

May 4, 1998

Ms. Alice Senechal
Chairperson
North Dakota Bar Association Ethics Committee
P.O. Box 5576
Grand Forks, ND 58206-5576

RE: ADVISORY OPINION

Dear Ms. Senechal:

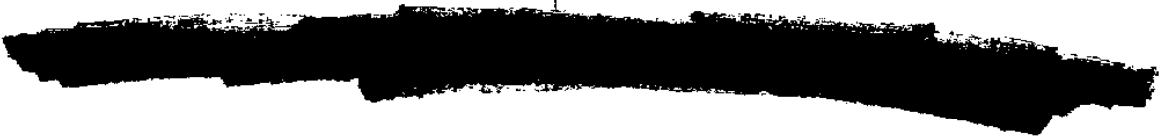
I am writing to request an advisory opinion concerning any professional responsibility issues or ethics concerns arising out of the following factual scenario. I am the [REDACTED] State's Attorney with the statutory obligation to prosecute any criminal or public offenses which are presented to the office. Obviously, there is broad prosecutorial discretion in determining which cases are appropriate for prosecution. In the instant case, an altercation occurred in a [REDACTED] bar involving a local attorney, [REDACTED]. [REDACTED] Police Department officers responded and conducted an investigation which included follow up investigation by a department investigator. After a period of weeks, the investigation reports were forwarded to the [REDACTED] State's Attorney's office and were reviewed by myself and two assistant prosecutors. After meeting about the merits of the case, the three of us agreed that to avoid any appearance of impropriety or conflict, the case would be forwarded to the North Dakota Attorney General for review and prosecution. Several weeks later, the North Dakota Attorney General's office sent a letter to me indicating a decision to decline prosecution for the reason that in their opinion, assault could not be proven beyond a reasonable doubt because of a variety of conflicting witness statements. That letter was received on Friday, April 24, 1998, and also stated

[REDACTED]

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that in my discretion, I could request the [REDACTED] City Prosecutor to review the case for possible charges. Having received the case back from the Attorney General with an indication that they were returning it to me for further action in my discretion, I determined I would give the case a full and fair review for possible criminal charges. After doing so, and meeting with numerous witnesses, and consultation with the assistant prosecutors in my office, I determined that criminal charges were appropriate and filed the same on Thursday, April 30, 1998 at 4:41 p.m. At no time, did I believe I had an actual conflict of interest in handling the prosecution. However, it is important to note, that the [REDACTED] law firm, and more specifically, attorney [REDACTED], receives about 95% of the referrals from the North Dakota Insurance Reserve Fund for [REDACTED] County matters. In that vein, there are pending [REDACTED] County cases in which I am a named defendant which are being handled by Mr. [REDACTED] at the [REDACTED] Firm. At the time of filing criminal charges, I had no knowledge or any recollection of Mr. [REDACTED] representing myself or [REDACTED] County in any pending or former litigation.

On Friday, May 1, 1998, at 12:55 p.m., I read a letter addressed to myself, Sheriff [REDACTED] and Mr. [REDACTED] of the North Dakota Insurance Reserve Fund dated April 29, 1998 and dated stamped received in the [REDACTED] County State's Attorney's office on April 30, 1998. That correspondence was regarding a civil action against myself, Sheriff [REDACTED], and [REDACTED] County by a [REDACTED] county jail inmate. The letter was authored by Mr. [REDACTED], and indicates that Mr. [REDACTED] has referred this file to Mr. [REDACTED] for handling. It continues to say that Mr. [REDACTED] made an appearance before Judge [REDACTED] in [REDACTED] County District Court at 10:30 a.m. on April 29, 1998 on behalf of all defendants. Upon reading this correspondence on May 1, I was first advised that Mr. [REDACTED] was in any way personally involved in handling matters involving myself or the County. I immediately became concerned about an actual and obvious conflict of interest. To that end, I immediately contacted Ms. [REDACTED] of the North Dakota Disciplinary Board who referred me to you as Chair of the Bar Association Ethics Committee. I also called Mr. [REDACTED] and left a voice mail message indicating that I had no prior knowledge that Mr. [REDACTED] was acting on behalf of myself or [REDACTED] County in this or other litigation. It should be noted, however, that the limited appearance by Mr. [REDACTED] on



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behalf of myself, Sheriff [REDACTED] and [REDACTED] County was to challenge the service of process for the reason that none of the defendants had been properly served to initiate the litigation.

Upon reading the correspondence of Mr. [REDACTED] dated April 29, 1998 which is attached hereto and incorporated herein be reference, I immediately became seriously concerned about an actual conflict of interest. It also became more evident to me that Mr. [REDACTED] was shifting litigation to other attorneys in his law firm. It has been my experience with Mr. [REDACTED], that he has not referred litigation to other attorneys in his firm without a courtesy notice to me or consultation with me.

