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February 21, 1997

S.B.A.N.D.
Ethics Committee
P.O. Box 2136
Bismarck, ND 58502-2136

Re: Request for Ethics Committee Opinion

Dear Members of the Ethics Committee:

I am respectfully submitting this request for an ethics opinion from the North Dakota State Bar Association Ethics Committee, regarding an ethical dilemma that our office of criminal prosecutors faces in the prosecution of a local attorney for a misdemeanor criminal traffic offense.

Thank you to Ms. Alice Senechal, Committee Chair, for sending me a copy of the Ethics Committee Procedures. I will follow the protocols outlined there as best as I can.

Our office is currently involved in a prosecution of a local attorney for a misdemeanor criminal traffic offense [DUI]. The attorney-defendant has retained local counsel and the case will inevitably be resolved by a trial by jury.

All of the attorneys in our office, myself included, have had prior professional dealing with the attorney-defendant in addition to actually having current cases pending with the attorney-defendant who is acting in the professional capacity of representing criminal defendants whom our office is also currently actively prosecuting.

The ethical issue that presents itself is whether the prosecution of a fellow member of the local bar, for a criminal offense such as DUI, is an unethical conflict of interest for our prosecutors, when the prosecutors have all had extensive professional and personal contacts with the defendant/attorney and where the attorney-defendant is

also actively representing other criminal defendants who are being prosecuted by our office for criminal offenses.

Since the National Prosecution Standards published by the National District Attorneys Association generally provides that when the prosecutor has an actual or potential conflict, it is his or her responsibility to seek a special prosecutor, I feel that an actual or potential conflict of interest presents in the above case where the defendant-attorney is also an advocate for other criminal defendants whose cases are now pending in our office.

I surely appreciate any attention that the ethics committee could give to this matter. I hope to hear from the committee in the future. If the committee has any further questions for clarification of the issue, then you can contact me at your convenience at the address and telephone number above.

Sincerely yours,

A large, irregular black redaction mark covers the signature and any text that might have followed it. The redaction is solid black and obscures the entire area where the sender's name and contact information would typically be provided.

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 97-01
MARCH 25, 1997

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CLERK

The Ethics Committee has been requested to issue its opinion on whether a states attorney or the other attorneys in the states attorney's office are disqualified from prosecuting a criminal charge against an attorney who actively represents criminal defendants in the same court in which both the states attorney and the attorney-defendant practices.

FACTS

Attorney-Defendant has been arrested on a misdemeanor criminal traffic offense, and has retained local counsel. The states attorney, who is the attorney requesting this committee's opinion, states that it appears that the case will inevitably be resolved by a trial by jury. The attorney-defendant has an active criminal defense practice in the court in which he has been charged. There are several current cases pending in which the attorney-defendant is representing other defendants. The states attorney, herein sometimes referred to as the prosecutor, questions whether he and/or the other attorneys in the prosecutor's office have an ethical obligation to disqualify themselves, and request that the court appoint a special prosecutor to prosecute the case.

DISCUSSION

"The states attorney is the public prosecutor, and shall:

1. Attend the district court and conduct on behalf of the state all prosecutions for public offenses. . . ." N.D. Cent. Code §11-16-01(1)

When it appears, by affidavit or otherwise, to the satisfaction of the court, that the states attorney is absent or unable to attend to the states attorney's duties, the judge shall (1) request the attorney general or an assistant attorney general to take charge of such prosecution, or (2) appoint an attorney to take charge of such prosecution. Id. §11-16-06.

If the states attorney fails or is unable to attend at the trial, the court may appoint some attorney at law to perform the duties of the states attorney on such trial. Id. §29-21-36.

Where a case is brought by the state and pending in a district court and there is no states attorney or he is absent, disqualified, or refuses or neglects to perform his duties . . . , the court may constitutionally fill such temporary vacancy by appointment of an attorney to represent the state. State ex rel. Ilvedson v. District Court, 291 N.W. 620 (N.D. 1940).

