

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 01-05**

The Ethics Committee has been asked to render its opinion as to the ethical obligation of an attorney to report another attorney's possible misuse of an IOLTA account.

Applicable North Dakota Rules of Professional Conduct

Rule 1.6 Confidentiality of Information

Rule 8.3 Reporting Professional Misconduct

FACTS

Attorney A is an attorney and an employee/agent of a bank. Through Attorney A's work in the bank, he has learned that Attorney B is transferring funds from Attorney B's IOLTA account to cover overdrafts on Attorney B's law office account or personal account. Attorney A asks whether he is to report Attorney B to the disciplinary system.

DISCUSSION

Issue One: Is knowledge of improper use of an IOLTA account a reportable offense?

This inquiry begins with Rule 8.3 (a), N.D.R. Prof. Conduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of these rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules of Disciplinary Procedure.

The initial quest is then twofold – Did Attorney B violate the Rules of Professional Conduct and secondly did the violation raise a substantial

question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. (SBAND Ethics Committee Opinion 90-03).

The duty to report is not triggered if Attorney B withdrew **earned** funds from the appropriate client's IOLTA account under proper bookkeeping procedures there is no violation to report and no further inquiry. If, however, Attorney B withdrew **unearned** funds from the IOLTA account, it is a violation of the Rules of Professional Conduct and the second step need be taken.

Rule 8.3 requires that Attorney A have knowledge of Attorney B's violation. The term "knowledge" as used in 8.3 denotes actual knowledge of the fact in question. N.D Rules of Professional Conduct, Terms. The knowledge may be inferred from the person's conduct under the circumstances. N.D Rules of Professional Conduct, Terms. Attorney A must determine whether he has knowledge of the violation.

The second step for Attorney A then is, to decide whether Attorney B's conduct raises a "substantial question as to that lawyers honesty, trustworthiness or fitness of a lawyer in other respects." Substantial is defined as "a material matter of clear and weighty importance." Terminology, Model Rules of Prof. Conduct.

Whether a violation is substantial depends on the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. Because the purpose of Rule 8.3 is to promote a self-regulating profession, in exercising that judgment Attorney A need consider whether

the violation is one "which the profession must vigorously endeavor to prevent." The duty to report is higher if the victim is unlikely to discover the offense. In measuring the violation, Attorney A should consider that "even an isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover." Comment to Rule 8.3.

Conversion of client funds has been deemed a reportable violation under *In re Himmel*, 125 Ill.2d 531, 533 N.E. 2d 790 (1988). The Illinois violation in *Himmel* was reportable under the Model Code of Professional Responsibility, a predecessor to the ABA Model Rules of Professional Conduct after which the North Dakota Rules are patterned. Although the North Dakota rules have a more limited scope of reportable violations, theft of client funds would likely be reportable under either. Paul F. Richard, *Lawyers as the Police of their Own Profession: Rule 8.3 and the Duty to Report*, 67 N.D.L. Rev 373 (1991).

Attorney A must exercise independent judgment in deciding whether the violation is substantial. The Committee will not determine whether a fact pattern described by an attorney requesting the committee's opinion requires an attorney to initiate disciplinary proceedings. Even when the committee is provided with a detailed fact pattern, the requesting attorney is in the best position to evaluate all of the facts and decide whether there is an obligation to report. SBAND Ethics Committee Opinion 93-06, SBAND Ethics Committee Opinion 96-14, SBAND Ethics Committee Opinion 98-02. The Committee does believe that mishandling of client funds is a matter of

seriousness which does reflect upon a lawyer's honesty, trustworthiness, and fitness. For guidance, the Committee refers Attorney A to Disciplinary Action Against Robb, In re, 2000 ND 146, 615 N.W.2d 125, Disciplinary Action Against Boughey, In re, 1999 ND 205, 602 N.W.2d 268, Disciplinary Board v. Gray, 544 N.W.2d 168, (N.D. 1996); to the Ethics Opinions cited previously, and to Paul F. Richard, *Lawyers as the Police of their Own Profession: Rule 8.3 and the Duty to Report*, 67 N.D.L. Rev 373 (1991).

Issue Two: Is the reporting requirement subject to an exception because the information to be disclosed is protected by Rule 1.6.

Under Rule 8.3 (c), a lawyer need not report a violation if to do so would require a disclosure of information protected by Rule 1.6. Rule 1.6 states:

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to the representation of the client unless required or permitted to do so by this rule.

Before this exception comes into play, Attorney A needs to resolve whether his relationship with the bank is that of attorney-client. If he learns of the conduct in a capacity other than as an attorney to the bank the information he has received may be subject to other nondisclosure requirements of statute or regulation, but not Rule 1.6.

Within Rule 1.6 exist exceptions which permit or require the disclosure of confidential information.

(a) required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm;

(b) permitted when the client consents after consultation;

(c) permitted when impliedly authorized in order to carry out the representation;

(d) permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another;

(e) permitted to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(f) permitted, except as limited by Rule 3.3(c), to prevent or to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used without the lawyer's knowledge;

(g) permitted to comply with law or court order; and

(h) permitted when information has become generally known.

Unless Attorney A obtains the consent of the Bank to disclose the information, the exceptions to Rule 1.6 do not apply to the situation posed by Attorney A. While Attorney B may be engaging in fraudulent acts, Attorney A's client, the bank, is not.

The comment to Rule 8.3 states that a lawyer barred by Rule 1.6 should encourage the client to consent to disclosure where prosecution

would not substantially prejudice the client's interests. In considering the prejudice, Attorney A need be mindful of the regulatory and statutory or contractual prohibitions on disclosure of account information. It is not within the Committee's province to opine as to the applicability of the bank's statutes, regulations, and contractual obligations.

Conclusion

Conclusion One: If Attorney A, who is also a banker, has knowledge of misuse of IOLTA funds by Attorney B and Attorney A determines the violation is substantial, Attorney A must initiate disciplinary proceedings, unless to disclose the information would violate the prohibitions of Rule 1.6.

Conclusion Two: Rule 1.6 would bar the disclosure if the information came to Attorney A in his role as attorney unless the client consents to the disclosure. Attorney A should encourage the client to consent unless to do so would substantially harm the client.

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 August 15, 2001.

A handwritten signature in black ink, appearing to read 'Mark Hanson', with a long horizontal stroke extending to the right.

Mark Hanson, Chair
State Bar Association of North Dakota
Ethics Committee