

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 95-03
Date: June 7, 1995

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The Ethics Committee has received a request from [REDACTED] of [REDACTED] for an opinion on the following questions:

Is there an inherent conflict of interest in an arrangement where a state's attorney, with part time duties in a sparsely populated county, also practices in a law firm that specializes in the representation of public benefit applicants and recipients in such areas as debtors' rights, contested custody and guardianship proceedings over a multi-county area which includes the state's attorney's home county? If there is a conflict, she asks: (1) Can it be cured by screening only cases which go to the part time state's attorney or through some kind of case by case client consent, and (2) does it apply only to residents of the county in which the state's attorney's work is done?

A state's attorney is a public officer, required by law to prosecute and defend against legal proceedings on behalf of or against the State of North Dakota and the county he or she serves and to furnish numerous other services for the state and county. There are also statutory restrictions on the ability of a state's attorney to present a claim or advocate relief against the county. See NDCC 11-16-01 and NDCC 11-16-05. For purposes of this opinion we shall assume that the part time state's attorney here involved is not bound by any additional restrictions imposed by NDCC 11-16-05(5).

The following North Dakota Rules of Professional Conduct governing conflicts of interest must be considered:

1.7(a) 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 clients 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 interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and

(2) The client consents after consultation

1.8(j) 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 lawyer and the client is charged or expects to be charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment.

The "comment" to rule 1.8(j) states that other considerations may prohibit a part time lawyer or another lawyer associated with the part time official in practice, from accepting or combining representations not specifically prohibited by this rule; for instance, even though the matter will be defended in a Court other than the one 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 prosecutor had had any involvement as a prosecutor.

This Committee has previously stated that under Rule 1.10, NDRPC, the term "firm" includes legal services organizations and that a conflict on the part of the one of the lawyers employed by the organization would disqualify the organization (Ethics Committee Opinion 92-05).

Accordingly, any conflicts attributable to the state's attorney member of the firm by reason of his or her office as state's attorney would also be imputed to all lawyers in the firm.

CONCLUSION

There is a potentially "inherent" conflict of interest for an attorney acting in the dual capacity as state's attorney and as an associate of a public interest law firm and it extends to all members of the firm in matters relating to the state's attorney member's governmental duties and restrictions. Only by careful screening of clients and the securing of consents, where permissible, can such adverse claims be discovered and conflicts of interest avoided.

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 in good faith and with 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 subject of the Opinion or advisory letter.

This Opinion was drafted by Robert A. Wheeler and was unanimously approved by the Committee on June 7, 1995.



Alice Senechal, Chair

[REDACTED]

April 21, 1995



Sandi Tabor
State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502

Dear Sandi:

REQUEST FOR ETHICS OPINION

If a part time state's attorney in a sparsely populated county also practices in a law firm that specializes in the representation of public benefit applicants and recipients, debtors' rights, contested custody and respondents in guardianship proceedings over a multi-county area which includes the states attorney's home county, is there an inherent conflict of interest potential in this arrangement? If so, can it be cured either by screening only cases which go to the part-time state's attorney or through some kind of a case by case client consent? If there is a conflict, does it only apply to residents of the county in which the state's attorney work is done, or to all state residents.

The particular context in which this request arises is as follows. The state's attorney for a sparsely populated county works part time fulfilling all legal responsibilities of a county states attorney from prosecution of criminal and juvenile cases, to advice, to representation of county offices, including county social services and law enforcement, to involuntary mental health commitments and guardianship matters.

That attorney also practices in a non-profit law firm which specializes in the cases set forth in the question posed above, but which also provides advice and referrals in a much wider range of substantive areas. The attorney supervises a service which screens potential clients for income and case type and then provides advice primarily in family law, (including divorce, domestic violence, child support, paternity, visitation) consumer law, housing law, and public benefits law. The program is composed primarily of volunteer government and corporate attorneys, however firm attorneys also volunteer in this effort. Callers are screened for

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potential conflicts with the firm's other offices as well as the site office. Conflicts identified in this screening process are referred to the State Bar Association Lawyer Referral Service, immediately.

The attorney does not have a litigation caseload but does provide advice and brief legal services and conducts the final staffing of calls the volunteers have handled during the evening. Final staffing encompasses determinations on which cases are referred to the SBAND LRS, VLP or low income divorce panels, which cases need minimal follow up work and which cases are to be kept in the firm.

The attorney does not personally talk with any potential clients from the county in which state's attorney work is done. Those cases are handled by other law firm staff.

92-12 → In reality, the state's attorney has made alternative arrangements for criminal prosecutions of public assistance recipients. However, these cases and other conflict situations that might arise are extremely infrequent because of the small potential population involved, if the conflict applies only to the residents of that one county.

The Ethics Committee issued a letter opinion on a similar issue in 1993 regarding an attorney in a private practice involving extensive creditor collections work who wished to volunteer for the same non-profit law firm services now supervised by the state's attorney in question. There have also been previous formal opinions about criminal work of states attorneys which allows defense work to be undertaken outside the county of the state's attorney's jurisdiction. I believe these opinion have relevance to the issues presented, but are not dispositive of the matter.

The insight of the committee on this issue would be greatly appreciated.

Sincerely,

[REDACTED]

[REDACTED]