

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

Opinion No. 05-06

The Committee received a request for an opinion asking if the North Dakota Rules of Professional Conduct prohibit an attorney serving as a city council member and sitting on its Police Commission from representing criminal defendants in city cases transferred to the District Court when the cases are handled by the State's Attorney. In addition, the same request is made concerning city cases transferred to District Court handled by the City Attorney. Third, would the attorney be prohibited from representing defendants in District Court on non-city charges where an officer of the City Police Department may or will appear as a witness?

If it is determined that the above situations create a conflict, the requesting attorney asks whether the conflict can be cured by resignation from the requesting attorney's position on the Police Commission, or is resignation from the entire City Council necessary?

FACTS

The requesting attorney was elected as a city council member. The requesting attorney was also appointed to sit on the Police Commission, which makes recommendations regarding salaries and the number of police officers to the full City Council. The Police Commission does not have any direct oversight over the individual officers. The City Council appoints the city attorney, approves the Police Department budget and appoints the Police Chief. The Council also has authority to address police officers' grievances as the last step in a grievance procedure. Other than this oversight, the Council does not have direct control or interaction with the officers. A large portion of the attorney's work involves criminal defense. The requesting attorney does not represent any defendants in city court.

The following questions are addressed to the committee:

1. If a city case is transferred to District Court and is handled by the State's Attorney, may the requesting attorney act as defense counsel?
2. If a city case is transferred to District Court and is handled by the City Attorney, who is hired by the Council, may the requesting attorney act as defense counsel?
3. May the requesting attorney act as defense counsel in cases in District Court where an officer of the Police Department (who is cross deputized as a county sheriff's officer) may or will appear as a witness?

4. If any of the above three situations results in an impermissible conflict, can that conflict be cured by the requesting attorney's resignation from the Police Commission, or is resignation from the entire City Council required?

No prior Ethics Committee Opinions appear to address these issues.

DISCUSSION

The issue is not one of direct conflict between clients as the requesting attorney is not the attorney for the city. The potential for conflict comes from the requesting attorney's obligations to the City as a council member and a member of the council's Police Commission. In addition, the attorney's own interest in being re-elected could arguably be a personal interest which might have an affect on the attorney's representation of a defendant in a City case. Further, there is the potential for a client or even a victim of a criminal act to believe that the attorney, as a council member or member of the Police Commission, can impliedly influence an officer's testimony. Lastly, consideration must be given to the impact upon the administration of justice related to the attorney acting as defense counsel and being required to aggressively cross-examine city police officers in relation to the attorney's elected position on the city council with responsibility for overseeing the Police Department budget and grievances. The issues are governed, in part, by N.D.R. Prof. Conduct 1.7 - Conflict of interest: general rule and N.D.R. Prof. Conduct 8.4 – Misconduct. Rule 1.7, in pertinent part, states:

(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.

Dealing first with the attorney's own interests, we believe only the attorney can judge the effect any re-election desire may have upon the representation. In those cases in which the attorney's representation will be affected, the attorney is prohibited from

representing the client. In all other cases it is up to the attorney to determine if the representation might be affected by re-election desires. If the representation might be affected by re-election desires, the attorney must advise the client of this personal interest and obtain a waiver of the potential conflict. If there is no chance that the attorney's personal interest might affect the representation, nothing further is required concerning this area.

The attorney has recognized the conflict in the attorney's obligations to the City and to the defense client and refrained from appearing in city court. We believe the same considerations create a conflict concerning a city case in District Court whether the City Attorney or State's Attorney is prosecuting the city case. In a city case, the prosecutor is enforcing a city ordinance. The city council is responsible for adopting ordinances and seeing that they are enforced. In addition, the city cases have a financial impact upon the city, regarding both income and expense of prosecution. The duties and loyalty required of an elected city official will adversely affect the attorney's duties as defense counsel on city cases and is not a waivable conflict. See: NY Eth. Op. 692, 1997 WL 1068495 (N.Y. St. Bar. Assn. Comm. Prof'l Eth.); CA Eth. Op. 1977-46, 1977 WL 15964 (Cal. St. Bar. Comm. Prof'l Resp.) (citing People v. Rhodes, 524 P.2d 363 (Cal. 1974)).

Cases not involving a city charge but in which a city police officer may or will be called as a witness create a potential conflict arising from the attorney's position on the City Council and on the Police Commission. If the attorney has gained confidential information about the officer which could be used to the detriment of the officer's testimony and such information was obtained through the attorney's duties as a city council member or member of the Police Commission, there is a conflict which can not be waived and the attorney must not represent the defendant. N.D.R. Prof. Conduct 1.7(a).

In other cases, the attorney's obligation to the client may be affected by a desire to tone down or hold back on cross-examining a police officer due to the attorney's relationship with the officer and police department because of the attorney's position on the City Council or Police Commission. Again, if the attorney believes this will affect the representation the attorney must not represent the defendant.

The attorney must also recognize that a client or even a member of the public, such as a victim of a city charge, may view the attorney's position on the city council and police commission as a position of authority from which the attorney could influence an officer's testimony. Rule 8.4, N.D.R. Prof'l. Conduct states in part:

It is professional misconduct for a lawyer to:

. . . .

- (c) state or imply an ability to influence improperly a government agency or official;
- (d) engage in conduct that is prejudicial to the administration of justice, . .

If the attorney does not reasonably believe the attorney's representation of the client will be adversely affected by the attorney's duties or position on the City Council or Police Commission, the attorney must also assure that nothing is said or implied about the ability to influence an officer's testimony.

The Committee recognizes that the conduct of the attorney-city council member, in representing a defendant and examining a city police officer, may well create an impression that the attorney can improperly affect the administration of justice. Conduct perceived to be prejudicial to the administration of justice under N.D.R. Prof. Conduct 8.4(d) can be resolved by obtaining the consent of the city governing board allowing the attorney to represent the defendant under these circumstances. TX Eth. Op 497, 1994 WL 417012 (Tex. Prof'l Eth. Comm.); MI Eth. Op. RI-292, 1997 WL 452261 (Mich. Prof'l Jud. Eth.)

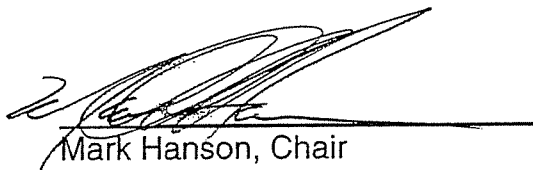
Conclusion

We believe an attorney sitting on the city council is prohibited from acting as defense counsel on city cases transferred to District Court regardless of whether they are prosecuted by the State's Attorney or the City Attorney. To defend such cases, the attorney must resign the position as a city council member. In defending cases in which a city police officer may or will appear we believe the attorney must decide if the representation will be affected by the attorney's obligations as a city council member. If so, the attorney can not proceed with representing the defendant. If the defense representation might be adversely impacted, the attorney may proceed with the representation if the attorney reasonably believes the actual representation will not be adversely affected and the city and client consent.

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 Kent Reiersen and adopted by unanimous vote on December 21, 2005.


Mark Hanson, Chair