

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 09-02**

April 7, 2009

The Ethics Committee received an electronic request for an opinion dated November 17, 2008, regarding whether a former full-time attorney for the State of North Dakota Child Support Enforcement Program, who after resigning that position and assuming the position as the Clerk of Court for the same county in which she practiced law, could participate in the Volunteer Lawyer Program. Rule 1.7, (Conflict of Interest at: General Rule), N.D.R. Prof. Conduct, applies to this issue.

ASSUMED FACTS

According to the requesting attorney, she had previously been a full-time attorney for the State of North Dakota Child Support Enforcement Program. In that capacity, she would routinely initiate civil actions to establish child support obligations, paternity judgments, as well as enforcing those same obligations and/or judgments.

Presently, she is the clerk of court for the county wherein she practiced as an attorney for the State of North Dakota Child Support Enforcement Program. She remains a licensed attorney. In her position as clerk of court, she would have access to all documents filed in her county, obviously in a very wide variety of legal situations. She would also by virtue of her position as clerk of court have what she describes as "limited computer access" to the State of North Dakota's child support computer

program, FASCES. Additionally, she would personally or at her direction others working for her office would enter data onto the UCIS [Uniform Court Information System] program.

Obviously, as clerk of court she would work routinely with the active district judges in her county on a day-to-day basis. Her county is home to two active district judges. It is an accepted fact that a significant part of the work of the district court involves child support enforcement proceedings. The question she poses is whether it would be a violation of the North Dakota Rules of Professional Conduct to actively participate in the Volunteer Lawyer Program of the State Bar Association of North Dakota by taking pro bono or reduced-rate legal cases, specifically in the area of defending child support enforcement proceedings. And, if she is able to participate in the program, is there a specific limitation on the type of cases she would be able to accept? She is also raising her own concern about accepting matters in her home county where she sits as the clerk of the district court.

In conclusion, the requesting attorney states she would like to be able to provide pro bono or reduced-rate legal work in a variety of cases and would be willing to work only cases that are outside of the county where she functions as clerk of court.

QUESTION

The first question posed is controlling of the other questions by this attorney.

Specifically, can an active clerk of court who holds a license to practice law accept assignments from the Volunteer Lawyer Program of the SBAND with the following realities?

1. That clerk of court has computer access to the State of North Dakota's child support computer program;
2. She works on a daily basis with the only two district judges in her county who would also have jurisdiction in the judicial district within which she would participate as a private attorney; and
3. She would represent clients whom she would defend in child support matters and paternity litigation against the same office with whom she had been associated.

ANSWER

The answer is no. Her position as clerk of court and coupled with the authority of that office, along with her statutory responsibility to the district court, and her access to computer information would place her into conflict and would violate Rule 1.7, N.D.R. Prof. Conduct.

DISCUSSION

The language of Rule 1.7, General Conflict of Interest: General Rule, is applicable. The first sentence of the comment section seems most appropriate.

"Loyalty and independent judgment are essential elements in a lawyer's relationship to a client. If an impermissible conflict of interest exists before representation is undertaken, the representation ordinarily must be declined." The nature of this request is that we have a lawyer going from public service into a clerk of court position. Nonetheless, the former client does exist in the form of the State of North Dakota and the position this attorney now holds as clerk of court places her in a position of conflict. There appears to be no aspect of this case which would allow for a waiver of conflict by the former client (the State of North Dakota). The appearance of impropriety, even though that standard no longer specifically applies, nonetheless does exist in this case. 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.

It is clear that the statutory duties this attorney would have as clerk of court would make it presumptive that she would have access to computer systems of the State in the very program where she would represent private clients. More importantly, she would have a statutory duty to the two judges in her county and even though she professes that she would only accept cases outside of her county, they nonetheless would have authority within the judicial district and it is more likely than not those judges would sit on cases that would involve her.

Rule 1.7(a) makes it clear the lawyer cannot accept representation of the client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client would be adversely affected by the lawyer's responsibility to another client or third person or by the lawyer's own interests. All of the parts of subsection (a) would apply in this instance. Her duties and responsibilities as clerk of court would interfere with her judgment as a practicing attorney – an advocate in the system. Her prior work with the Child Support Enforcement Program would also place her in a position of conflict with new clients coming into the same system but now on the other side while she is or holds the neutral position of clerk of court in her home county.

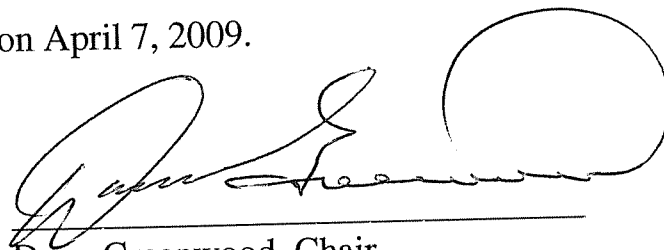
There is simply not a way under these circumstances described by this attorney for her to build a "Chinese Wall" in her position as clerk of court with respect to the State of North Dakota Child Support Enforcement Program and her official relationship with the district court in her position as clerk of court.

CONCLUSION

This attorney cannot in the present public position participate in the Volunteer Lawyer Program by accepting pro bono appointments which would involve civil actions to establish child support obligations, paternity judgments and things of that nature. Her public position has now taken her outside of the private practice of law and the uniqueness of her public position as clerk of court within the county of her

judicial district makes it impossible for her to gain a waiver of her conflict.

This opinion was drafted by James S. Hill and approved by a unanimous vote by those present at a meeting of the Committee on April 7, 2009.



Dann Greenwood, Chair