

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

OPINION NO. 01 - 03

May 24, 2001

The Committee has received a request for its opinion on questions involving communication with a firm's clients and request for clients' information following the departure of a lawyer from a law firm.

Applicable North Dakota Rules of Professional Conduct

Rule 1.4 Communication.

Rule 1.15 Safekeeping Property.

Rule 1.16 Declining or Terminating Representation.

Rule 5.7 Responsibilities Regarding Law-Related Services.

Rule 7.1 Communications Concerning the Services of a Lawyer or Persons
Professionally Associated with the Lawyer.

FACTS

Attorneys A, B and C practiced law together for approximately four years before Attorney C left the firm to practice on his own. Attorneys A and B continue to practice together. Following the departure of Attorney C in April of 2000, a proposal was made to provide the clients with a joint letter informing them of the departure of Attorney C and to assist the clients in determining whether their file would remain with the law firm of A and B, be transferred to Attorney C or transferred elsewhere. Attorneys A and B declined to provide a joint letter. Attorney C provided a letter to former clients during mid-year 2000. Toward the end of the year 2000, Attorney C began to organize his tax business as he has done for over the 30 plus years that he has practiced law. Attorney C states that although his tax service was not particularly contained within the concept of practice of law, it was none the less an important component of his business. As

such, he prepared another letter, which was sent to clients or individuals that he had worked with in the past, noting that he would again be preparing tax returns for his tax clients. A follow-up letter was sent in February 2001. Attorney C has questioned whether he has committed any unethical acts in making contact with prior tax clients and proceeding to make contact by way of the letters related to the preparation of tax returns.

Related to the same law firm break up, Attorneys A and B have requested an ethical opinion regarding a request for electronic data. Attorneys A and B have provided Attorney C or the clients with files as requested. Now Attorney C or the clients have requested tax program data directly off the computer or stored on back-up disks. Attorneys A and B believe the actual software data is their work product and typically re-key tax return information to manipulate the data electronically on their software. That is, they input a new client's tax information, such as their names, social security numbers, and dates of birth, depreciation items, etc. into their computer software. Existing client's information carries over from year to year. Attorneys A and B suspect that Attorney C has purchased the same software and would like to download the information electronically. Attorneys A and B have offered to provide any printout of the information requested, but not the actual computer data.

QUESTIONS PRESENTED

1. Is Attorney C subject to the North Dakota Rules of Professional Conduct when conducting his tax business?
2. Considering the offer to provide a joint letter to the clients that was rejected, was it proper for Attorney C to proceed to make contacts by letter as he did?
3. On an ongoing basis, is Attorney C in compliance with the rules of the North Dakota Rules of Professional Conduct with such contact, considering particularly the language of Rule 7.1?
4. Do Attorneys A and B have an ethical obligation to provide the requested electronic data?

DISCUSSION

Is Attorney C subject to the North Dakota Rules of Professional Conduct when conducting his tax business?

North Dakota Rule 5.7 provides that a lawyer is subject to the Rules of Professional Conduct when providing law-related services if the law-related services are provided in circumstances that are not distinct from the lawyers provision of legal services to a client. "Law-related services" are defined in Rule 5.7 (b) to mean services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a non-lawyer. Tax return preparation is specifically noted as an example in the Comment to Rule 5.7 of a law-related service. In this instance, the letter that Attorney C provided to his tax clients was on letterhead indicating it came from his law office and that Attorney C was a counselor and attorney at law. No indication was made that preparing tax returns was a business unrelated to the practice of law. (Even if such a disclaimer was made, it would not be effective if Attorney C was, in fact, performing legal services or offering legal advice.) When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, which is the case here, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct, Comment to Rule 5.7. It is the Committee's opinion that the Rules of Professional Conduct apply to Attorney C's tax business. See State Bar Association North Dakota Ethics Committee Opinion 98-07 (September 9, 1998) for further discussion and guidance regarding law-related services.

Considering the offer to provide a joint letter to the clients that was rejected, was it proper for Attorney C to proceed to make contacts by letter as he did?

The Ethics Committee cannot address this question. Under its procedures adopted September 23, 1998, the Committee will consider only requests addressing issues of prospective conduct, and will not address issues relating to past conduct.

On a go-forward basis, is Attorney C in compliance with the rules of the North Dakota Rules of Professional Conduct with such contact, considering particularly the language of Rule 7.1?

This Committee addressed the issue of targeted mailings in State Bar Association of North Dakota Opinion No. 92-15 (November 23, 1992). The Ethics Committee received a request for an Opinion on whether an attorney may use direct mail targeted to former clients and potential clients to advise them of her new licensure in another state and expansion of her firm. It was noted in that Opinion that North Dakota has chosen not to regulate targeted mailings to the extent that would be allowed under the Supreme Court Case of Shapero vs. Kentucky Bar Association's, 486 U.S. 466 (1988). It was the opinion of this Committee that the targeted mailings to inform prospective clients would not be prohibited by the North Dakota Rules of Professional Conduct, so long as those mailings are not false or misleading. The Committee is not in a position to determine whether a particular communication is truthful and not misleading. It remains the obligation of the lawyer to insure that a communication is truthful and not misleading. State Bar Association of North Dakota Ethics Committee Opinion 97-11 (November 11, 1997).

Do Attorneys A and B have an ethical obligation to provide the requested electronic data?

The final question presented is whether Attorneys A and B have an ethical obligation to provide the requested electronic data. The Committee would note this opinion does not deal with the issue of whether all or any part of a file may be discoverable in litigation or other proceedings pursuant to applicable rule or law. Although some of the information might be considered “work product” in the discovery context, the focus of this opinion is whether a lawyer has an ethical obligation to provide requested information to a client. The law governing the discovery of “work product” is not relevant to this inquiry.

The general principal rules governing a lawyer's duty to provide information in this situation are found in keeping the client informed under Rule 1.4, to promptly deliver to the client or third persons, property that the client is entitled to receive upon request of the client under Rule 1.15 (d) and the client's right to chose counsel and, upon termination of representation, to surrender papers and property to which the client is entitled under Rule 1.16. The Illinois State Bar Association has issued several professional conduct opinions on the obligation to provide this information under similar rules. ISBA Opinion No. 94-13 (1995), Opinion 94-14 (1995) and ISBA Opinion No. 95-2 (1995). In this instance, Attorneys A and B have provided hard copy files requested and printouts of the data stored electronically.

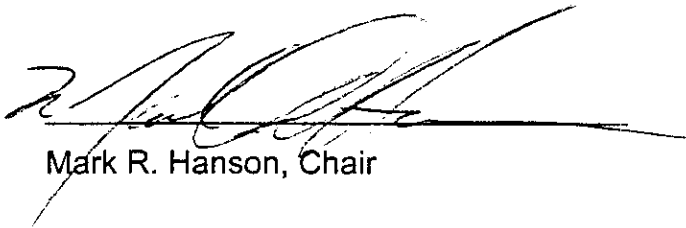
No opinions have been found in other jurisdictions with respect to client files maintained in electronic format. However, the Committee believes there is no distinction to be made on the medium in which the file information is stored. A client's file that is maintained in an electronic format should be provided in that same format if requested. With the computerization of the law office and the development of electronic imaging and storage technology, the retention of records in electronic format has become routine and found to be an acceptable way of maintaining certain client records.

CONCLUSION

The Committee is of the opinion that under the facts presented, the Rules of Professional Conduct apply to Attorney C's tax business. Under its procedures, the Committee will not address issues related to past practice. Targeted mailings are not prohibited so long as those mailings are not false or misleading. No distinction can be made between a client's file in electronic or paper format with respect to the ethical obligation to provide requested information.

This opinion is provided pursuant to North Dakota Rules of Lawyer discipline 1.2 (B), which states: a lawyer who acts in good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the Association is not subject to sanction or violation of the North Dakota Rules of Professional Conduct as to the conduct that is a subject to the opinion or advisory letter.

Because of a conflict of interest, Ethics Committee member James S. Hill took no part in the discussion or vote on this matter by the Committee. This opinion was drafted by Paul K. Sandness and was approved by the majority of the Ethics Committee on May 24, 2001.



Mark R. Hanson, Chair