

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-02

THIS OPINION IS ADVISORY ONLY

QUESTION PRESENTED

Attorney has been granted a temporary law license for the state of North Dakota. As a requirement for the temporary license, Attorney must affiliate with a licensed associate attorney. In this case, Attorney and Associate Attorney do not work in the same firm. Attorney has a solo practice. Recently, Attorney met with a potential client regarding a family law issue. During the interview, Potential Client disclosed he previously met with Associate Attorney, who declined representation due to a conflict of interest. The Ethics Committee has been asked to render its opinion on whether it is permissible for Attorney, practicing under a temporary license, to represent a client when Associate Attorney is unable to do so because of a conflict of interest. Attorney also inquired whether he/she is able to represent Potential Client if that case does not involve filing any pleadings with a North Dakota Court.

OPINION

Based upon the facts presented, and the assumptions set forth below, Attorney practicing under a temporary license may not represent a client when his/her designated Associate Attorney is unable to represent that same client due to a conflict of interest, absent informed consent. The same is true for cases where no pleadings are filed in a North Dakota Court on behalf of the client.

APPLICABLE NORTH DAKOTA RULES

Rule 6.1, N.D. Admission to Practice: Temporary License for Lawyers Applying for Admission
Rule 3, N.D. Admission to Practice: Pro Hac Vice Admission and Registration of Nonresident Lawyers

Rule 5.5, N.D.R. Prof. Conduct: Unauthorized Practice of Law

Rule 1.7, N.D.R. Prof. Conduct: Conflict of Interest: General Rule
Rule 1.18, N.D.R. Prof. Conduct: Duties to Potential Client

FACTS PRESENTED

Attorney has been granted a temporary law license for the state of North Dakota. This committee presumes the temporary law license is granted pursuant to North Dakota Admission to Practice Rule 6.1. As a requirement for the temporary license, Attorney must work with a designated associate attorney (N.D. Admission to Practice Rule 6.1B). The associate attorney must fulfill specific obligations to the temporarily licensed attorney, which include: (1) inserting his/her name and address on all papers served and filed; and, (2) personally appearing at all hearings before a Court, Administrative Agency, or Tribunal, unless excused by such entity (N.D. Admission to Practice Rule 6.1(C) and Rule 3(A)(3)).

In this case, Attorney and Associate Attorney do not work in the same firm. Attorney has a solo practice. Recently, Attorney met with a potential client regarding a family law issue. During the interview, Potential Client disclosed he previously approached Associate Attorney, who declined representation due to a conflict of interest. This opinion is based upon the assumption that Associate Attorney does have a conflict of interest pursuant to N.D.R. Prof. Conduct 1.7(a), which prevents him/her from representing Potential Client.

DISCUSSION

The overriding consideration is whether Associate Attorney's conflict of interest is imputed to Attorney. This requires an analysis of the working relationship between Attorney and Associate Attorney.

As a requirement for practicing under a temporary license, Attorney must work with a designated associate attorney (Admission to Practice Rule 6.1B). The associate attorney must fulfill specific obligations to the temporarily licensed attorney, which include: (1) inserting

his/her name and address on all papers served and filed; and, (2) personally appearing at all hearings before the Court, Administrative Agency, or Tribunal, unless excused by the Court (Admission to Practice Rule 6.1(C) and Rule 3(A)(3)).

N.D.R. Prof. Conduct 5.5 further illustrates the importance and protection offered to an attorney working under a designated associate attorney on a temporary basis:

(b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who performs legal services in this jurisdiction on a temporary basis does not engage in the unauthorized practice of law in this jurisdiction when:

...

(4) with respect to matters, transactions or proceedings pending in or substantially related to this jurisdiction and for which pro hac vice admission is not available under Admission to Practice R.3, the lawyer is associated in the matter, transaction or proceeding with a lawyer admitted to practice in this jurisdiction who **actively participates** in the representation of the client in the matter, transaction or proceeding, or...

N.D.R. Prof. Conduct 5.5(b) (emphasis added).

Comment 6 to this Rule further clarifies the “active participation” role of the associate attorney:

[6] Paragraph (b)(4) requires the out-of-state lawyer to associate with a duly licensed local attorney for all transactions that are pending in or substantially related to this jurisdiction and for which pro hac vice admission is not available. The Rule recognizes that association with a lawyer licensed in this jurisdiction is likely to protect the interests of both clients and the public. **The local lawyer may not serve merely as a conduit for the out-of-state lawyer, but must actively participate in and share actual responsibility for the representation of the client in the matter. If the licensed lawyers involvement is merely pro forma, then both lawyers are subject to discipline under this Rule.**

N.D.R. Prof. Conduct 5.5(Comment 6) (emphasis added).

To actively participate and share actual responsibility for the representation of a client in a case where Associate Attorney is serving in a supervisory capacity, Associate Attorney must know, understand, and process the case, alongside Attorney. If Associate Attorney cannot represent a client because his/her ability to consider, recommend, or carry out a course of action

on behalf of the client will be adversely affected by his/her responsibility to another client, or third person, or the lawyer's own interest, pursuant to N.D. R. Prof. Conduct 1.7(a), that same restriction applies to cases Associate Attorney supervises.

If Associate Attorney has a conflict of interest, and cannot actively participate in Attorney's potential case, as required by N.D. Admission to Practice Rules 6.1, and N.D.R. Prof. Conduct 5.5(b), Attorney should not accept the case.

The only exception to this opinion would be if the Associate Attorney reasonably believes the representation will not be adversely affected by his/her responsibility to another client, to a third person, or the lawyer's own interest, **and** both the affected client and potential client consent. See N.D.R. Prof. Conduct 1.7(c) (emphasis added), and N.D.R. Prof. Conduct 1.18(d).

Furthermore, North Dakota Admission to Practice Rule 6.1 and N.D.R. Prof. Conduct 5.5(b)(4) do not limit Attorney's requirement to work with Associate Attorney only in formal Court settings. Instead, N.D.R. Prof. Conduct 5.5(b) requires the involvement of a local licensed attorney when the Attorney is providing "legal services." North Dakota Admission to Practice Rule 6.1 requires an associate attorney when Attorney "practices law." Our Supreme Court defines "the practice of law" as:

Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These 'customary functions of an attorney or counselor at law' bear an intimate relation to the administration of justice by the courts. No valid distinction...can be drawn between that part which involves appearance in court and that part which involves

advice and drafting of instruments in his office. The work of the office lawyer is the ground work for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations, and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counselors at law outside of courts.

Ranta v. McCarney, 391 N.W.2d 161, 163 (N.D. 1986), quoting Cain v. Merchants Nat. Bank & Trust Co. of Fargo, 66 N.D. 746, 752, 268 N.W.2d 719, 722.

The same ethical obligations apply whether or not Attorney is providing legal services to a client before the Court.

CONCLUSION

Attorney practicing under a temporary license may not represent a client when his/her designated Associate Attorney is unable to represent that same client due to a conflict of interest, unless Associate Attorney reasonably believes that the representation will not be adversely affected and he/she has informed consent from both the affected client and potential client. The same is true for cases where no pleadings are filed to a North Dakota Court on behalf of the client.

This opinion was drafted by Leah duCharme, and was unanimously approved by the Ethics Committee on the 14th day of April, 2015.


Ethics Committee Chairperson

This opinion is provided under Rule 1.2(B), North Dakota Rules for Lawyer Discipline, which 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.