

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 94-08
November 28, 1994

The Ethics Committee received a request for an opinion from [REDACTED] North Dakota. [REDACTED] request to the Committee for an opinion arises from the following set of facts.

[REDACTED] is the [REDACTED] City Attorney. City of [REDACTED] Ordinance §14-01-02 provides that the City Attorney is an ex-officio member of the [REDACTED] Planning Commission. As an ex-officio member of the Planning Commission, the City Attorney regularly votes on all issues that come before the Planning Commission. Furthermore, the City Attorney provides advice on substantive and procedural issues which may arise during meetings of the Planning Commission.

If an appeal is taken from a Planning Commission decision, the City Attorney represents and advises the City Commission, which is the first level of appeal from a Planning Commission decision. If the decision of the City Commission is appealed to the District Court, the City Attorney represents the City Commission before the District Court. The City Attorney's dual role as a voting member of the Planning Commission and as legal counsel to the City Commission, could result in a situation where the City Attorney votes one way on an application to the Planning Commission, and also represent the City Commission that voted a different way.

The question [REDACTED] has asked this Committee to consider is as follows:

Given the legal services and advice that the City Attorney provides to the City Commission and Planning Commission regarding matters originating at the Planning Commission, should the City Attorney be voting on the merits of issues with the rest of the Planning Commission?

North Dakota Rules of Professional Conduct, Rule 1.17(a), provides that "[a] lawyer employed or retained to represent a governmental entity represents the governmental entity as distinct from its officials or employees". While the comments to Rule 1.17 indicate that statutes or laws may impact the determination of the the actual client's identity, Mr. [REDACTED] has not cited, nor is the Committee aware of, any statute or ordinance which would indicate that the City of [REDACTED] is not the client. Accordingly, the Committee is of the view that Mr. [REDACTED] client is the City of Bismarck, not any individual board, commission, official or employee of the City.

"In general, the Rules of Professional Conduct apply to a lawyer representing a governmental entity in the same manner as they apply to a lawyer for a private client." See, Comments to Rule 1.17. In his representation of the City of [REDACTED], the City Attorney must adhere to the rules of conduct concerning conflicts of interest. While the Committee recognizes that statutes and ordinances may impact the issue of whether a conflict actually exists, no statute or ordinance appears to address the question raised by Mr. [REDACTED]. The ordinance in question simply designates the City Attorney as a voting member of the Planning Commission. While his membership on the Planning Commission is by virtue of his

holding the office of City Attorney, the Committee is of the opinion that [REDACTED] dual capacity as Planning Commission member and City Attorney are two separate roles.

The comments to North Dakota Rules of Professional Conduct, Rule 1.7, make it clear that a lawyer must be able to exercise independent professional judgment in the representation of the client. The City Attorney's role as a member of the Planning Commission might impact his ability to exercise independent professional judgment when advising the City Commission, particularly where the City Commission disagrees with the Planning Commission's decision and the City Attorney voted in favor of the Planning Commission's decision. Thus, the Committee is of the opinion that under Rule 1.7, a conflict of interest does exist in a situation where the City Attorney represents the City Commission where the City Commission and Planning Commission disagreed on the appropriate action to be taken.

Having concluded that a conflict of interest does exist where the City Commission and Planning Commission disagree, Rule 1.7 requires a determination of whether the conflict is one which will, is likely to, or might adversely affect the City Attorney's representation of the City. Under Rule 1.7(a) and (b), a lawyer must decline representation of a client if the conflict will or is likely to adversely affect the lawyer's ability to represent the client. In either case, the client cannot waive the conflict. If the conflict is one which might adversely impact the lawyer's

representation of the client, Rule 1.7(c) permits the lawyer to represent the client if the following requirements are met:

- (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.

The Committee is of the view that the City Attorney's dual role as a member of the Planning Commission and as City Attorney is a situation which might adversely impact the City Attorney's representation of the City in matters where the City Commission and the Planning Commission disagree. In this case, Mr. [REDACTED] must examine the matter and decide whether he "reasonably believes the representation will not be adversely affected" by the conflict. If Mr. [REDACTED] reasonably believes that the conflict will not adversely affect his representation of the City and the City waives the conflict (consents to the dual role), then Mr. [REDACTED] would not be required to withdraw from representing the City on matters where the City Commission and the Planning Commission disagree.

The Committee cannot make the determination of whether Mr. [REDACTED] "reasonably believes" the conflict will adversely impact his representation of the City. That is a decision that Mr. [REDACTED] must make after considering all relevant factors. The Committee would, however, point out the following factors that Mr. [REDACTED] may want to consider:

1. As pointed out in the Comments to Rule 1.7, like a lawyer who sits on the board of directors of a client, Mr. Whitman should consider the frequency with which such

"conflicts" between the City Commission and Planning Commission arise, the potential intensity of the conflict, the effect of the City Attorney's removal from the Planning Commission as a voting member, and the possibility of the City obtaining legal advice from another attorney if conflicts arise between the City Commission and the Planning Commission.

2. Mr. [REDACTED] should consider the effect his having taken a public position on a Planning Commission matter will have on his ability to zealously represent his client, the City, if the City, through the Commission, rejects the Planning Commission's action.
3. The likelihood of statements made by Mr. [REDACTED] as a member of the Planning Commission, might be used as admissions or evidence against the City.
4. Whether the dual role as voting member on the Planning Commission and legal adviser to the City and its boards/commissions may adversely impact privileges which attach to the advice given to the City or any of its boards/commissions.

If after weighing these factors and other relevant consideration, Mr. [REDACTED] reasonably believes that his dual role will or is likely to adversely impact his representation of the City in situations where the City Commission and Planning Commission disagree, Rule 1.7 does not permit the conflict to be waived by the client. In such a case, Mr. [REDACTED] should advise the City to seek alternative legal counsel. While amendment of the ordinance to remove the City Attorney as a member of the Planning Commission would alleviate this conflict, that is a decision for the City, not this Committee.

This opinion is provided pursuant to Rule 1.2(B) of the 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 or North Dakota shall not be subject to sanctions 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, a member of the Committee and unanimously approved by the Committee at its meeting on November 28, 1994.


Michael Maus, Chairman

94-08

[REDACTED]

October 26, 1994

Mr. Michael Maus
Chair, Ethics Committee
137 1st Avenue West
P. O. Box 370
Dickinson, ND 58602-0370

W/ or w/out
vote?

Dear Mr. Maus:

A question has arisen on which I would appreciate the Ethics Committee's opinion. I am the City Attorney [REDACTED] a full time position. City Ordinance 14-01-02 (copy attached) provides that the City Attorney, along with the Mayor and City Engineer are ex officio members of the [REDACTED]. For the almost seven years I have been here, all three city employee members of the Planning Commission have voted as regular members on all issues that come before the Commission.

During the regular course of Planning Commission meetings, the City Attorney provides advice on legal issues that arise. This is the case for substantive issues as well as procedural issues. In addition, the City Attorney represents the Board of City Commissioners in appeals from the Planning Commission, both before the Board of City Commissioners and in District Court. There is some potential for the attorney to vote for or against an issue before the Planning Commission and then to represent a City Commission that voted a different way.

My question is, given the legal services and advice that the City Attorney provides to the City Commission and Planning Commission regarding matters originating at the Planning Commission, should the City Attorney be voting on the merits of issues with the rest of the Planning Commission? It appears that such action may be a conflict. I would appreciate any direction you can give on this matter. Thank you.

Sincerely,

[REDACTED]

[REDACTED]

Attachment

c: Sandra Tabor
SBAND
PO Box 2136
Bismarck, ND 58502

[REDACTED]

[REDACTED]