At this point, I would like to state that the original concern of an appearance of actual or potential conflicts of interest which prompted my referral of the case to the North Dakota Attorney General, did not specifically arise out of the [REDACTED] Firm's representation of [REDACTED] County or myself. Very specifically, I was more concerned about the fact that Mr. [REDACTED] occasionally defends a criminal case with this office and more importantly, my relationship with members of the [REDACTED] Law Office. As is common in local bar associations, I have a professional relationship with these attorneys and a casual and respectful social relationship with some of them. More specifically, however, attorney [REDACTED]'s brother, [REDACTED], was involved in the middle of the altercation at [REDACTED] which is the subject of the criminal charges. [REDACTED] and one or more of the attorneys in that law firm could potentially be witnesses in that case. Nevertheless, when the Attorney General's office declined prosecution and referred the case back to me to determine whether further review was appropriate in my "discretion", I felt it appropriate to give the case a full and fair review once again. After consultation with the Assistant State's Attorneys in my office, it was unanimous consensus that there was ample probable cause to support criminal charges, and the general consensus that there was a reasonable opportunity to obtain a conviction. At that point, it was my sincere belief there were no actual conflicts of interest, and my belief that any appearance of a conflict was related only to potential relationships with people involved, and those were so remote that I would not be precluded from objectively prosecuting the case based upon its merits after

[REDACTED]

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a full review of the facts and the law. That is what I did.
Nevertheless, the situation has now been changed.

You can rest assured that I will take whatever steps are necessary to conform with this committee's opinion concerning my professional responsibility. I hold those concepts at the center of my professional judgment and conduct. Likewise, I am committed to the pursuit of justice as a prosecutor and equal treatment for all. I request that you expedite this opinion as much as possible. At this point, I have not taken steps to advise the Court or defense counsel of my actions in requesting this opinion. Therefore, I anticipate the Court will expect this case to proceed. I certainly do not want to exacerbate the situation further.

One final point, is to state that it is common practice for [REDACTED] County, myself, and other members of the [REDACTED] County State's Attorney's office, to be represented by Mr. [REDACTED] and the [REDACTED] Law Firm in civil litigation, and at the same time, Mr. [REDACTED] represents criminal defendants in [REDACTED] County District Court with the very prosecuting attorneys he is representing in civil litigation. I am making this statement only for the purpose of asking whether that is a different ethical issue, and also, to provide you with background as to why we would not see the law firms involvement with the county as any particular impediment for objective professional judgment. These circumstances seem analogous to me to the situation I am writing about. However, if I am in error, please advise.

If I can provide you with any further assistance or information, please contact me at your convenience. Thank you.

Very truly yours,

[REDACTED]

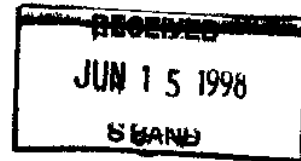
[REDACTED]

[REDACTED]

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 98-05

JUNE 9, 1998



Facts

The attorney requesting the opinion is currently a state's attorney. An attorney licensed in North Dakota and practicing law in that County was involved in an altercation in a local tavern. The matter was investigated by the local police department and a report thereof submitted to the state's attorney's office. Concerned that there may be an appearance of a conflict, the state's attorney asked the Attorney General's office to investigate the matter and determine whether charges should be made and prosecuted. The Attorney General's office concluded that any assault charges could not likely be proved beyond a reasonable doubt and declined to pursue the matter; but deferred to the state's attorney's discretion as to whether it should be reviewed by the city prosecutor. Instead, the state's attorney determined to reconsider the matter; and, in doing so, concluded that there was sufficient basis to proceed and filed criminal charges against the attorney.

At the time of the commencement of the criminal action and before, the law firm with whom the attorney charged was associated represented the County and the attorney requesting the opinion (presumably in his capacity as state's attorney) on various civil matters, some of which were pending at the time. After commencing the prosecution, it came to the state's attorney's attention that the attorney charged had, in fact, been assigned by the firm to

handle a pending case against the County and the attorney requesting the opinion; and that the attorney charged had made a court appearance on an issue limited to challenging service of process. Feeling that such heightened the concern about a possible conflict, this Committee's input was requested.

The attorney requesting the opinion asks for this committee to issue an advisory opinion "concerning any professional responsibility issues or ethics concerns arising out of the... factual scenario."

