

[REDACTED]

July 25, 1995

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

Dear Sandi:

REQUEST FOR ETHICS OPINION

I recently spoke with you about the necessity of [REDACTED] obtaining ethics opinions on several issues of significance during our pending restructuring process. On June 7, 1995, the Ethics Committee issued an opinion at my request focussing on the potential conflict of interest created in an arrangement with a State's Attorney with part-time duties in a sparsely populated county who also practices in a law firm that specializes in representation of public benefits applicants and recipients. The Committee concluded that there was a potential "inherent" conflict of interest acting in the dual capacity as State's Attorney and as an associate of a public interest law firm. The Committee found that the conflict of interest extends to all members of the firm in matters relating to the State's Attorney member's, governmental duties, and restrictions. The Committee advised that only by careful screening of clients and securing of consents, where permissible, can such adverse claims be discovered and conflicts of interest avoided.

As a result of that opinion, I met with the Attorney General and several of her staff to discuss the impact of the Assistant Attorneys General in their volunteer efforts with [REDACTED]. I have three areas which need clarification. If these questions could be treated as emergency in nature, and depending upon the substance of the answers, [REDACTED] may be able to be restructured and continue. Until a response is received from the Committee, I have decided that the opinion as written must result in the discontinuation of [REDACTED] program. The system of screening and consents needed would have to be extensive and too time consuming, as well as another hoop clients would need to jump through to obtain services.

[REDACTED]

I would greatly appreciate clarification in the following areas:

- (1) Does this opinion apply with equal force to Assistant Attorneys General? If so, does it apply equally to all attorneys who are employed by the Attorney General or a department of the state of North Dakota? Does this opinion apply with equal force to attorney employees of the state who do not litigate on behalf of the state or its various departments, draft rules or legislation, acts as administrative law judges, or who hold managerial or administrative positions within government as a position to being classified as legal practitioner?
- (2) Can the Committee support any exception to allow attorneys employed as Assistant Attorneys General or as attorney of a specific department of the state, to participate in [REDACTED] based on the fact that the service provided is primarily referral to one of the State Bar Association panels or very brief advice, with no further follow or contact?
- (3) If the part-time State's Attorney is a part-time attorney with [REDACTED] but is involved in no [REDACTED] casework at all, is there still "a potential inherent conflict" because of the imputed knowledge about [REDACTED] cases? Does it make any difference whether that attorney is actually located in a [REDACTED] law office or housed in a separate unit which does not do direct litigation? If location in a non-direct litigation unit is allowed, could that attorney carry on an individual case contracting with private attorneys which included taking action on requests for payment and primarily reviewing final legal documents received on a case for LSC compliance purposes, which includes quality control?

I also wish to request a meeting with the Committee on a broad range of actual ethical questions which [REDACTED] must address due to the virtually certain 30%-40% decrease in federal funding from the [REDACTED] come January 1, 1996. In order to competently plan for such an impact, [REDACTED] needs to be sure that the various ideas for [REDACTED] do not run afoul of the North Dakota Rules of Professional Conduct.

Legal aid programs find themselves in unique situations because they are viewed, as and probably are, the only source of representation for a sizeable percentage of the population. If [REDACTED] conflicts itself out, a huge percentage of the population will go unadvised and unrepresented. If [REDACTED] needs a consent, I would not be surprised if clients signed because they are desperate for representation, which is unacceptable. [REDACTED] is required to complete an eligibility

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application on those who request assistance, which requires financial information and at least a description of the situation. This limits the screening of what is discussed during the initial contact with [REDACTED].

These are examples of the types of issues I would like to discuss with you. It is not an emergency which needs to be attended to in the next ten days, but hopefully could take place within the next couple of months before [REDACTED] has to have a final plan ready to implement.

I hope to hear from you in the near future.

