

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 19-01**

THIS OPINION IS ADVISORY ONLY

FACTS

A firm represents an enterprise with diverse and is a governmental entity ("Government Client"). The firm currently provides services to the Government Client in two distinct areas of the law which are unrelated to the other. The attorney at issue ("Attorney") is employed at the firm. Attorney does not currently represent the Government Client in any matter. Attorney has not represented the Government Client in any matter in the past. Only Attorney's colleagues in the firm have represented the Government Client.

The firm also represents another client ("Private Client") concerning a business. The firm's services to the Private Client are unrelated to the firm's representation of the Government Client. Attorney has primarily represented the Private Client. Although other counsel within the firm have provided services to the Private Client, none of the other counsel are currently providing services for the Government Clients.

The Government Client served a subpoena on the Private Client indicating that Government Client (a governmental entity) is investigating whether the Private Client have committed unlawful conduct including construction fraud ("Investigation"). The firm is not providing any services to the Government Client regarding the Investigation.

The Private Client have asked Attorney to represent the Private Client regarding the Investigation. After consultation, both the Government Client and the Private Client have consented to the firm's representation of the Private Client regarding the Investigation.

QUESTIONS PRESENTED

Under the North Dakota Rules of Professional Conduct, according to Rule 1.7:

1. Does Rule 1.7 of the North Dakota Rules of Professional Conduct permit the firm to represent the Private Client in the Investigation?
2. If the firm believes the representation will not be adversely affected, is the firm's belief "reasonable" as required by N.D.R.Prof.Conduct 1.7(c)(1)?

OPINION

I. APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

North Dakota Rules of Professional Conduct, Rule 1.7 is most applicable in this case.

The Rule states in pertinent part:

- 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.
- b. ...
- c. A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - 1. the lawyer reasonably believes the representation will not be adversely affected; and
 - 2. the client consents after consultation.

II. DISCUSSION

Subsection (a) addresses the situation where a lawyer's responsibilities to another client *will* adversely affect the lawyer's representation of a client. N.D.R. Prof. Conduct 1.7, Comment 2. Subsection (c), on the other hand, addresses the situation where a lawyer's responsibilities to another client *may* adversely affect the lawyer's representation of a client. *Id.* Under subsection (c), the lawyer may cure the conflict if the lawyer reasonably believes there will not be an adverse effect and the client consents. In this circumstance, subsection (c) applies because there is no concrete evidence that Attorney's representation of the Private Client will adversely affect the Government Clients.

"Ordinarily, 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. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, **a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent after consultation.**" N.D.R. Prof. Conduct 1.7, Comment 9 (emphasis added). However, concurrent representation of this nature can depend on the nature of the litigation. *Id.* Specifically, "a suit **charging fraud** entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation." *Id.* (emphasis added).

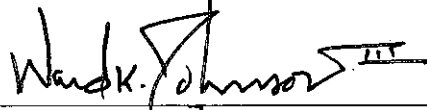
On its face, "charging" fraud could be construed differently than "defending." In this case, Attorney would be defending the fraud allegation. However, the Comment references "conduct of the suit," but does not state either charging or defending and does not distinguish between the two. Because of that lack of distinction, it is possible that the phrase "a suit charging fraud" is making a general statement about what type of suit it is, as opposed to which side of the suit an attorney is on.

Rule 1.7 does not explicitly prohibit Attorney from undertaking the representation. However, an Attorney in this situation should proceed with caution and the Attorney must make a determination of whether Attorney reasonably believes that the representation will not be adversely affected given the circumstances; then Attorney must get the client's consent, preferably in writing.

Without further context or facts concerning this representation, the question of whether the firm's belief that the representation would not be adversely affected is reasonable, cannot be answered.

CONCLUSION

This opinion was drafted by Sarah Atkinson and was unanimously approved by the Ethics Committee on the 15 day of August, 2019.

A handwritten signature in black ink, appearing to read "Wade K. Johnson". The signature is stylized with a large, looped initial "W" and a trailing flourish.

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.