

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

Opinion No. 05-03

March 24, 2005

The Ethics Committee has been asked to issue an opinion on whether the Requesting Attorney has any further obligations to the court or the client after withdrawing from representation under N.D.R.Prof. Conduct 3.3(d).

I. Applicable North Dakota Rules of Professional Conduct

Rule 1.2 Scope of Representation

Rule 1.6 Confidentiality of Information

Rule 3.3 Candor Toward the Tribunal

II. Background Provided by Requestor

Requesting Attorney ("RA") represented Client in an adjudicatory proceeding. RA and Opposing Counsel ("OC") reduced to writing a negotiated settlement agreement that was finalized in the form of a Court Stipulation ("Court Stipulation"). Client visited RA's office to sign the finalized agreement. When Client insisted on hand delivering the agreement to the other party, RA became suspicious and asked Client if he had something he was not telling him. Client admitted to having a separate agreement with the other party. The separate "side agreement" had a different distribution of funds, resulting in a fundamentally different agreement.

The "side agreement" diverted money to the Client. Client was advised by RA to correct the Court Stipulation and to include the side agreement. Client was also asked to permit RA to disclose the side agreement to the Court and OC.

Client refused to alter the Court Stipulation or to permit RA to disclose the information. Client specifically indicated to RA that the information disclosed about the side agreement was protected by the attorney-client privilege.

RA informed Client of the potential tax and legal implications of the side agreement, which included the potential for fraud and well as other legal issues. RA tried without success to dissuade Client from executing the Court Stipulation.

In light of Client's refusal to correct the Court Stipulation or to disclose the side agreement, RA informed Client that he had no option but to withdraw immediately from representing him.

Client then signed the Court Stipulation and the signature page was sent to OC. Subsequently that day, RA wrote OC informing him that he would be withdrawing as the attorney of record. The same day RA filed a Motion to Withdraw, advising the Court

that an agreement had been reached, the Court Stipulation was signed by his client, and that no client harm was anticipated as a result of his withdrawal.

At the time of the Motion, Judgment had not yet been entered by the Court.

The Court granted RA's Motion to Withdraw and the case is now finalized.

III. Questions Presented

1. Is there an obligation to disclose the side agreement to the Court?
2. Is the communication regarding the "side agreement" absolutely protected by the attorney-client privilege?

IV. Discussion

The following relevant sections of the North Dakota Rules of Professional Conduct apply.

Rule 1.2 Scope of Representation.

...

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by these rules or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment to Rule 1.2 states in relevant part:

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.

Rule 1.6 Confidentiality of Information.

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. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. Such revelation or use is:

(a) required to the extent the layer 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;

...

(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;

...

(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;

...

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not:

...

(2) Offer evidence that the lawyer knows to be false.

...

(c) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless the evidence was contained in the testimony of the lawyer's client. . . .

- (d) If a lawyer has offered material evidence and comes to know of its falsity and the evidence was contained in the testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules.

1. Is there an obligation to disclose the side agreement to the Court?

Because the side agreement alters the facts agreed to in the Court Stipulation, the submitted Court Stipulation is false. If the Court Stipulation is "evidence," Rule 3.3 applies.

Black's Law Dictionary defines evidence as "[a]ll the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." The term "Stipulation" is defined in Black's Law Dictionary as a "voluntary agreement . . . concerning disposition of some relevant point so as to obviate the need for proof." In other words, the Stipulation was a sworn agreement to avoid the necessity of presenting evidence to the Court. As such, it is the equivalent of a sworn statement attesting to a fact.

Accordingly, because the Court Stipulation involved the Client's offer of false evidence, Rule 3.3(d) governs this question. A lawyer's ethical obligation under Rule 3.3(d), if the client does not consent to disclosure after reasonable efforts to convince the client to do so, is to withdraw from representation "without disclosure." Thus, under the plain requirement so Rule 3.3(d), the RA does not have an obligation to disclose the side agreement to the Court. To the contrary, Rule 3.3(d) mandates that the RA seek to withdraw "without disclosure."

2. Is the communication regarding the "side agreement" absolutely protected by the attorney-client privilege?

The communication regarding the side agreement can be revealed only if it meets one of the exceptions in Rule 1.6.

Rule 1.6(a) describes when disclosure is mandatory; none of the situations in Rule 1.6(a) apply to the facts described by RA.

Rule 1.6(d) permits disclosure if the lawyer reasonably believes that a criminal or fraudulent act is likely to result in "substantial injury or harm to the financial interests or property of another." This is a factual determination the Committee cannot appropriately make. However, if RA reasonably believes that the failure to disclose the side agreement is likely to result in substantial harm to the financial interests of another, RA may, but is not obligated to, reveal the communication.

Rule 1.6(f) also permits disclosure of confidential communications “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.” This subsection does not apply for two reasons: first, the Court Stipulation was sent to OC and sent to the Court with RA’s knowledge not without it; and, second, Rule 1.6(f) prohibits disclosure of confidences if the limitations of Rule 3.3(c) apply. Rule 3.3(c) and (d) prohibit the disclosure because the Court Stipulation is equivalent to the Client’s testimonial offer of false evidence.

Accordingly, disclosure is permitted only if the RA believes that there may be substantial harm to the financial interests of another.

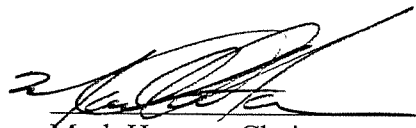
V. Conclusion

There is no obligation to disclose the side agreement to the Court; however, seeking to withdraw is mandatory. RA may not disclose the falsity of the Court Stipulation unless he believes it will cause another substantial financial injury.

