

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 09-01

The Ethics Committee received a request for an opinion dated October 31, 2008, regarding whether a law firm that currently represents a city under a contract arrangement with the city attorney may also enter a contract with the city to defend indigents who face city criminal prosecution.

ASSUMED FACTS

Requesting attorney's law firm served as city attorney for the city for many years. That arrangement ended approximately two years ago when one of the firm's attorneys left Requesting Attorney's law firm, opened his own firm and became the city attorney. Although Requesting Attorney's law firm is not now the city attorney, various attorneys from Requesting Attorney's law firm have continued to represent city for civil matters, including litigation, through contracts with the current city attorney. Requesting Attorney's firm does not appear to represent the city in any criminal matter or civil matter that is related to a criminal case.

Requesting attorney's firm has been contacted about becoming contract indigent defense counsel for the city. Requesting attorney is concerned that conflict of interest provisions of the North Dakota Rules of Professional Conduct preclude the firm from taking on indigent defense duties under a contract with the city while at the same time representing the city under the firm's contracts with the city attorney.

QUESTION

Is there an impermissible conflict of interest that disqualifies the law firm from representing a city under a contract arrangement with the city attorney and while at the same time performing indigent defense counsel services under a separate contract with the city?

ANSWER

Yes, there are impermissible conflicts of interest which preclude requesting attorney's law firm from representing the city in civil matters, including litigation, and at the same time, representing indigent clients who are being prosecuted in city court.

DISCUSSION

The request implicates Rules 1.7 and 1.10, N.D.R. Prof. Conduct, relating to conflicts of interest and imputation of conflicts to all attorneys who are associated with a "firm". The applicable provisions of Rule 1.7 are subsections (a) and (b) which state:

(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 a 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.

The Ethics Committee has three times recently addressed situations with facts similar to those presented by Requesting Attorney. In Ethics Opinion 05-06 the Committee concluded an

impermissible conflict of interest prevents an attorney who is a member of a city council from representing criminal defendants in city cases that are transferred to district court. In Ethics Opinion 06-05 the Committee concluded there is an impermissible conflict of interest that precludes an attorney from representing criminal defendants in city court when the attorney's partner is on the city council. In Ethics Opinion 08-03 the Committee concluded there is an impermissible conflict of financial and other interests that precludes a state's attorney from functioning in the dual capacity as state's attorney and as community service coordinator for the same county. The foundations of Ethics Committee Opinions 05-06 and 06-05 are that there are impermissible conflicts of interest among the obligations of a city officer/city attorney to serve a city's interests in enforcing its ordinances in an economical manner, an attorney's duties when defending a client in city court against that enforcement, and related ongoing financial entanglements between a city or county and a defendant. Each of these opinions (and others as well) have concluded conflicts arising from attorneys' efforts to serve government as a client on the one hand while at the same time representing individuals in matters for which the city or county is an adverse party to be inherent to the proposed dual representation, rather than arising from the unique circumstances of a particular case or a particular defendant. The same applies to the situation at hand.

The duties of a city attorney are to "conduct all law business in which the city or any of its departments is interested, N.D.C.C. 40-20-01(1), to furnish written opinions upon all questions submitted to the city attorney by the city or its departments, N.D.C.C. 40-20-01(2), to draft ordinances, N.D.C.C. 40-20-01(3), and to keep a detailed, public docket of civil and criminal court cases to which the city is a party, N.D.C.C. 40-20-01(5). Specifically as it relates to indigent defense representation, the city attorney also must attempt to recover a city's cost of defending an indigent person from that person, "anytime the state's attorney or city attorney determines the person for whom counsel was appointed may have funds to repay the state or city within six years of the date such amount was paid on that person's behalf." N.D.C.C. 29-07-01.1. The collection activity is a civil matter.

Requesting attorney's firm has responsibilities to the city because it functioned as city attorney for many years and because it continues to function as a city attorney for various civil matters; the city is still a client of the firm, even though that relationship results from the contract between the firm and the appointed city attorney. As have previous Ethics Committees, the current Committee considers the clashes from the firm's ongoing duties of loyalty to the city, its obligation not to take positions that are antagonistic to the interest of the city in enforcing its laws, the responsibility to vigorously defend an accused indigent against prosecution by the city, the firm's interest in its own finances by continuing as contract provider of legal services to the city and by continuing as indigent defense counsel, and the obligation of the city attorney to recover indigent defense fees to be an inherent and impermissible conflicts which are prohibited by Rule 1.7(a) and Rule 1.7(b).

Even though the firm currently represents the city in civil matters through a contract relationship with the current appointed city attorney, the city is, nonetheless, the firm's client. As Comment 9 to Rule 1.7 states, "[o]rdinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." The comment notes there are circumstances under which a single lawyer may advocate against a consenting client in unrelated lawsuits. However in the words of the comment, "the propriety of concurrent representation can depend upon the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment." A criminal prosecution after which the city may seek recovery of defense counsel fees from the

defendant entails too high a degree of conflict for the Committee to conclude Rule 1.7 may permit concurrent representation of the city in civil matters and defendants in city criminal prosecutions.

The contractual relationship between the appointed city attorney and Requesting Attorney's firm provides a separate basis upon which to conclude the firm is disqualified from representing defendants in city criminal prosecutions. Under Rule 1.10 disqualifying conflicts of interest of any lawyer in a "firm" are imputed to all lawyers in the firm. Under that Rule, the contract under Requesting Attorney's firm provides legal services to the city creates an association between the firm and appointed city attorney under which all parties to the contract are regarded as a single firm for purposes of imputing disqualifications to all attorneys in the firm. Rule 1.10(a), Comments 2 and 4. Under previous Ethics Committee Opinions and Rule 1.7, an appointed city attorney would not be permitted to engage in concurrent representation of the city and an adverse party to the city, whether in the same or unrelated litigation. Under Rule 1.10 this disqualifying conflict of the appointed city attorney is imputed to all attorneys in Requesting Attorney's firm. Rule 1.10 [2] notes, "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 lawyer should not represent opposing parties in litigation, while the same group of lawyers might not be regarded as a firm for purposes of the rule that information acquired by one lawyer is attributed to another." Imputed disqualifications may not be waived by clients when the disqualification is due to an impermissible conflict of interest. Ethics Committee Opinion 06-05.

Requesting attorney's situation also raises the matter of an appearance of impropriety, a factor that is not explicitly included in the North Dakota Rules of Professional Conduct, but is nonetheless an important consideration for situations involving client loyalty and conflicts of interest. See Continental Resources, Inc. v. Schmalenberger, 2003 ND 26. Matters of appearances are assessed from the perspective of an ordinary citizen, rather than a law trained judge or attorney. Ibid. Requesting attorney's firm has represented the city over the course of several years. For all but the past two years, that representation included civil and criminal cases. Members of the public and, indeed, a defendant may well conclude that as a result of its "connections" with the city the firm has special insights or information or will receive special treatment that will be unfairly advantageous to a defendant appearing in city court. "Appearances" matter and also support the Committee's conclusion that the arrangement contemplated by Requesting Attorney is prohibited.

CONCLUSION

The situation proposed by Requesting Attorney engenders impermissible conflicts of interest which are prohibited by Rule 1.7.

This opinion was drafted by Marilyn Foss and approved by the Ethics Committee on February 25, 2009.

A large, stylized handwritten signature in black ink, likely belonging to Dan Greenwood, the Chair of the Ethics Committee.

Dan Greenwood, Chair