

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-04**

THIS OPINION IS ADVISORY ONLY

QUESTIONS PRESENTED

Defendant, despite receiving notices from Court and Public Defender, fails to appear at a scheduled hearing. At the hearing, Court asks Public Defender what contacts have occurred between Public Defender and Defendant. State's Attorney then charges Defendant with bail jumping.

The Ethics Committee has been asked to render opinions on the following:

1. To what extent may Public Defender address Court's inquiry into contacts with Defendant?
2. Is Public Defender barred from representing Defendant in original action, new bail jumping action, or both?

OPINION

Based on the facts presented below, Public Defender – when ordered by Court - may address the inquiry by disclosing nonprivileged facts of contacts with Defendant. However, a mere question by Court is insufficient to justify Public Defender's disclosure. Further, under the limited facts provided, Public Defender is not necessarily barred from representing Defendant in either the original action or the new bail jumping action.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.6, N.D.R. Prof. Conduct: Confidentiality of Information
Rule 3.3, N.D.R. Prof. Conduct: Candor Toward the Tribunal
Rule 1.7, N.D.R. Prof. Conduct: Conflict of Interest: General Rule
Rule 3.7, N.D.R. Prof. Conduct: Lawyer as Witness

FACTS PRESENTED

Defendant attends initial court appearance, receives the scheduling order setting forth all hearing dates and times for the case, and acknowledges in writing that Defendant received scheduling order. Public Defender is assigned.

After learning of assignment, Public Defender sends to Defendant a notification letter, which includes another copy of the scheduling order and an appointment time for Defendant and Public Defender to discuss the case. Public Defender's policy is that if a defendant does not make the appointment, Public Defender sends to defendant a second letter with a request to reschedule the appointment, a reminder of the date and time of the next hearing, and yet another copy of the scheduling order.

Defendant fails to appear at a scheduled hearing. Public Defender attends the hearing, and Court, on the record, asks what contacts have occurred between Public Defender and Defendant.

State's Attorney charges bail jumping as a separate criminal action, based upon Defendant's failure to appear at the scheduled hearing where Public Defender was present.

DISCUSSION

I. When ordered by Court, Public Defender may address inquiry by disclosing nonprivileged facts of contacts with Defendant.

The extent to which Public Defender may address Court's inquiry into contacts with Defendant turns largely on Rule 1.6. Under the rule, a lawyer "shall not reveal information relating to the representation of the client" unless (1) the client consents, (2) disclosure is authorized to carry out the representation, (3) disclosure is required because it is necessary "to prevent reasonably certain death or substantial bodily harm," or (4) disclosure is permitted because one of five scenarios exists. N.D.R. Prof. Conduct 1.6. The rule is "broad," applying not just to matters communicated in confidence by the client but "also to all information relating to the representation, whatever its source. *In re Disciplinary Action Against Dyer*, 2012 ND 118, ¶ 19, 817 N.W.2d 351; N.D.R. Prof. Conduct 1.6 cmt. 3. Court's inquiry into what contacts had occurred between Public Defender and Defendant thus does encompass the rule's broad protection of "information relating to the representation." See N.D.R. Prof. Conduct 1.6(a). Because Court's inquiry triggers that protection, the exceptions to the prohibition on disclosure must be considered.

Neither of the first two exceptions apply; no facts show that Defendant consented to disclosure or that disclosure is authorized for Public Defender to carry out the representation. N.D.R. Prof. Conduct 1.6(a). Nor do any facts suggest that disclosure is required because it is "necessary to prevent reasonably certain death or substantial bodily harm." N.D.R. Prof. Conduct 1.6(b). Moreover, of the five scenarios where a lawyer is permitted to disclose, none of the first four apply; no facts suggest that disclosure is necessary (1) to prevent Defendant from committing a financial crime or fraud, (2) to prevent or mitigate substantial injury to another's financial interest, (3) to secure legal advice about Public Defender's compliance with the ethical rules, or (4) to establish a claim or defense of Public Defender or to respond to allegations about Public Defender's representation. See N.D.R. Prof. Conduct 1.6(c)(1)-(4).

The final scenario where disclosure is permitted, though, could apply. A lawyer "may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary.... to comply with other law or court order." N.D.R. Prof. Conduct 1.6(c)(5). It should be noted that Public Defender would not be authorized under Rule 3.3(b), which provides for disclosure if necessary as a remedial measure when the lawyer "knows that person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding[.]" The potential crime involved is bail jumping, which requires that the offender act "willfully." See N.D.C.C. § 12.1-08-05(1). Yet no facts show that Public Defender knows Defendant's culpability, i.e., whether Defendant intended to skip the scheduled hearing, recklessly forgot about it, or intended to attend the hearing but while enroute was involved in a terrible accident and rushed to a hospital. While one could envision a scenario in which Rule 3.3(b) might authorize a lawyer's disclosure, Public Defender's case does not qualify.

