

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS OPINION

Opinion No. 06-07

The Ethics Committee received a request for an opinion asking whether the three public defender offices opened by the Commission on Legal Counsel for Indigents can be treated as separate law firms for purposes of imputing conflicts of interests.

FACTS

The Commission on Legal Counsel for Indigents (Commission) is created by N.D.C.C. ch. 54-61. The purpose of the Commission is to develop and monitor a process for providing state-funded legal counsel services for indigents. N.D.C.C. § 54-61-01(1). The law authorizes the Commission to "[e]stablish public defender offices in the regions of the state as the commission considers necessary and appropriate." N.D.C.C. § 54-61-02(1)(c). It further authorizes the Commission to develop standards for maintaining and operating regional public defender offices. N.D.C.C. § 54-61-02(1)(a)(2). Pursuant to this statutory authority, the Commission has opened three public defender offices: one in Minot, one in Williston, and one in Dickinson. The request letter provides the following factual information regarding the three public defender offices:

In each office are attorneys who are employed full time by the State as public defenders. . . . Each office has its own administrative staff.

Each public defender office has a supervising or lead attorney who is responsible for case assignments and case management in his office. There is no direct supervision by the Commission as to the handling of specific cases. However, the Commission does have a fiscal policy which requires approval by the Commission prior to an attorney (whether a public defender or a contractor) incurring expenditures in excess of a certain dollar amount. In a request in such a case, some confidential information may come to the attention of the Commission, but . . . the request and response of the Commission is maintained in a confidential file in the Valley City office of the Commission which is inaccessible to the public defenders and their staff.

The attorneys and staff from one public defender office do not have access to confidential information regarding the clients of another public defender office. Each public defender office has its own filing system and its files are not accessible by the attorneys from the other offices. Each office has its own separate computer drive which is not accessible by the attorneys or employees from the other public defender offices. There is also a shared drive, which is

shared by the Commission and the public defender offices, but nothing confidential or privileged is placed on it. The shared drive is used for Commission standards, policies and forms, and sample documents (these documents do not involve attorney work product or pertain to open cases, or they are open record-type documents).

Each public defender office has its own letterhead. Each attorney has, or will have, his own business card identifying the office in which he works.

DISCUSSION

The issue is governed by N.D.R. Prof. Conduct 1.10(a) – Imputed disqualification: general rule. Rule 1.10(a) provides:

(a) 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 laws, except as provided by N.D.R. Prof. Conduct 1.11 or N.D.R. Prof. Conduct 1.12.

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 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). But such is not necessarily true when public defenders work in different offices. In Graves v. State, 619 A.2d 123, 133 (Md. Ct. Spec. App. 1993), rev’d on other grounds, 637 A.2d 1197 (Md. 1994), after thoroughly reviewing and considering cases on the issue from numerous jurisdictions, the court concluded “district offices of the district public defender are analogous to independent private law firms.” The Graves court approved and followed the language from the Florida Court of Appeals in Babb v. Edwards, 400 So.2d 1239, 1240 (Fla. Dist. Ct. App. 1981), wherein the court stated:

[T]hat attorneys employed by a public defender who are required to “practice their profession side by side, literally and figuratively” are members of the “firm” for purposes of the rule, we believe that, where the practice of each attorney is so separated from the other’s, that the interchange of confidential information can be avoided or where it is

possible to create such a separation, there need be no relationship between them analogous to that of a law firm and there would be no inherent ethical bar to their representation of antagonistic interests.

Id. Based upon the trial courts finding there was no danger of information being shared between the two appointed assistant public defenders, because they maintain separate offices in separate counties, the Graves court held the assistant public defenders could represent adverse defendants. Id.

A similar result was reached in People v. Christian, 48 Cal. Rptr. 2d 867 (Cal. Ct. App. 1996). In Christian, an Alternate Defender Office (ADO) was created to represent defendants when there was a conflict with the Public Defender (PD) representing the defendant. Id. at 870-71. Although the ADO is a branch of the PD, the ADO “operates autonomously, with a separate supervising attorney who is responsible for directing, coordinating, and evaluating the work of attorneys employed by the ADO. This supervising attorney is solely responsible for providing guidance to and determining litigation strategy of ADO attorneys.” Id. at 871. Furthermore, the “Public Defender exercises no control or influence over the handling of cases by the ADO. Nor does he have access to the client files or other client confidences of the ADO.” Id. The court also noted:

Individual cases in the ADO are opened, litigated, and closed under separate ADO file numbers. The ADO generates calendars listing appearances only for attorneys in the ADO. The ADO has its own clerical support staff and investigators, independent of those employed by the PD. The ADO offices are physically separate from those of the PD. The keys to the offices of the ADO are different from the keys to the PD offices, and ADO keys are not available to attorneys or support staff not employed by the ADO. The Public Defender does not personally possess a key to the ADO offices, nor does the ADO supervisor possess keys to the PD offices. The ADO maintains a separate communications network, with its own telephone number, computer hookups to the Law & Justice computer system, facsimile machine, and computer equipment. The ADO also uses independent library facilities.

