

Opinion book  
LO 91-01

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January 17, 1991

[REDACTED]

Dear [REDACTED]

RE: Request for Ethics Opinion Dated January 10, 1991

The Ethics Committee of the State Bar Association of North Dakota has addressed and discussed the questions raised in your letter of January 10, 1991.

The Ethics Committee was of the opinion that since your client in the matter described in your letter has requested that you not discuss the matter or disclose any information concerning the suit, you ought to honor that request. The Committee was of the unanimous opinion that you ought to simply indicate that you have not been authorized to discuss the matter and can make no comment concerning the information which has already been disclosed.

As you are aware, the duty to maintain confidences of a client under Rule 1.6, North Dakota Rules of Professional Conduct, applies even after the attorney client relationship ends. If it is your decision that you will discuss the suit with the press despite your client's position, you will have to assure that the disclosure is permitted under one of the exceptions outlined in Rule 1.6. In your letter you raised a question as to the meaning of the language in the opening paragraph of Rule 1.6 which stated that the release of information shall "be no greater than the lawyer reasonably believes necessary to the purpose". The Ethics Committee is of the opinion that the language refers to the various purposes outlined in the subparagraphs of Rule 1.6. Our review of subparagraphs (a)

  
January 17, 1991  
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- (g), would indicate that none of those situations are applicable to the circumstances described in your letter.

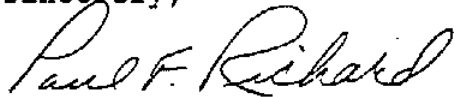
Essentially, you would have to rely upon Rule 1.6(h) as the basis for your authority to discuss the matter with the press. While it is apparent that some of the information has become "generally known" by the Insurance Commissioner's release of the file, we are sure that the press is not looking to have you simply read your memo and will want you to comment on its contents, disclose your thought processes in the preparation of the memo and the matters contained therein, and generally expand on the information disclosed. The Committee is of the view that this could not be done without the consent of your client.

The Committee would like to point out that it would be your burden to establish that the information that you disclose to the press was "generally known". In a situation where your client has requested you not to comment on the matter, and we are sure that the press wants more from you than to simply read the memo that they already have, we would think that you would be at risk for violating Rule 1.6 if you did carry out additional conversations or disclosures.

The Ethics Committee is in no position to comment on each piece of information you would want to disclose. First, we do not have all of the information that would be necessary to make such a determination, and the Committee was of the view that it was beyond its role to make that determination. Essentially, you will have to determine whether or not you feel comfortable that the information you are discussing is "generally known", but the Ethics Committee was of the view that in light of your client's position on the matter, it would be prudent not to comment as requested by your client.

This letter opinion is issued to you for advisory purposes only and is not binding on you, the Court's of North Dakota, the Disciplinary Board, Grievance Committees, or any other member of the Bar of the State of North Dakota.

Sincerely,



Paul F. Richard  
Chairman-Ethics Committee  
State Bar Association of North Dakota  
cc: Sherry King

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RECEIVED

January 10, 1991

Paul F. Richard  
Chair, Ethics Committee  
P.O. Box 6017  
Fargo, ND 58108-6017

Dear Ethics Committee:

I have received an inquiry from the press relating to a document containing information supplied to me by a client in my capacity as a Special Assistant Attorney General. The document contains information derived from public documents as well as all communications from the client (a state employee) being interviewed relating to pending litigation. Because the document has been released to the public, I would like direction on whether the privilege has been waived, and if not, to what extent I am permitted to comment on information which was previously contained in public records and the confidential information which is now public.

As Deputy Insurance Commissioner, I was given various briefing relating to the former manager of NDIRF, [REDACTED], and his subsequent discharge from NDIRF. I was also provided copies of public examination reports prepared by the Department's Chief Examiner. All of this information was provided to me as the Deputy, and not in my capacity as a Special Assistant Attorney General, and related to events that occurred prior to my becoming Deputy Insurance Commissioner.