It should be made clear at the outset that this opinion is not intended to guide the actions of the trial court or appellate court in ruling on a request for a special prosecutor by either the states attorney or defendant, but is intended only to give guidance to the states attorney with respect to his ethical obligations, or the ethical obligations of the other attorneys in his office, as required or suggested by the North Dakota Rules of Professional Conduct. The sections of the North Dakota Century Code are cited merely to establish the statutory framework for the question.

It is the opinion of the committee that the states attorney and/or the other attorneys in the states attorney's office, under the facts presented, are not disqualified from prosecuting the case described herein.

If, however, despite the committee's opinion, the states attorney subjectively believes that he or any other attorneys in his office have an actual conflict of interest, he should disqualify himself. This opinion seeks to give some guidance to this prosecutor and others, as to when disqualifying conflicts of interest are likely to arise.

Rule 1.7, North Dakota Rules of Professional Conduct, sets forth the general rule with respect to conflicts of interest. Two of the pertinent sections to that rule are,

(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 responsibility 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.

(c) . . .

Rule 1.10, NDRPC, is the general rule for imputed disqualification. It reads in part,

(a) Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, . . .

The official comment to Rule 3.8, Special Responsibilities of a Prosecutor, NDRPC, states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."

A prosecutor's client is the people who live in the prosecutor's jurisdiction. Since all lawyers have a fiduciary duty to their clients, the professional judgment of the prosecutor must be exercised, within the bounds of the law, solely for the benefit

of the client--the people--free of any compromising influences or loyalties. A prosecutor's own interests, of whatever nature, shall never be permitted to have an adverse effect on the professional performance of the prosecutor's official duties and obligations. For example, a prosecutor's past, present, or anticipated future personal, business, or employment relationship with an accused person, a potential witness, or another lawyer must not be permitted to affect the prosecutor's charging decisions or the prosecutor's handling of prosecutions or appeals. Commentary to Prosecution Function Standard 3-1.2, American Bar Association Standards for Criminal Justice (3d ed. 1993).

Other guidance is found in the official comment to Rule 1.7, NDRPC. Loyalty is an essential element in the lawyer's relationship to a client. . . . Loyalty to a client is impaired when a lawyer can not consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. . . . A possible conflict does not itself preclude the representation. The critical questions are the likelihood the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . . A lawyer's personal interests can not be allowed to affect the representation. For example, a lawyer's personal relationship through marriage, blood, or otherwise, with the opposing counsel or the opposing client, may compromise the lawyer's ability to exercise the independent professional judgment required. . . . Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. . . .

The legal encyclopedia, American Jurisprudence, discusses some of the issues as follows:

The prosecution must never lose sight of the fact that every defendant is entitled to a full measure of fairness. It is as much the prosecutor's duty to see that a person on trial is not deprived of any of his statutory rights as it is to prosecute the defendant. 63A AM.JUR.2d. Prosecuting Attorneys §26.

Prosecutorial vindictiveness constitutes a denial of due process. However, a mere claim of apprehension of vindictiveness, without a determination of actual vindictiveness, established only prima facia proof of a due process violation. Id. §28

A trial court has the power to disqualify a prosecuting attorney from proceeding with a particular criminal prosecution if the trial court determines that the prosecuting attorney suffers from a conflict of interest which might prejudice him against the accused, or where he has a personal interest in convicting the accused, or where he has a pecuniary interest in the outcome. Id. §30.

Depending on the particular circumstances involved, the impropriety of a prosecuting attorney's participation in a criminal case has been recognized because of such factors as close personal friendship, political rivalry, and the display of personal antagonism and animosity toward the accused. Id. §30.

An attorney will not be permitted to prosecute a criminal case if, by reason of his professional relationship with the accused, he has acquired a knowledge of facts upon which the prosecution is predicated, or which are closely interwoven therewith. Id. §31.

The courts, in two cases cited by the authors of the foregoing article, state as follows:

The protection of prosecutorial impartiality is a major purpose of the court's recusal power. . .Recusal may be denied, when the evidence of personal animus or bias is slight and does not amount to a reasonable possibility of unfairness. People v. Hamilton, 756 P. 2d 1348 (Cal. 1988).