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

cc: Alice Senechal, Chair

STATE BAR ASSOCIATION OF NORTH DAKOTA

Ethics Committee

Opinion No. 95-08

September 26, 1995

The Ethics Committee has received a request from [REDACTED] to clarify and possibly expand upon our Opinion No. 95-03.

In 95-03, we stated that 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. We further commented that careful screening and securing of consents, where permissible, could avoid such conflicts.

[REDACTED] asks if there still is a potential conflict that could be imputed to other lawyers in the firm (1) if the part-time state's attorney is involved in no case work with the public interest law firm, (2) if the attorney practices with a separate unit of the firm which does not do direct litigation and (3) if practicing with a non-direct litigation unit, may the attorney carry on an individual case contracting with private attorneys which include taking action on requests for payment and primarily reviewing final legal documents received on a case for LSC compliance purposes, including quality control.

Rule 1.11, NDRPC, entitled "successive government and private employment" prevents a lawyer from exploiting public office for the advantage of a private client. When a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represented the government after having served private clients, the situation is governed by Rule 1.11(d). N.D.R.Prof. Cond. 1.11 comment.

However, Rule 1.11, unlike Rule 1.10, its counterpart for private-to-private moves, specifically provides for screening and notice as mechanisms to avoid vicarious disqualification

of an entire law firm because of a single member's conflict of interest.

The comment to Rule 1.11 recognizes that the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government.

This committee believes that Rule 1.11 is applicable to concurrent as well as successive government and private employment (See Op. 94-01) and that the rule should be liberally construed to accommodate a government attorney who also is employed by a public interest law firm, which, like the government, provides a public service.

Accordingly, the screening and notice provisions of Rule 1.11 may be utilized to avoid conflicts of interest that would otherwise be imputed to other lawyers of the public interest law firm by reason of the disqualification of a state's attorney member of the firm.

While the state's attorney member of the firm may not literally personally or substantially participate for the government in cases the firm received involving a state governmental agency, her statutory duties and restrictions appear sufficient to bring her within the reach of Rule 1.11, thereby necessitating implementation of its screening and notice requirements.

An effective screening system should have the following attributes: (1) The system should be in place in time to accomplish its objective, i.e. preserving confidentiality of files and avoiding positions adverse to affected clients, (2) the attorney must be excluded from all participation in matters relating in any way to the conflict of interest, (3) all employees must be directed not to discuss such matters in the attorney's presence, (4) all fees must be segregated from the attorney so that she receives no direct financial benefit from the matters, and (5) the firm size must be considered when implementing the screening system. Colorado Ethics Opinion, Opinion 88 (5-18-91). See also, Philadelphia Ethics Opinion, Opinion 91-18 (7-91)

In the instant situation, since the state's attorney member is not a "new" member, the screening mechanism may be effective only for cases that arise after it is in place. A procedure excluding the state's attorney member will also have to be adopted to identify for screening and notice purpose all cases that have the potential for conflict of interest with the state's attorney member in pursuance of her governmental duties and restrictions.

The fact that the state's attorney member is involved in no case work, and the mere location of the state's attorney member in a separate office or unit of the firm are not in themselves sufficient to avoid the imputation of her disqualification to other lawyers of the firm. The screening provisions are required in order to preserve confidentiality of files.

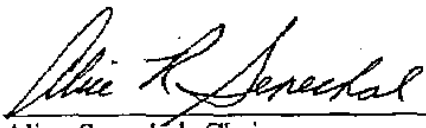
CONCLUSION

By implementation of proper screening and notice procedures mandated by Rule 1.11(a) conflicts of interest between government agencies and a state's attorney member of a public interest law firm will not be imputed to other members of the firm.

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer Discipline. This rules states:

A lawyer who acts with good faith and reasonable reliance on a *written opinion or advisory letter of the ethics committee of the association* is not be subject to sanction for violation of the *North Dakota Rules of Professional Conduct* as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Robert A. Wheeler and was unanimously approved by the Committee on September 26, 1995.



Alice Senechal, Chair