

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-06

May 5, 1993

The Ethics Committee received a request for an opinion from [REDACTED] of [REDACTED]. The opinion sought is whether the factual situation described gives rise to a duty to report lawyer misconduct under N.D.R. Prof. Conduct 8.3. The factual situation presented is complex, and is detailed in a two page attachment to the letter which requests the opinion.

Rule 8.3 requires a lawyer to initiate proceedings under the Rules of Disciplinary Procedure when the lawyer has knowledge that another lawyer has committed a violation of the Rules of Professional Conduct which "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." "Knowledge" of a violation means actual knowledge, but actual knowledge may be inferred from conduct in the circumstances. SBAND Ethics Comm., Formal Op. 42 (April 4, 1990).

In a previous interpretation of Rule 8.3, this Committee stated:

Rule 8.3's requirement of a "substantial question" depends on the seriousness of the possible violation rather than on the quantum of evidence of which the lawyer is aware. The "substantial question" must concern a lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respect." A lawyer must exercise independent judgment in determining whether he or she has the requisite knowledge of a violation and whether the violation meets Rule 8.3's "substantial question" and "honesty, trustworthiness, or fitness" standards. See Comment to Rule 8.3.

Id. See also Richard, Lawyers As The Police Of Their Own Profession: Rule 8.3 And The Duty To Report, 67 N.D.L. Rev. 371 (1990).

Not every violation need be reported, and a measure of judgment is therefore required in complying with Rule 8.3. ABA Annotated Model Rules of Professional Conduct 573 (2d ed 1992). This Committee cannot substitute its judgment for that of the requesting attorney to determine whether the requesting attorney has the requisite knowledge of a rules violation to initiate reporting under Rule 8.3. However, the Committee notes that a district court has found reason to disqualify the law firm of

Attorneys A and C. (Though not explicitly stated, the facts provided imply that the disqualification was based on violation of Rule 1.10.) The Committee further notes that information concerning Attorney A's apparent simultaneous representation of CLIENT and BANK came to the requesting attorney directly from CLIENT.

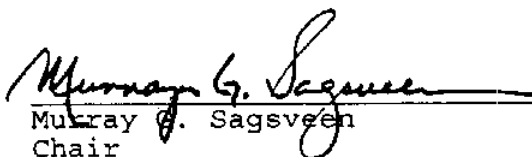
Rule 8.3's "substantial question" requirement depends on the seriousness of the possible violation. "Substantial is defined as "a material matter of clear and weighty importance." Terminology, Model Rules of Prof. Conduct. Rule 8.3 limits the reporting obligation to violations that the profession must vigorously endeavor to prevent. See Comment to Rule 8.3. The possible violations involved in the facts presented are violations of conflict of interest rules. The Committee is of the opinion that continuing with a representation in the face of knowledge of violations of the conflict of interest rules raise a substantial question as to a lawyer's honesty, trustworthiness, and fitness as a lawyer.

If the requesting attorney determines that [REDACTED] has the requisite knowledge of possible violations, [REDACTED] should also consider whether reporting the possible violations would disadvantage [REDACTED] client. If so, Rule 1.6(c) could apply to protect the information, until such time as its disclosure would no longer prejudice [REDACTED] client, or until the client consented to the reporting. Unless reporting would substantially prejudice the client's interest, the lawyer should encourage a client to consent to the reporting. See Comment to Rule 8.3. The client could also be urged to report the violation, though the client's reporting would not relieve the attorney's obligation to report.

This information is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Alice R. Senechal and was unanimously approved by the Ethics Committee on May 5, 1993.

  
Murray G. Sagsveen  
Chair

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
C O N F I D E N T I A L

April 2, 1993

Mr. Murray G. Sagsveen  
Attorney at Law  
Chair of the Disciplinary Committee West  
P.O. