

STATE BAR ASSOCIATION OF NORTH DAKOTA ETHICS COMMITTEE
Opinion No. 00-06
June 28, 2000

The Ethics Committee has been asked to render its opinion as to the ethical responsibilities of an attorney who questions her client's competence to accept an offer the attorney views as inequitable or to waive presentation of an issue that would support a better result.

FACTS

The requesting attorney represents a spouse in a divorce action. The attorney believes her client to be alcohol dependent, in part, as a response to the client's spouse's conduct. The attorney further believes the addiction to be an important factor in support of her claim for spousal support. The client refuses to allow the attorney to raise the issue of the addiction and also is willing to accept an offer the attorney views as inadequate. The attorney has urged the client to seek chemical dependence treatment or counseling. The client has declined. The attorney has explained to the client the potential impact of her position on the outcome and the applicable marital dissolution law. The attorney believes the client will accept an offer contrary to her best interest rather than to disclose her addiction or to face the prospects of trial.

The question then becomes whether the client is able to make the decision to waive property and support rights, or to refrain from raising issues which the attorney believes would enhance the client's position in the dissolution.

DISCUSSION

The answer lies within North Dakota Rules of Professional Conduct 1.14

and the comments. For guidance also see the previously issued Opinion LO 88-03.

RPC Rule 1.14 provides:

When a client's ability to make adequately considered decisions in connection with the representation is impaired, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

The comments parse this obligation by first defining a normal client relationship.

A normal client-lawyer relationship exists in those situations where the client, when properly advised and assisted, is capable of making or communicating responsible decisions concerning the client's person or affairs.

RPC Rule 1.14.

If the attorney reasonably believes the client has the ability to make adequately considered decisions, the client may do so and the inquiry ends. On the other hand the comments to the rule suggest that if the attorney believes the client is not, or may not be able, the attorney ethically must go further.

First the attorney needs to consider whether, in her professional judgment, a legal representative needs to be appointed to serve the best interest of the client, or is necessary to complete the representation. If the attorney is uncertain about the extent of the disability, the attorney needs to seek assistance to make that determination.

Doing so places the attorney between the obligation to determine the nature of the disability and the prohibition on revealing client confidences. The comments to Rule 1.14 of the North Dakota Rules of Professional Conduct solve the dilemma by providing:

In those situations where a legal representative has not been appointed but in the lawyer's professional judgment such an appointment would serve the client's best interests, or is in fact necessary for the effective completion of a transaction involving the client's property, the lawyer should seek to have a legal representative appointed to act in behalf of the client. The nature and extent of the client's disability may be disclosed by the lawyer to the extent the lawyer reasonably believes necessary to obtain the appointment of a legal representative.

When considering the nature and extent of a client's disability and whether or not disclosure of the client's condition is necessary in the advancement of the client's interests, a lawyer may consult with an appropriate diagnostician.

The attorney should first seek the client's consent to disclose confidential information being mindful that if the client is impaired, she may not be able to give valid consent. Even without consent, the client's disability may be disclosed to a professional, however, for the purpose of determining the nature and extent of the disability. The extent of the disclosure must be limited to that reasonably necessary to the purpose. North Dakota Rules of Professional Conduct, Rule 1.6.

CONCLUSION

The Committee concludes that the attorney needs first to establish whether she reasonably believes the client to be able to make the requisite decisions. If she is unsure, she needs to consult a professional who can make that determination. Prior to the consultation, she needs to solicit the client's consent to reveal confidences to the diagnostician. If there is no consent, or she deems the client unable to consent, she may reveal sufficient confidences for the diagnosis.

This opinion is provided pursuant to Rule 1.2(b) of the 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.

This opinion was drafted by Sherry Mills Moore and unanimously approved by the Ethics Committee on June , 2000.

Mark Hansen, Chair