

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 08-03

The Ethics Committee received a letter request for an opinion, dated July 15, 2008, regarding whether a states attorney's office could assume the duties of a Community Service Coordinator. Rule 1.7 (Conflict of Interest: General Rule) of the North Dakota Rules of Professional Conduct applies to this issue.

ASSUMED FACTS

According to the requesting attorney, the primary duty of the Community Service Coordinator is to monitor compliance with and to assist individuals in completing their community service requirements of criminal judgments. Prosecutors, during the sentencing phase of a criminal case, may have advocated for or opposed community service for the same persons who are completing their community service obligation. If community service is part of the sentence, monitoring compliance with the sentence is the job of the Community Service Coordinator. If that position is allowed to be under the control of a states attorney, the states attorney's office has the multiple functions of advocating for the best interests of the state and the county, advocating for the victims and victims' family, advocating for a certain type of sentence, and monitoring compliance of the criminal defendant with the sentence imposed by the court. The ethical question posed by these assumed facts is whether this multi-functional role is ethically permissible.

FURTHER INFORMATION ABOUT COMMUNITY SERVICE

Community service is a sentencing option allowed in conjunction with probation for certain crimes pursuant to N.D.CENT. CODE §12.1-32-07(3)(a) and (4)(q) (2007). If

such a sentence is imposed by the court after advocacy efforts of the prosecution and defense, the court must order that supervision costs and fees, not less than \$45.00 per month, be paid by the convicted person, unless undue hardship can be shown.

N.D.CENT. CODE §121-32-07(2) (2007). The money eventually would be paid to the entity supervising the community service. In the scenario posed to the Ethics Committee, the money for supervision would be paid to the states attorney's office. The Community Service Coordinator would not be a client, but would be an employee of the office.

It is the understanding of the Ethics Committee that community service supervision, until recently, was within the functions of the Department of Corrections; but, when funding was lost this function was discontinued. In some jurisdictions, community service programs were created locally to fill the void. These programs are funded by a combination of local or other government taxes and the statutory fees paid by the persons who are on probation and undertaking their community service obligation. If an individual is hired to supervise community service compliance, sufficient funding must be available from someplace to pay for the salary and overhead of the person performing the job.

QUESTION

Does the assumption of the Community Service Coordinator's role by a states attorney's office create an impermissible conflict of interest?

ANSWER

Yes.

DISCUSSION

The scenario posed by the requesting attorney creates an impermissible conflict of interest. Inherent in the statutory framework for community service is payment of monthly fees by the convicted person. In budgeting for the Community Service Coordinator, it is likely that these fees will be used to pay at least a portion of the salary of the person assigned to monitor community service. Depending on whether, or how much, a political subdivision funds the Community Service Coordinator position, a steady flow of persons being sentenced to community service may be required to maintain the financial viability of the Community Service Coordinator position within the states attorney's office. This budgeting reality, especially in light of traditionally tight governmental funding, will likely affect the states attorney's office's advocacy regarding sentencing. In particular, states attorney's offices will naturally be pressured to recommend, or agree to, community service when it might not be in the best interests of others in obtaining just punishment for convicted criminals. Such a dichotomy will or is likely to create an irreconcilable conflict.

The Comment to N.D.R.Prof. Conduct 1.7 provides guidance regarding how to determine whether a dual relationship is impermissible:

Paragraphs (a), (b), and (c) of this Rule [Rule 1.7] address three separate and distinct conflict of interest situations. Paragraph (a) addresses the situation in which the lawyer's own interests or the lawyer's responsibilities to another client or to a third person *will* adversely affect the lawyer's representation of a client. Paragraph (b) addresses the situation in which the lawyer's own interests *are likely to* adversely affect the representation. In both of these conflict situations, the lawyer is absolutely prohibited from undertaking or continuing representation of the client. Paragraph (c) addresses the situation in which the lawyer's own interests or the lawyer's responsibilities to another client or to a third person simply *might* adversely

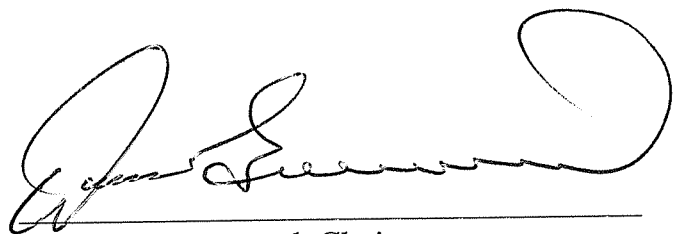
affect the lawyer's representation of a client. In this situation the lawyer is permitted to undertake the representation if the lawyer reasonably believes there will be no adverse effect on the representation and if the clients consent after consultation.

The fact situation presented by the requesting attorney will or is likely to adversely affect loyalty to an existing client. Here, the states attorney's clients include the people of the State of North Dakota. The third person is the Community Services Coordinator. It is inevitable that at times victims of crime, or their families, will be opposed to community service as an alternative sentence. The states attorney will inevitably have to balance that interest against the interest of ensuring the financial stability and continued employment of the Community Service Coordinator. This will or is likely to adversely affect the states attorney's duties in sentencing matters. It does not appear to the Ethics Committee that this conflict can always be resolved to the satisfaction of the best interests of the client and to the third person, the Community Services Coordinator.

CONCLUSION

The scenario posed by the requesting attorney creates an irreconcilable dual relationship that is prohibited by Rule 1.7

This opinion was drafted by Alvin O. Boucher and approved by the Ethics Committee on November 17, 2008

A handwritten signature in black ink, appearing to read "Dann E. Greenwood", is written over a horizontal line.

Dann E. Greenwood, Chair