A conflict of interest that will justify disqualification of a prosecuting attorney exists whenever the circumstances of a case evidence a reasonable possibility that the prosecutor's office may not exercise its discretionary function in an evenhanded manner. People v. Phillips, 215 Cal. Rptr 394 (Cal. 4th Dist. 1985).

The realities of criminal practice in a North Dakota court are that the prosecutor's office has regular and repeated discussions in the course of discovery and plea bargaining with a small number of defense counsel. It is inevitable that the prosecutors and defense counsel will know each other well, both professionally and personally. They will likely know when the other is bluffing, or not bluffing. They will know how competent the other is. They will know the likely range of sentences given by the court for a particular offense, and the lower limits of sentences a prosecutor will recommend before going to trial. It might be that the outcome of the instant case may have some bearing on the future relationship between the prosecutor and the attorney-defendant. It may be that the discussions between prosecutor and counsel with respect to other defendants represented by counsel, both those cases now pending, and future cases may be affected. The prosecutorial discretionary decisions will almost certainly be closely scrutinized by the media or others.

Nonetheless, the committee believes that these kinds of problems are not those that must disqualify a prosecutor. In fact, most of these problems described arise over and over in a small county where "everyone knows everyone else," judges, prosecutors, defense counsel, defendants, victims, and witnesses alike. Prosecutors and defense counsel recognize their respective duties and loyalties, and these problems do not prevent justice from being done. The committee could not find one reported case, or ethical

opinion, where disqualification was mandated in situations similar to the facts presented here.

The prosecutor, in his letter to the committee, questions whether a potential conflict requires disqualification. It is the committee's opinion that unless a potential conflict rises to the level of a reasonable likelihood of actual conflict, disqualification is not mandated.

There might also be questions about the "appearance of impropriety." Canon 9 and related ethical considerations of the former American Bar Association Code of Professional Responsibility state, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." The subsequent Model Rules of Professional Responsibility which North Dakota adopted in 1987, eliminated the articulated reference to "appearance of impropriety." The official comment to Rule 1.10, NDRPC, recognizes the difficulty of having an appearance of impropriety standard. The comment states, . . . since "impropriety" is undefined, the term "appearance of impropriety" is question-begging.

A previous edition of the American Bar Association Standards for Criminal Justice, stated, "A prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties. . ." Id. Prosecution Function Standard 3-1.2. Conflict of Interest (2d ed. 1979). The ABA Standards as revised in 1993, now state "(a) A prosecutor should avoid a conflict of interest with respect to his or her official duties. . ." Prosecution Function Standard 3-1.3, Conflict of Interest (3d ed. 1993). According to the historical comments to the revised standard, the standard was revised to reflect the ABA Model Rules of Professional Conduct's rejection of appearance-based conflict of interest standards. Rather, the revised standard in Prosecution Function Standard 3-1.3 (b) through (g) describe examples of conflicts of interest. None of them fit the fact situation described here.

At least one state court, nonetheless, has stated, "[W]hile the appearance of impropriety is not a basis for automatic disqualification, it is an element that the trial court may consider in making disqualification determination. . . . Disqualification is a fact-specific determination." State v. Stevens, 490 N.W.2d 753 (Wis.App. 1992).

Another court stated, "[I]t is still appropriate to consider the 'appearance of impropriety' when weighing ethical matters because its meaning pervades the Rules, and embodies their spirit." First American Carriers, Inc. v. Kroger Co., 787 S.W. 2d 669, 672 (Ark. 1990).

CONCLUSION

In summary, the question whether the prosecuting attorney in the instant case should disqualify himself (and the other attorneys in the office) is one only he can answer. This opinion is designed to give the prosecuting attorney some guidance in making that decision. The committee is of the opinion that disqualification in the instant case is not required by the North Dakota Rules of Professional Conduct.

This opinion is provided pursuant to Rule 1.2(B) North Dakota Rules for Lawyers 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.

This opinion was drafted by David L. Petersen and was unanimously approved by the Ethics Committee on March 25, 1997.



Alice R. Senechal, Chair