual situations posed by the inquiring attorney.

This opinion 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 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 Alice R. Senechal, and was unanimously approved by the Ethics Committee on February 4, 1994.


Michael Maus, Chair

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[REDACTED]

December 18, 1993

Sandy Tabor
Ethics Committee
P.O. Box 2136
Bismarck, ND 58501

Dear Sandy:

Pursuant to our telephone conversation yesterday, I am detailing four specific situations where I am concerned about possible conflicts. As I mentioned, I am working at the Regional Child Support Unit as a case investigator and not as an attorney. I do the initial work on a case until legal action is needed. Then the case is sent to the legal department to work.

The following are situations that I have encountered:

1. A custodial parent is served with a motion to decrease child support. The custodial parent is not receiving AFDC so the Child Support Unit will not represent her on the motion. However, she has a non-AFDC open file with the agency and in the past was on AFDC. Can I represent the custodial parent on this motion when I have access to the agency file which contains information about the non-custodial parent?
2. A non-custodial parent wants a review of his child support and is having some visitation problems. Our agency does not have a case with either party. However, the Bismarck Child Support Unit does have an open non-AFDC file and a closed AFDC file. Background information, including the address for the custodial parent which my client claims not to have, is available to me on the state-wide computer system. Are there any problems with this? Can I represent the non-custodial parent on a motion to decrease child support under the provisions of section 14-09-08.4 of NDCC when the order is less than 36 months old and the Child Support Unit won't do a review?

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3. Can I represent the non-custodial parent on the issue of child support when the Child Support Unit is attempting to do enforcement against the obligor, or is attempting to establish an order for child support?

4. [REDACTED] and I are involved in an office sharing arrangement. She is wondering if there would be any conflict problems when she represents the obligor or non-custodial parent against the custodial parent that is a client of the Child Support Unit.

These are the types of situations that I can think of at the present time. There may be other types of problems that I haven't thought about. I would appreciate having the committee address any other issues that I should be aware of.

If you have any questions about the above, please feel free to call me. I can be reached mornings at the Child Support Unit, 795-3854 and other times at the number listed above. Thank you in advance for your time and consideration.

Sincerely,

[REDACTED]

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December 1, 1993

Michael Maus, Chairman
Ethics Committee
State Bar Association
515 1/2 E Broadway
P.O. Box 2136
Bismarck, ND 58501

RE: Request for opinion

Dear Mr. Maus:

I am a newly licensed attorney in North Dakota. I am working 1/2 time for the Grand Forks Regional Child Support Enforcement Unit as a case investigator as well as working in private practice. A conflict of interest question has arisen involving my employment at the government agency and my private practice.

The issue is whether a conflict exists in my representation of the custodial parent (obligee) of a child support obligation who is also a recipient/client of the Child Support Unit. Is there a conflict involved when I have access to information pertaining to the non-custodial (obligor) parent in my capacity as a case investigator? The usual information about the obligor contained in the files at the Child Support Unit is information that would be available during representation through discovery methods.

It is obvious to me that I would have a definite conflict if I was representing the non-custodial parent who would be an adverse party. But would I be prevented from representation in private practice of a custodial parent who is also a recipient/client of the Child Support Unit?

Your opinion on this matter would be greatly appreciated. If you need further information, I can be reached at the Grand Forks Regional Child Support Unit from 8:00 a.m. until 12:00 p.m. daily, telephone 701-795-3854, and at other times at the number listed above.

Sincerely,

A large, solid black rectangular redaction mark covering the signature area.