

LETTER OPINION
2001-L-19

June 7, 2001

The Honorable Keith Kempenich
District 39, House of Representatives
HCR 4 Box 10
Bowman, ND 58623-8810

Dear Representative Kempenich:

Thank you for your letter asking for my opinion whether there is a conflict of interest between an individual's positions as both executive director for the State Board of Accountancy (Board) and executive director of the North Dakota Society of Certified Public Accountants (Society). You refer specifically to the individual's activities regarding a bill that was considered and defeated during the 2001 legislative session.

A staff attorney in this office discussed your letter with the special assistant attorney general who represents the Board and with the executive director of the Board to obtain more information about the arrangement between the Board and the Society for staff services. We also reviewed a copy of the current contract between the Board and the Society. The contract provides that the Board will make the services of its employees, including the executive director, available to the Society in exchange for the Society paying an amount equal to 60 percent of the Board's payroll expense.

The phrase "conflict of interest" refers to "a situation in which regard for one duty tends to lead to the disregard of another." Letter from Attorney General Robert Wefald to F.C. Rohrich (Apr. 14, 1983). In this situation, the staff of the Board are employed by the Board and owe a duty only to the Board. It is the Board that has committed itself to performing services for the Society. All work performed by the staff of the Board is performed by them in their official capacity as Board employees, and not in their personal capacity. Accordingly, the first question presented in your letter is not whether the executive director has a personal conflict of interest, but rather whether the Board's contract to provide staffing services to the Society is legally authorized.¹

¹ A number of Attorney General opinions from other states have discussed whether a potential conflict arises when a person serves on a professional licensing board and is also active in the association for the same profession. 1990 Ga. Op. Att'y Gen. No. 90-25 (inspectors for board of funeral service not prohibited from holding office in private

The Board, as a state agency, has only those powers expressly delegated by the Legislature or which may be reasonably inferred from the powers expressly granted. 1998 N.D. Op. Att'y Gen. L-43, citing First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984).

[T]he real reason for prohibiting the practice of a profession by those who have not been examined and found to be qualified is not to create a monopoly for those who have been licensed. It is done to protect the members of the public who desire architectural services from receiving such services from persons who are not qualified. The State, in the exercise of its police power, has determined that the public interest requires the regulation of the practice of architecture and the licensing of architects, and thus enforcement of such requirement is in the public interest.

Harrie v. Kirkham, Michael & Associates, Inc., 179 N.W.2d 413, 415 (N.D. 1970). This statement applies equally to the Board.

The responsibility of the Board to serve the interests of the public with regard to accounting services is confirmed by the statement of purpose in N.D.C.C. § 43-02.2-01. This responsibility is relevant in interpreting the Board's statutory authority to employ "an executive director and such other employees as it deems necessary in administration and enforcement of [N.D.C.C. ch. 43-02.2]." The Board cannot assign tasks to its staff that are inconsistent with the interests of the Board or the public in effective administration and enforcement of state law regarding accounting services. On the other hand, if the Board determines that the contract with the Society improves the efficiency of the Board's operations or economizes the Board's use of its licensing revenue, the contract is impliedly authorized under the Board's express authority to employ and manage staff. Whether the contract serves the public interest is ultimately a question of fact which cannot be resolved

association, but the dual capacity creates appearance of impropriety); 1983-84 Va. Op. Att'y Gen. 432 (president of state pharmaceutical association may serve on state board of pharmacy); 1982-83 Va. Op. Att'y Gen. 678 (member of state board may serve as lobbyist for the trade association, if the member does not participate in any matter involving the association); 1988 Ariz. Op. Att'y Gen. NO. 188-04 (member of state board may serve as a non-salaried officer of national association); 1979 Ariz. Op. Att'y Gen. 179-142 (member of state board may serve as a non-salaried officer of state association).

A prior opinion of this office suggests that a person's service as an employee of a board, rather than a board member, affects whether a conflict of interest exists. 1972-74 N.D. Op. Att'y Gen. 585.

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in an Attorney General's opinion. However, any benefit to the Society from the contract is irrelevant in determining whether the contract is authorized.

It is my opinion that the Board is authorized to enter into a contract to provide staff services to the Society as long as the contract furthers the public interest in efficiently regulating the delivery of competent accounting services and does not require the Board to take actions on the Society's behalf that are prohibited by law. This limit on the Board's authority also applies to your second question: whether an employee of the Board can act as lobbyist for the Society.

As long as the Board's staff is lobbying on behalf of the Board, a registration is not required under N.D.C.C. ch. 54-05.1. N.D.C.C. § 54-05.1-02(2)(c). Under the Board's contract with the Society, it is foreseeable that the Board and Society could take the same position on a piece of legislation. In that case, it is my opinion that the Board's staff could testify or "lobby" on behalf of both the Board and Society, as long as the staff person is registered under N.D.C.C. ch. 54-05.1 to lobby on behalf of the Society. However, if the Society's position on a bill is different than the Board's position, which must be governed by the public interest, it is my opinion that the Board and its staff are neither authorized nor required to "lobby" on behalf of the Society. The contract between the Board and Society must be construed to include this limitation, although I recommend it be expressly stated in the next annual contract.

With regard to the bill mentioned in your letter, I understand the executive director testified on behalf of the Board only and not on behalf of the Society. Your letter suggests that the executive director "spearheaded" the opposition to the bill. Because this is a question of fact which I cannot resolve, I have responded to your question in a general fashion. Given the Board's neutral position on the bill, it would have been inappropriate for the executive director to do any lobbying against the bill on behalf of the Society.

Sincerely,

Wayne Stenehjem
Attorney General

jcf/vkk