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May 29, 1992

[REDACTED]

Subject: Opinion of the State Bar Association of North Dakota
Ethics Committee

The Ethics Committee of the State Bar Association of North Dakota is providing the following opinions concerning the questions raised in your May 15 letter.

A. Are communications between the transferee attorney and you privileged communications and, therefore, not discoverable? You are asking for a legal, not an ethical, opinion. Accordingly, it would be inappropriate for the committee to respond to the question.

B. Can you act as a paid paralegal or in some other lay assistant capacity concerning the files transferred to another attorney? Yes, provided you act under the supervision of the transferee attorney and comply with the guidelines explained in *Application of Christianson*, 215 N.W.2d 920, 926-927 (N.D. 1974).

C. Can you, as a pro se owner and president of Sun Well Service, Inc., do legal work for the company, as long as you do not represent yourself to be an attorney? No. Corporations are considered "persons" under state law, so providing legal work for the corporation would be the same as providing legal work to another individual.

Would your status as a pro se plaintiff or defendant be the same as any other person entitled to represent themselves in a legal proceeding? Yes.

D. Can you continue to do the work commonly done by landmen, as long as your correspondence and contacts do not represent you to be functioning as an attorney? Yes, pursuant to *Application of Christianson*, 215 N.W.2d 920, 924-926 (N.D. 1974).

~~CONFIDENTIAL~~
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However, the Ethics Committee cautions that the actions mentioned in your letter (i.e., "investigative work regarding oil and gas titles in the various register of deeds offices, as well as preparing oil and gas leases, mineral deeds and associated curative documents, verifying division orders, and validating payments due from oil companies") may constitute the practice of law. In addition, the Ethics Committee cautions that you should advise your employers and others you are working with that you are not acting as an attorney during the suspension period. You should carefully review *Application of Christianson*, 215 N.W.2d 920 (N.D. 1974); *State v. Niska*, 380 N.W.2d 646 (N.D. 1986); *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986); and 7 AmJur2d, Attorneys at Law §§101-115.

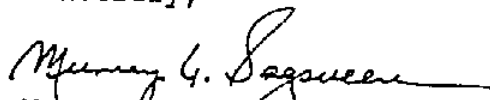
E. Can you practice as an accountant? Yes. However, see the comments concerning question D, above.

F. Can you continue to give business advice and consult with business people? Yes, but see the comments concerning question D, above.

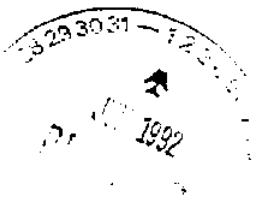
G. Can you retain billing records, rough drafts, hand written notes, and photocopies of portions of the file? You should provide the entire file to the transferee attorney, but you may keep a photocopy of part or all of the file for purposes other than the practice of law during the suspension period. However, the Ethics Committee cautions that you must safeguard the confidentiality of the copied file.

I am enclosing a copy of ABA Informal Opinion #1376 since this may provide further guidance concerning your question.

Sincerely,


Murray G. Sagsveen
Acting Chairman

Enclosure
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is part of the contract between M and C if, in fact, the arrangement were merely a subterfuge for fee-splitting between a lawyer and lay person. If, however, the Assignment by L is made with the knowledge and understanding of C and is merely to assure payment to M for proper services and authorized expenses in connection with C's cause, L's signing the Assignment would not violate a disciplinary rule. This, of course, is a factual question and, like any question of whether M was engaged in unauthorized practice of law, we do not undertake to determine it.

Assuming, as we do, the validity of the contract between C and M, L's obligation is to abide by those terms to which L assented.

We finally assume that the funds involved have been deposited in accordance with DR 9-102(A). From the material submitted L appears to have complied with DR 9-102(A)(2). To comply with the requirement of DR 9-102(B)(4) to "[p]romptly pay or deliver to the client as requested by a client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive," L, if the matter is not quickly and amicably resolved, may properly file an appropriate action so that the rights of the claimants will be promptly adjudicated.

Informal Opinion 1376

February 18, 1977

Files in Possession of Trademark Counsel Pertaining to Trademark of a Client

You have asked a series of questions which relate to the lawyer's duty to deliver files or matter contained therein to the client. Your inquiry is in the context of files in the possession of counsel which pertain either to (1) trademarks or (2) potential or actual trademark disputes involving the client. You state that we are to assume the lawyer has been paid.

In your description of material contained in the two types of files, you identify the following:

- a. notes and memos to the file prepared by the attorney (containing recitals of facts, conclusions, recommendations);
- b. correspondence between attorney and client;
- c. correspondence between attorney and third parties;
- d. material furnished by the client (for example, labels applying the trademark);
- e. applications, receipts, affidavits filed, in respect to use, etc., all pertaining to registration of trademarks for the client;
- f. searches made at the expense of the client;

g. copies of pleadings and the like filed in administrative or court proceedings;

h. legal research embodied in memos or briefs.

