

[REDACTED]

August 25, 1995

Alice R. Senechal
Attorney at Law and Chairman of Ethics Committee
106 North 3rd, Suite M-102, P. O. Box 5576
Grand Forks, North Dakota 58206-5576

8
1995
[REDACTED]

Re: Requested Opinion

Dear Ms. Senechal:

I attempted to contact you and Sandy Tabor by phone, but was informed you were both on vacation. Pamela Hermes suggested that I put my request in writing and request an expedited opinion.

I served [REDACTED] as county judge for twelve years. During the last three years of my term, I also served the district court as a judicial referee on non support and other matters, and during the approximate same period of time, heard and presided over other district court matters pursuant to a blanket assignment issued by Judge [REDACTED] which made me primarily responsible for all district court matters filed in the aforementioned counties. I am now engaged in private practice in [REDACTED] North Dakota.

I hereby request an advisory opinion on the following:

1. May I represent a client on a motion to modify custody and/or reduce child support, where I previously presided over an order to show cause hearing as a judicial referee, where the client was to show cause why he should not be held in contempt of court for failing to pay child support, but another judge entered the original judgment and/or approved, rejected or modified my findings and recommendations as referee?
2. May I represent a client who seeks a change in custody, where I as an assigned judge, previously executed, Findings of Fact, Conclusions of Law and Order for Judgment in the original action, but where the same was issued pursuant to either a stipulation entered into between the parties, or was presented to me as a default matter?
3. May I represent a client on a collateral matter such as a change in custody or modification of child support where I presided as the assigned judge in the original and contested action, but where six months or more have elapsed since I last ruled? Does it make any difference if a different judge has since ordered modification of the judgment? Would it make any difference if my client's previous lawyer was deceased, or my client is now indigent, or that I have previously performed other legal services for my client which were not in any way related to the original action.
4. If opposing counsel and the opposing party consent to me representing a client under any of the foregoing circumstances, would this change or modify your

client under any of the foregoing circumstances, would this change or modify your opinion?

5. Since potential clients are often in need of filing or making a response within a relatively short period of time, may I interpose a timely response on their behalf and notify opposing counsel or party of my prior involvement, and then withdraw, if there would be an objectionable conflict?

Unless some of the foregoing representation is permissible, I may be forced to establish a law practice outside of [REDACTED] North Dakota.

Looking forward to your prompt reply.

Sincerely,

[REDACTED]

cc: Sandra Tabor

STATE BAR ASSOCIATION
OF NORTH DAKOTA

ETHICS COMMITTEE

Opinion No. 95-10

September 26, 1995

The Ethics Committee has received a request for an opinion from [REDACTED] of [REDACTED]

[REDACTED] served as a county judge for 12 years; served the district court as a judicial referee on various matters; and also presided over other district court matters filed in the four counties in which he served as county judge. [REDACTED] is now engaged in the private practice of law in [REDACTED]. He requests an opinion on the following matters:

1. May I represent a client on a motion to modify custody and/or reduce child support, where I previously presided over an order to show cause hearing as a judicial referee, where the client was to show cause why he should not be held in contempt of court for failing to pay child support, but another judge entered the original judgment and/or approved, rejected or modified my findings and recommendations as referee?
2. May I represent a client who seeks a change in custody, where I as an assigned judge, previously executed, Findings of Fact, Conclusions of Law and Order for Judgment in the original action, but where the same was issued pursuant to either a stipulation entered into between the parties, or was presented to me as a default matter?
3. May I represent a client on a collateral matter such as a change in custody or modification of child support where I presided as the assigned judge in the original and contested action, but where six months or more have elapsed since I last ruled? Does it make any difference if a different judge has since ordered modification of the judgment? Would it make any difference if my client's previous lawyer was deceased, or my client is now indigent, or that I have previously performed other legal services for my client which were not in any way related to the original action.
4. If opposing counsel and the opposing party consent to me representing a client under any of the foregoing circumstances, would this change or modify your opinion?
5. Since potential clients are often in need of filing or making a response within a relatively short period of time, may I interpose a timely response on their behalf and notify opposing counsel or party of my prior involvement, and then withdraw, if there would be an objectionable conflict?

DISCUSSION

Rule 1.12(a) of the North Dakota Rules of Professional Conduct provides as follows:

Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after consultation.

The exception in paragraph (d) is not applicable as it concerns only those persons selected as part of a multi-member arbitration panel.

The comment to the rule provides that a former judge who exercised administrative responsibility in a court does not prevent that former judge from acting as a lawyer in a matter where the judge previously exercised remote or incidental administrative responsibility that did not affect the merits. The term "personally and substantially" is not defined.

The former ABA Disciplinary Rules and Ethical Considerations provided in part as follows:

A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity. DR 9-101.

After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists. EC 9-3.

Summaries of three ABA opinions on this subject provide as follows:

A former family court judge may not represent a party alleging a violation of an order he entered while a judge unless all parties to the proceeding consent after disclosure, even though the order was routine and was entered on consent. Rule 1.12. Opinion 93-26 (12/93). ABA/BNA Lawyers' Manual on Professional Conduct.

A lawyer may not represent an individual in a matter in which he has participated substantially in a judicial capacity unless all parties consent after full disclosure. The lawyer may represent persons who appeared before him in a judicial capacity if the matter is unrelated to the case in which the lawyer participated as

a judge. Rule 1.12 (a); DR 9-101(A); EC 9-3. Opinion 90-4 (11/4/90). ABA/BNA Lawyers' Manual on Professional Conduct.

A lawyer who in his former capacity as a part-time judicial magistrate set bond, appointed counsel, made preliminary findings of probable cause, and filed the standard initial appearance form for a defendant may not subsequently represent that defendant on appeal. DR 9-101(B); EC 9-3. Opinion 89-52 (5/11/90). ABA/BNA Lawyers' Manual on Professional Conduct.

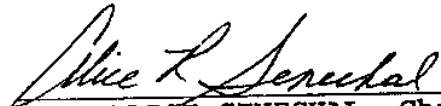
CONCLUSION

The Committee is of the opinion that Rule 1.12 (a) governs and directs that you participated personally and substantially as a judge and cannot serve as counsel in Items 1-3 of your letter unless all parties to those proceedings consent after consultation. With respect to Item 5, the Committee is of the opinion that you should not act as a legal representative on behalf of those potential clients until you have obtained such consent.

This opinion is provided pursuant to 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 association is not 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 Brian R. Bjella and was unanimously approved by the Committee on September 26, 1995.


ALICE SENECHAL, Chair