This opinion is provided pursuant to Rule 1.2(B) North Dakota Rules for Lawyers Discipline, which states:

A lawyer 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 Adele Page and was unanimously approved by the Ethics Committee on April 11, 2005.


Mark Hanson, Chair

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Saturday, December 4, 2004

Mark Hanson
Chair/Ethics Committee
P.O. Box 2626
Fargo, ND 58108-2626

RE: Request for Advisory Letter Regarding Ethics Issue

Dear Mark:

Question Presented:

When an attorney finds out from his client (in confidence) following the settlement of a divorce that the two parties have an unstated side agreement regarding distribution the property, does the attorney have an obligation to provide such information to the other attorney or the court? Given the fact that the client was unwilling to have placed in the stipulation (already agreed to by the parties) the content of the side agreement and was unwilling to allow the attorney to advise the opposing counsel or the court of such a side agreement, is it appropriate for the attorney to immediately withdraw from the case since in the attorney's view the stipulation signed by the parties contains inaccurate information?

Background Information:

I recently assisted a client in resolving a divorce. After numerous weeks of negotiations in written form, the parties had reached an agreement and my client came in to sign that agreement. We had arranged that my client would sign that agreement and then I would mail the original to the opposing attorney, who would have his client sign and prepare the final documents and send them to the court. My client, for reasons unknown to me, insisted that he wanted to take the original document directly to his wife and have her sign the document. I explained him that this is normally done through the attorneys and there should be no reason that he needs to do so. Based on the insistence and nervousness of my client, I point-blank asked him, "is there something you're not telling me?" He then admitted to me that the two of them had reached an unstated side agreement in which a portion of the money which his

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wife was going to be receiving from his 401k was going to be coming back to him so he would be in a position to pay the bills he was agreeing to pay under the stipulation. I advised my client that the stipulation should be full and complete and that the reality of what was going on should be part of the stipulation; I also stated that although I am unfamiliar with his particular 401k plan and do not do pension law, it appeared to me that doing this indirectly would quite possibly be violating his 401k plan and perhaps would result in some tax consequences and reporting requirements, not to mention the possibility of penalties that may apply to the person who owned the 401k taking it out early (but may not apply to the spouse if it's part of a divorce agreement). Since I do not deal with tax law or pension law, I told him I did not know what effect this unstated side agreement would have on those issues, but certainly what he and his wife were doing didn't "smell right" to me. I also stated to my client that since the stipulation is not accurate, it is inappropriate to proceed with it, and I asked him to correct the document, or in the alternative allow me to disclose the fact that the document is inaccurate to opposing counsel and the court. I also advised my client at that time that once the document is turned into a judgment that that is the only thing that counts, and that he will be unable to enforce any side agreement, and that if his then ex-wife decides not to provide him the funds that they had agreed to switch over to him, he would have no remedy. I also told my client that if there is anything illegal about his receiving the portion of his 401k in this manner that his ex-wife would be able to use that against him at any time in the future, and that by doing this he is literally walking on to a trap door to which his ex-wife holds the lever. I again asked him to correct the stipulation. My client refused to allow me to do so, asserting that he is confident that the parties will keep the side agreement between themselves and nobody needs to know about it; he also clearly indicated that he believed that the information he provided me is attorney-client privilege and he specifically refused to authorize me to disclose the situation to anyone. I once again attempted to dissuade my client from these actions, and asserted that although I don't know that area of the law relating to pension and tax law, it is possible that inappropriately taking money out of a pension plan without a penalty that should be applied may be inappropriate and indeed may itself be illegal; I also asserted that it is possible that the money that he is receiving would probably be considered income which he would have to disclose on his taxes, but he would have to talk to his tax accountant about that; and of course, if he were not to disclose something that was income on his taxes, that would be fraud on the US government and that would constitute perjury by the signing of a false tax return. Despite these possibilities, my client was insistent that the information he had relayed to me be kept confidential and known only to the two parties. I then advised my client that given his refusal to correct the stipulation and refusal to disclose the

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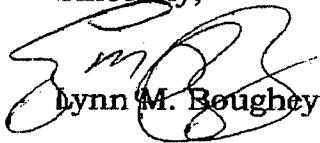
incorrectness of the stipulation, that I wanted no part of this and that I felt compelled to withdraw as his attorney immediately. He understood.

The agreement had already been reached and finalized. My client signed the stipulation and the signature page was faxed to the other attorney, as previously agreed. I sent the opposing counsel a subsequent letter later on the same day which advised him that I would be withdrawing as the attorney in this matter, and on that same day I filed a motion with the court to allow me to immediately withdraw from this case without telling the court why; I did advise the court that the parties had already reached an agreement, that my client has already signed the stipulation, they are getting the signature from the other party, and that I did not believe there would not be any harm to my client by allowing my withdrawal at this time.

All of this occurred yesterday. Judgment has not yet been entered. Am I obligated to tell the other attorney or the court? Or am I required to keep the information confidential since it is clearly an attorney-client communication? Am I required to withdraw my motion to withdraw and complete the final aspects of the case (i.e. review the documents sent to the court by opposing counsel, review the final judgment and QDRO, and ensure that the appeal time begins by issuing a notice of entry of judgment if opposing counsel fails to do so)?

Thank you for your consideration in this matter.

Sincerely,



Lynn M. Boughey

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