The files of ADO clients are held separately from those of the PD to insure that only ADO attorneys have access to the confidential files of the ADO. In turn, files of the primary branches of the PD are protected as separate and likewise inaccessible to ADO attorneys or staff. Every employee of the PD and ADO has been specifically advised to maintain the confidences of individual clients and to be sensitive to the required degree of separation between the ADO and the PD.

Id.

Although the Public Defender is in charge of both offices in an administrative sense, since the “attorneys from the two offices remain physically apart, have no access to each other’s files, and adhere to a well-known policy of keeping all legal activities completely separate,” the court found the PD and ADO to be separate “firms” for purposes of conflict analysis. Id. at 875=76. The court concluded:

[T]he PD and ADO do not constitute a single “firm” in that they present themselves to the public as separate entities with separate offices, phone numbers, letterhead, pleading paper, and distinct business cards. The two offices likewise conduct themselves as separate firms. They keep separate confidential files, none of which are cross-accessible, and each office has its own support staff and keeps separate computers, as well as copying and facsimile machines. Importantly supervision of ADO attorneys is the responsibility of the ADO supervising attorney, not the Public Defender, and neither office consults with the other on general litigation strategy or the handling of individual cases. . . . In sum, the two offices are separate “firms,” coinciding only for matters of administrative convenience and only at the top administrative level.

Id. at 876. See also Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998) (stating a conflict of interest may not be imputed to an attorney from a different public defender’s office solely by reason of statutorily created relationship between the offices); Mich. Prof. Jud. Eth. Op. RI-334 (“A county may ethically establish a separate public defender office to provide representation for defendants with interests adverse to the interest of defendants represented by the original County public defender office, provided that the two offices are completely independent, do not share client information, and have separate supervisory personnel.”); Mont. Bar Eth. Op. 960924 (concluding office of conflict counsel sufficiently separated from the office of the chief public defender so as not to constitute a firm when offices located in separate rooms of the county courthouse, the offices have separate computer systems, filing systems, and letterhead, and there is no joint supervision on cases assigned as conflict cases).

Based upon the facts stated in the request letter, the three public defender offices do not “present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm” N.D.R. Prof. Conduct 1.10, Comment. Rather, they maintain separate offices in different cities. And each office has its own filing system, its own separate computer drive which is not accessible by attorneys or employees from the other public defender offices, and its own letterhead. The three public defender offices also do not “have mutual access to confidential information concerning the clients they serve.” Id. Rather, according to the request letter, “[t]he attorneys and staff from one public defender office do not have access to confidential information regarding the clients of another public defender office.” Finally, as found significant in a number of court opinions, each public defender office has its own supervising attorney and its own

administrative staff. Any supervision over the public defender offices by the Commission is purely administrative.

CONCLUSION

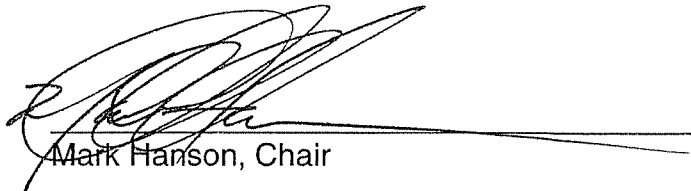
Based upon the facts provided in the request letter, the Ethics Committee finds that the three public defender offices are not a "firm" for purposes of N.D.R. Prof. Conduct 1.10(a). This opinion is based upon the facts provided in the request letter. Because a determination of whether two or more lawyers constitute a firm depends on the specific facts, any change in the facts provided in the request letter could change the opinion of the Committee. The Committee further recommends that the Commission consider, if it has not already done so, adopting policies and procedures regarding the relationship of the three public defenders offices to help maintain the confidentiality of client information and the required degree of separation between the three public defender offices.

This opinion is provided pursuant to Rule 1.2(B) of the 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 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.

Id.

This opinion was drafted by Douglas A. Bahr and adopted by the Committee on June 1, 2006, by unanimous vote.



Mark Hanson, Chair