

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS OPINION 06-06**

Issue

Where a States Attorney is prohibited from representing a governmental entity against a former client in the same matter, is the Assistant States Attorney also prohibited from representing the governmental entity?

Facts from Requesting Attorney

Attorney A sold a parcel of real property to John Doe. Later, in 2003, Attorney A was retained by John Doe to handle an abatement proceeding in which a North Dakota County entity would not allow John Doe to claim a farmland exemption on the parcel. The abatement proceeding was appealed¹ several times over the next several years. The matter remains unresolved.

Attorney A was then appointed as a States Attorney for the County in 2005. The abatement proceeding has been rescheduled several times “most notably because of the inherent conflict of interest for Attorney A.” Attorney B was hired as an Assistant States Attorney several months after Attorney A’s appointment. Attorney B “had no prior knowledge of the details of the abatement proceedings” until after being hired and has not discussed the matter with Attorney A other than to discuss the fact that John Doe hired a new attorney. Attorney B gained knowledge of the abatement proceeding by “reading the file and discussing the matter with County Tax Equalization.”

¹ The Requesting Attorney does not indicate to what appellate review entity the matter was appealed.

Discussion

For an “imputed conflict of interest” to exist, there first must be a conflict for Attorney A such that it would bar Attorney A from participating in the matter. Rule 1.9(a), N.D.R. Prof. Conduct² is squarely on point. It provides in part:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing.

N.D.R. Prof. Conduct 1.9 (a).³ Confidentiality and loyalty, the cornerstones of the attorney-client relationship, are promoted by the requirements of Rule 1.9. Continental Resources, Inc. v. Schmalenberger, 2003 ND 26 ¶ 13. (stating “loyalty is an essential element in the lawyer's relationship to a client.” “The duty of confidentiality continues after the client-lawyer relationship has terminated.” “An integral purpose of the rule of confidentiality is to encourage clients to fully and freely disclose to their attorneys all facts pertinent to their cause with absolute assurance that such information will not be used to their disadvantage.” “Clients must feel free to share confidences with their lawyers. This will not occur if we permit lawyers to be today's confidants and tomorrow's adversaries.”) (citations omitted).

² This Opinion references the Rules of Professional Conduct that are effective August, 1, 2006.

³ While Rule 1.9 uses the term “person” to describe the new adverse party, the Comment to Rule 1.9 reveals that the rule is intended to be broader than individuals and includes corporations and entities such as the County. For example, the Comment states “a lawyer may not represent another *client* except in conformity with this rule.” There are other examples in the Comment where the broad term *client* is used as opposed to “person.” Thus, the Committee’s opinion is that the term “person” used in Rule 1.9 applies to the County.

It is the Committee's opinion that Attorney A may not represent the County in the abatement proceeding against John Doe as it is the same matter and the County and John Doe have materially adverse interests.⁴

Having determined that a conflict exists for Attorney A, the question becomes whether Attorney B, working in the same county state's attorney's office, is also precluded from representing the County. Rule 1.10, N.D.R. Prof. Conduct governs. It provides, in pertinent part:

Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, except as provided by N.D.R. Prof. Conduct 1.11 or N.D.R. . .

Whether Attorneys A and B constitute a "firm" is the threshold question in applying Rule 1.10. The term "firm" is defined by the Rules of Professional Conduct. It "denotes lawyers in law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." The question of what a "firm" is was also addressed by the Committee in Opinions 06-07 and 98-04. In Opinion 98-04 it was the opinion of the Committee that continuing stock ownership in a professional law association made the stock holding lawyer a member of a "firm."

More recently, in Opinion 06-07, the committee stated:

The Comment to Rule 1.10 provides the following guidance regarding the definition of "firm":

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other

⁴ The former client may waive the prohibitions of Rule 1.9 in writing. The committee will assume for purposes of this opinion that John Doe will not agree to waive Rule 1.9 in writing.

organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyers should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

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Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

As plainly stated in the Comment, whether lawyers should be treated as associated with each other depends on the specific facts of the situation. Some of those factors, as identified in the Comment, include whether the attorneys present themselves to the public as a firm, whether the attorneys conduct themselves as a firm, whether the attorneys have mutual access to confidential information, and whether the attorneys work in separate units of the same organization. Numerous judicial opinions have elaborated on these factors while addressing whether public defenders should be treated as members of a law firm.

Courts have repeatedly held that public defenders in the same office are treated as members of a law firm. See, e.g., Perkins v. State, 487 S.E.2d 365, 368 (Ga. Ct. App. 1997) (stating “public defenders in the same office are treated as members of a law firm”); Kirkland v. State,

617 So.2d 781, 781 (Fla. Dist. Ct. App. 1993) (holding “the public defender’s office is the functional equivalent to a law firm”); People v. Simmons, 385 N.E.2d 758, 761-62 (Ill. App. Ct. 1978) (holding co-defendants are being represented by one officer when they are assigned separate assistant public defenders in the same office); S.C. Bar. Eth. Adv. Comm. Op. 92-21 (concluding the “public defender’s office is treated as a law firm for purposes of imputing disqualification” and that disqualification of a public defender “would be imputed to other members of the same office”); see also People ex rel. Peters v. District Court, 951 P.2d 926, 930 (Colo. 1998) (holding the rule of imputed disqualification applies to the office of the state public defender); Commonwealth v. Westbrook, 400 A.2d 160, 162 (Pa. Commw. Ct. 1979) (observing a public defender’s association is a “law firm” and members of the office are prohibited from representing multiple clients).

In Opinion 06-07 the Committee was presented with different facts than presented here. In 06-07, the public defenders had separate offices, each had their own filing system, separate computer systems, and their own letterhead. Based on those facts, the Committee opined that the public defenders were not a “firm” for purposes of the rules of professional conduct. Here, there are no such distinguishing facts. Both Attorney A and Attorney B work in the same county states attorney’s office and share letterhead.

In City and County of San Francisco v. Cobra Solutions, Inc., 43 Cal Rptr.3d 771 (Cal 2006) it was held that an attorney who had represented a company while he was in private practice and thereafter joined the city attorney’s office had a conflict of interest that was imputed to the entire city attorney’s office, thereby disqualifying all attorneys in the office.

The Committee’s opinion is that the State’s Attorney’s office and the attorneys working in it are analogous to the Cobra Solutions case. In Cobra, the court was concerned about ramifications connected with a city attorney’s oversight of

subordinates handling cases against the city attorney's former clients. The Committee shares this concern given the facts presented for this opinion.

Thus, it is the committee's opinion that Attorney B is prohibited from representing the County in the abatement proceeding. This opinion is consistent with the reasoning in Cobra and Opinion 06-07.

Conclusion

Both Attorney A and Attorney B are prohibited from representing the county in the abatement proceeding. The county should take steps to secure counsel for it in accordance with the procedures provided under law.

This opinion was drafted by Joseph A. Wetch, Jr. and adopted by a majority vote of the Committee on June 28, 2006.



Mark Hanson, Chair