On the other hand, Public Defender would be authorized by his duty to comply with an order to provide the information. While Court's mere inquiry would be insufficient to trigger Public Defender's duty, Court's directive to respond to the inquiry would be sufficient. At the outset, it must be recognized that a court has authority to question

court officers about nonprivileged information integral to court operations. The district court has “all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice[.]” N.D.C.C. § 27-05-06(3). These powers include setting release conditions, forfeiting bail, issuing bench warrants for failure to appear, and continuing hearings. See e.g. N.D.R.Crim.P. 46 (“Release from Custody”); N.D.R.Ct. 6.6 (“Bench Warrant”); N.D.R.Ct. 6.1 (“Continuances”). Moreover, the district court also has the duty to act diligently and thus is required “to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.” See N.D. Code Jud. Conduct Rule 2.5(A) cmt. 3. The district court’s workload highlights the importance of the court’s powers and duty of diligence. In 2014, there were 31,372 criminal cases filed in the district courts of the state. See 2014 North Dakota Court System Annual Report at 12. Caseloads per judicial district ranged from 2,866 to 6,272. See *id.* Simply put, assessing all nonprivileged information to determine whether a bench warrant should be issued, bond forfeited, or proceedings continued is integral to the efficiency of the district court.

It must also be recognized that information regarding what contacts Public Defender and Defendant have occurred is not privileged. Under N.D.R.Ev. 502(b), the attorney-client privilege applies to “confidential communications[.]” The fact that a communication occurred – without any reference to the actual communication, i.e., the content of the communication – is not privileged. See generally *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313, 320-21 (N.D. 1986) (recognizing as nonprivileged information that was “not the content of [the lawyer’s representative’s] communications with [the lawyer] or the client”); see also 81 Am. Jur. 2d Witnesses § 370 (2015) (noting “the attorney-client privilege does not apply to an attorney’s calendars, appointment books, or other logs of dates and/or events, absent a showing that the responsive documents would likely require disclosure of the attorney’s confidential communications with other clients”).

In sum, Public Defender may provide information as to what contacts have occurred between Public Defender and Defendant, but only in response to an order from the court rather than a mere inquiry from the court. Public Defender, though, may only disclose nonprivileged facts of contacts and may not discuss the substance of any confidential communications with Defendant.

II. Public Defender is not necessarily barred from representing Defendant in either the original action or the new bail jumping action.

Whether Public Defender is barred from representing Defendant in original action, new bail jumping action, or both is governed largely by Rules 1.7 and 3.7. Under Rule 1.7(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 the 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.” Under Rule 3.7(a), “[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue[.]”

No evidence establishes that Public Defender would necessarily be barred under Rule 1.7(a) from continuing the representation in the original action. Nothing shows that Public Defender’s ability to represent Defendant would be adversely affected by Public Defender’s own interests or responsibilities to a third person. Public Defender’s disclosure of nonprivileged information in response to Court’s directive would not necessarily change that.

Nor does the disclosure necessarily establish that Public Defender would be barred from representing Defendant in the new bail jumping action under Rule 3.7(a). For bail jumping, State's Attorney must simply prove that Defendant "after having been released upon condition or undertaking that he will subsequently appear ... willfully fail[ed] to appear as required." See N.D.C.C. § 12.1-08-05(1). It's uncertain whether Public Defender is likely to be a "necessary witness" of the alleged bail jumping or if so, whether his testimony would relate to a contested issue. In fact, the circumstances suggest that State's Attorney might rely exclusively on witnesses - such as court personnel or deputies - and records to prove the new bail jumping charge. Defendant had provided written acknowledgement of the scheduling order - before Public Defender became involved; many others in the courtroom likely saw that Defendant was not present at the scheduled hearing; and no facts definitely establish that Public Defender had unique knowledge that Defendant acted willfully. Moreover, it's unknown whether State's Attorney even endorsed, on the charging document, Public Defender as a potential witness. See N.D.R.Crim.P. 7(g) (providing that "[w]hen an indictment or information is filed, the names of all the witnesses on whose evidence the indictment or information was based must be endorsed on it before it is presented").

In sum, Public Defender is not necessarily barred from continuing representation of Defendant in existing case because the facts do not show that Public Defender's ability to represent Defendant would be adversely affected by Public Defender's own interests or responsibilities to a third person. Public Defender is also not necessarily barred from representing Defendant in new bail jumping case because the facts do not show that Public Defender would be a necessary witness in the case or that Public Defender's testimony would relate to a contested issue.

CONCLUSION

Information about what contacts have occurred between Public Defender and Defendant constitutes information relating to the representation under Rule 1.6(a), which Public Defender must not reveal unless an exception applies. To respond to an order by the Court, Public Defender has applicable exception under Rule 1.6(c) and may disclose such information to the extent it's not privileged under N.D.R.Ev. 502.

Public Defender is not necessarily barred from continuing to represent Defendant in existing case. The given facts do not establish that Public Defender's ability to represent Defendant would be adversely affected by Public Defender's own interests or responsibilities to a third person. Thus there is not necessarily a conflict of interest under Rule 1.7(a).

Further, Public Defender is not necessarily barred from representing Defendant in new bail jumping case. The given facts do not show that Public Defender would be a necessary witness in the case or that Public Defender's testimony would relate to a contested issue. Thus there is not necessarily any bar to representation under Rule 3.7(a).

This opinion was drafted by Cherie Clark and was unanimously approved by the Ethics Committee on the 29th day of June, 2015.



Douglas A. Bahr
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.