Discussion

This committee addressed the subject of "whether a state's attorney or the other attorneys in the state's attorney's office are disqualified from prosecuting a criminal charge against an attorney who actively represents criminal defendants in the same court in which both the state's attorney and the attorney-defendant practices." See Opinion No. 97-01. That opinion fairly comprehensively addresses the statutory duties and responsibilities of the state's attorney and some of the Rules of Professional Conduct which apply thereto. The Committee concludes that such Opinion is controlling so far as it applies to the issue raised herein.

Rule 1.7 of the Code of Professional Conduct provides, in relevant part, as follows:

(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 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.

(b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

(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. 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.

...

As indicated at page 2 of the aforementioned Opinion No. 97-01, citing Commentary to Prosecution Function Standard 3-1.2, American Bar Association Standards for Criminal Justice(3rd ed. 1993), "A prosecutor's client" is the people who live in the prosecutor's jurisdiction." Consequently, it would be impractical, if not impossible, to secure the client's consent such that exceptions provided by Rule 1.7(c) would be inapplicable.

Therefore, it would seem that the overriding issue is whether the lawyer's own interests will, are likely to, or might adversely affect the representation, in which case disqualification would be required. In that context, the aforementioned excerpt from page 2 of Opinion No. 97-01, goes on to state that:

"Since all lawyers have a fiduciary duty to their clients, the professional judgment of the prosecutor must be exercised, within the bounds of the law, solely for the benefit of the client--free of any compromising influences or loyalties. A prosecutor's own interests, of whatever nature, shall never be permitted to have an adverse effect on the professional performance of the prosecutor's official duties and obligations."

Notwithstanding that the aforementioned opinion, ie. Opinion No. 97-01, deals with the concern that the state's attorney's negative bias against an opposing defense attorney might adversely affect the representation of a client, the same principles would apply to the concern that the state's attorney's positive bias toward an attorney charged with an offense might adversely affect

the representation of a client. As stated at page 4 of Opinion No. 97-01:

"A conflict of interest that will justify disqualification of a prosecuting attorney exists whenever the circumstances of a case evidence a reasonable possibility that the prosecutor's office may not exercise its discretionary function in an evenhanded manner. People v. Hamilton, 756 P.2d 1348 (Cal. 1988)."

Further, as stated at page 3 of Opinion No. 97-01:

"...A possible conflict does not itself preclude the representation. The critical questions are the likelihood the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.... A lawyer's personal interests can not be allowed to affect the representation. For example, a lawyer's personal relationship through marriage, blood, or otherwise, with the opposing counsel or the opposing client, may compromise the lawyer's ability to exercise the independent professional judgment required.... Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation..." Citing the comment to Rule 1.7, NDRPC.

There may be some concern on the part of the attorney requesting the opinion about whether prosecution of the attorney charged could, in turn, compromise that attorney's representation of the County and/or the attorney requesting the opinion. A corresponding question may be whether such a concern on the part of the attorney requesting the opinion could compromise the prosecution. The former would presuppose that the interests of the attorney charged may adversely affect the representation of a client, ie the County and the attorney requesting the opinion. The latter would presuppose that the interests of both the attorney charged and the attorney requesting the opinion may adversely affect the representation of their respective clients.

It is the opinion of the committee that the state's attorney and/or the other attorneys in the state's attorney's office, under the facts as presented, are not *per se* disqualified from

prosecuting the case herein described. However, if the state's attorney subjectively believes that he has an actual conflict because the lawyer's own interests will, are likely to, or might adversely affect the representation, he should disqualify himself.

If the state's attorney is disqualified as a result of a conflict of interest then, pursuant to Rule 1.10, NDRPC, so too would be the other attorneys in the state's attorney's office.

Because the requesting attorney submitted the more general inquiry "concerning any professional responsibility issues or ethics concerns arising out of the... factual scenario," and because the Attorney General's office concluded that any assault charges could not likely be proved beyond a reasonable doubt, it is appropriate to note that Rule 3.8 NDRPC provides, in relevant part, that:

"The prosecutor in a criminal case shall:

(a) not prosecute a charge that the prosecutor knows is not supported by probable cause;

..."

There is, of course, a substantial difference between "probable cause" and "reasonable doubt"; and it is expected that the state's attorney, in the appropriate exercise of prosecutorial discretion, can determine whether probable cause exists.

Conclusion

In summary, the committee is of the opinion that disqualification in the instant case is not required *per se* by the North Dakota Rules of Professional Conduct on the basis of the facts as presented. However, only the state's attorney himself can answer the question about whether there is a conflict of interest pursuant to Rule 1.7 NDRPC or whether, under Rule 3.8 NDRPC, the

charges are "supported by probable cause."

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer 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 Dann Greenwood and was approved by a unanimous vote of the Committee on June 9, 1998.



Alice R. Genechal, Chair