[REDACTED] subsequently brought a lawsuit against NDIRF, Commissioner Pomeroy, the Chief Examiner, and others relating to his termination. On or about March 14, 1990, we became aware that a lawsuit had been commenced by [REDACTED]. The Commissioner was served on March 15, 1990. An initial decision was made that [REDACTED], an Assistant Attorney General, and I would represent Commissioner Pomeroy and the Chief Examiner. On March 17, 1990, the Chief Examiner was interviewed by me (in person) and Attorney [REDACTED] (by phone).

The results of that interview is contained in a nine-page memo written by me to Attorney [REDACTED]. All information provided by the Chief Examiner is contained in that memo. As stated above, this memo contains information supplied by the Chief Examiner as well as substantial information that is based on public records. On March 20, 1990, I was informed of the decision (made on March 16) that this matter would be handled

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"in-house" by the Attorney General's office. All information was documented and provided to Attorney [REDACTED], who would continue working on the case.

Thus, I worked on this case for less than one week, and all information received in my capacity as an attorney on this case has been documented; those documents were subsequently made public.

The lawsuit was eventually settled. Apparently the press requested access to the file following settlement, and, according to Attorney [REDACTED], a decision was made by the Attorney General and Commissioner Pomeroy to allow access to the complete file, including attorney-client documents. Attorney [REDACTED] has advised me that the press discussed the case with the Attorney General and Attorney [REDACTED], and, among other things, reviewed and discussed my memo of March 17, 1990.

The press then contacted me. I informed the press that the document is an attorney-client document, and that I could not discuss the document until I determined that it had indeed been released to the press by the Attorney General. I then contacted Attorney [REDACTED], who provided me the information mentioned above. In our general discussion, it was our impression that the attorney-client privilege had been waived by the Commissioner, but that I was not obligated to discuss the matter with the press.

Perceiving potential problems in interpretation of my obligations under the Rules of Professional Conduct, I retained an attorney who served on the committee that recently redrafted the Rules of Professional Conduct. After discussing in detail the history of my representation, the information already contained in the public records, and the contents of the attorney-client privilege document recently released to the public, my attorney advised me that it was her opinion that the privilege no longer applied since all the confidential information was now public. In making this determination, we reviewed Rule 1.6 of the Rules of Professional Conduct. I was further advised that the decision to release the attorney-client documents to the public also acted to waive the privilege. This waiver was further confirmed by the Attorney General and Attorney Fiergola's discussion of attorney-client information with the press.

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I then contacted my former clients and informed them that the document had become public, that the document contained all confidential information provided to me, and that it was my opinion that according to the Rules of Professional Conduct the material contained in the document had become generally known to the public and that as such the privilege no longer applied. As additional protection for myself, so that there would be no question that I was authorized to answer questions from the press, I asked for permission to be released from attorney-client privilege. I have been advised by the Commissioner and the Chief Examiner that they do not waive the attorney-client privilege. I was also informed by Commissioner Pomeroy, who is a lawyer, that he disagreed with my analysis of whether the attorney-client privilege still applies, stating that the release of the attorney-client privileged documents under the open records law does not waive the attorney-client privilege, even if those records contain all confidential information received by the attorney. I once again contacted my attorney, who confirmed her previous advice.

My questions are as follows:

1. Do the Rules of Professional Conduct prohibit me from discussing public information received by me prior to working on the litigation?
2. Do the Rules of Professional Conduct prohibit me from discussing the public (i.e., non-confidential) information reviewed while working on the litigation?
3. Do the Rules of Professional Conduct prohibit me from discussing the confidential information received while working on the litigation, even though that information has now become, in its entirety, public?
4. In the event that I am allowed to discuss the confidential information because it has become generally known, am I allowed to confirm or deny whether the document was created by me and whether the document contains the information supplied to me by my client?
5. How am I to apply the provision that "the revelation or use shall be no greater than the lawyer reasonably

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believes necessary to the purpose"? To what purpose?  
Necessary to answer the specific question asked by  
the press? Or necessary to assist the client in his  
or her goals (i.e., the client's personal purpose),  
as best that can be determined under the circumstances?  
And what if the goals of the two clients are not  
necessarily identical?

Thank you for your consideration.

Sincerely,

A large, solid black rectangular redaction mark covering the signature and any accompanying text.