You advise us that the content of the files is useful to the client in a variety of ways.

Your first question is whether the attorney may ethically refuse to deliver to the client any or all of the types of matter, described above, contained in such files. The attorney clearly must return all of the material supplied by the client to the attorney. DR 9-102(B)(4). He must also deliver the "end product"—the certificates or other evidence of registration of the trademark which he was employed to procure and for which the client has paid. Such items as searches ordered for the client's matter and likewise paid for by the client presumably may have utility to the client and should be delivered to the client.

On the other hand, in the Committee's view, the lawyer need not deliver his internal notes and memos which have been generated primarily for his own purposes in working on the client's problem.

Between these extremes are the items about which you may be uncertain. In the Committee's view, upon request by the client you should deliver all other material which is useful to the client in benefiting fully from services he has purchased from you. From your description, this would appear to include all significant correspondence, applications and material filed in aid thereof, receipts, documents received from third parties, significant documents filed in the administrative and court proceedings, finished briefs whether filed or not if they pertain to the right of the client to the use or registration of the mark in question.

It must be kept in mind that the Committee cannot answer questions of law. In the gray areas, what is the lawyer's property and what is the client's property in a particular case are questions of law governed by the law of the applicable jurisdiction. The ethical principles involved are simple. The client is entitled to receive what he has paid for and to the return of what he has delivered to the lawyer. Beyond that, the conscientious lawyer should not withhold from the client any item which it could reasonably be anticipated would be useful to the client. How these principles are to be applied in individual cases is, of course, not easy. The respective interests of lawyer and client can be protected by court order in an adversary proceeding or by private agreement if the parties can agree.

You next inquire whether the attorney may ethically insist, as a condition of delivery to the client of such files, that the client pay the attorney for expenses incurred in making photographic copies of the matter contained in such files, which copies the attorney will keep. You indicate that copies of some of the items have been furnished to the client.

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client the actual files but furnish the client with copies of all material contained in such files, conditioned on payment of the client of the expense of duplication.

Finally, you ask if the attorney may ethically insist, as a condition to delivery to the client of any portion of such files, that the client pay the attorney at his normal rate for legal services rendered for his time spent in culling from such files the material which the client is otherwise entitled to receive.

The lawyer should return all items which are the client's property without charge. Whether the lawyer charges for copies of other items or for "culling the file" is not in the Committee's view a question of ethics, but rather a matter of the lawyer's usual and customary practice or, if not, a matter of his agreement with his client.

Whether the lawyer may retain the file pending payment is a question of law. The law in respect to a lawyer's right to a lien varies from jurisdiction to jurisdiction. The Committee is accordingly unable to advise.

Informal Opinion 1377
Notification of Codefendant When
Employee Is Interviewed by Other
Defendants Prior to Trial

June 2, 1977

You have requested the opinion of this Committee on the following matter:

You advise that the Department of Law serves as counsel for the Metropolitan Government of (City) and () County, (State), and you indicate the Metropolitan Charter states the Department of Law has the power and duty to supervise, direct and control all the work of the Metropolitan Government, including furnishing legal advice to the Mayor, City Council and all officers, commissions, departments and boards concerning any matters arising in connection with the exercise of their official powers or performance of their official duties; and to represent the Metropolitan Governments in all litigation.

You further describe in your letter a hypothetical situation whereby, your client, the Metropolitan Government of (City) has been named the party defendant along with certain other private individuals and firms in a law suit for property damage arising from the alleged defective construction of a sewer system. According to your facts, the sewer construction is regulated by a building code and enforced by the Metropolitan Government's Building Marshal, who has complete authority, including police power, to inspect, require correction and enforce the

92-07

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May 15, 1992

Ethics Committee
ATTN: Sherry King
North Dakota State Bar Association
PO Box 2136
Bismarck, ND 58502-2136

RE: North Dakota Supreme Court Disciplinary Action

Dear Sherry:

I have practiced law in [REDACTED], North Dakota since 1969. In October, 1988, I self-reported to Vivian Berg, Disciplinary Counsel, inaccurate testimony I had given. At the same time, I made restitution with the wronged party. Initially a hearing panel of the Disciplinary Board issued a private reprimand. Later the Disciplinary Board voted to issue a public reprimand. I agreed to stipulate to a public reprimand. Thereafter, the Supreme Court sent the matter to Judge Norman Backes as a special master. Judge Backes also recommended a public reprimand. The Supreme Court declined to accept the stipulation between the Disciplinary Board and myself and chose not to accept the recommendations of Judge Backes. Instead, it issued a more severe sanction on April 21, 1992, ordering a two-year suspension of my license, commencing June 1, 1992. It is my intent to conform my behavior completely to the suspension. My questions herein are designed to eliminate any question of violating the suspension.

I have written all of my clients and informed them of my suspension. I have informed them that they may select whatever counsel they choose in the future and have pledged my willingness to cooperate in any fashion my clients and their successor attorneys wish. In addition, I have informed my clients that Kathleen Key Imes, an attorney in Williston, North Dakota, who has been in my employ, will continue in the practice of law independently. She will lease space from Sun Well Service, Inc., a company I own, in the location that she presently occupies.

- A. Attorneys requesting assistance. In the event there is a request by a transferee attorney, I assume that I can answer questions directly to the attorney. If the information has to do with work that has previously been done by me or is necessary for the transferee attorney to be fully versed in the case, I would provide that information and assistance without any charge. It would appear that it is in my clients' best interests that this information flow freely from me to the transferee attorney. I would assume that these communications between the transferee attorney and me would be privileged communications and not discoverable. My concern is that I not divulge information that might otherwise be privileged if not communicated by me to the transferee attorney.
- B. Transferee Attorney/Clients. I have two major lawsuits ongoing. It would appear to be in the clients' interest that my assistance be given if requested by transferee attorneys and clients. To the extent that work is necessary to bring the attorneys current, no fee would be contemplated. In the event my assistance is requested on an ongoing basis, can I act as a paralegal or in some other lay assistant capacity for which a fee can be paid on these files? See Application of Christianson, 215 NW2d 920 (ND 1974).
- C. Pro Se Representation Status. I am the 100 percent owner of a small oil well service business in Williston called Sun Well Service. Can I, as a pro se owner and president of the company, do legal work for the company, as long as I do not representative myself to be an attorney? Would my status as a pro se plaintiff or defendant be the same as any other person entitled to represent himself in a legal proceeding?
- D. Landman Work. I have various oil and gas interests, as do my parents, Leo and Selina Kaiser of Fargo, North Dakota. In the past, I have, as do many landmen, drafted oil and gas leases, mineral deeds, and various other oil and gas documents on behalf of myself and my parents. In the oil and gas industry, it is common for non-attorneys to do investigative work regarding oil and gas titles in the various register of deeds offices, as well as preparing oil and gas leases, mineral deeds and associated curative documents, verifying division orders, and validating payments due from oil companies. I have done this work in the past. Can I continue to do the work commonly done by landmen, as long as my correspondence and contacts do not represent me to be functioning as an attorney? As this activity is not solely done by attorneys, it should not be forbidden. Application of Christianson at 926.

E. Tax Preparation/Tax Advice. I have an undergraduate and masters degrees in accounting from the University of North Dakota. I do not have a CPA license. I would like to continue to give accounting and tax advice. I understand that I could prepare no legal documents. Am I able to practice as an accountant? See Application of Christianson, holding that a suspended lawyer who is also a public accountant may prepare tax returns as a public accountant.

F. Accountant/Business Advisor. As earlier stated, I am a businessman who owns a well service business. In addition, I have been an investor in oil and gas ventures and have been in the drilling fluids business. I have been recognized by the Small Business Administration as the innovator of the year. I sit on various boards of directors from which I give business advice, including the Myron Nelson Fund and the University of North Dakota Center for Innovation and Business Development. I have disclosed my situation to these Boards and have been asked to stay.

Further, based on my business experience and accounting background, I have given business advice to various entities. A number of medical clinics have approached me for assistance with business management matters, seeking advice on cost cutting, financial statement analysis, etc.

I would like to be able to continue to give business advice and consult with business people. I recognize that I could not prepare any legal documents and could not give any legal advice. In addition, I would inform each of the consulting businesses of my suspended legal license.

In Application of Christianson, at 924-925, the court announced it would be extremely harsh to deprive a suspended lawyer from performing certain acts in incidental occupations from which he can make a livelihood because it might constitute the practice of law, denying him reinstatement. A suspended lawyer is permitted to perform those acts he is permitted to perform by alternate qualifications.

G. File Transfer. It is my intention to turn over all of my files to the transferee attorney, less my billing records, rough drafts, and my hand written notes preliminary to memos, correspondence or pleadings. In some cases, I intend to photocopy portions of the file. Are there any ethical problems associated with this proposal?

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May 15, 1992
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I understand that the Ethics Committee meets on Wednesday, May 20, 1992. I would appreciate your submitting this letter to the Committee for consideration on that date, as I need a response by June 1. Thank you for your assistance in this matter.

Sincerely,

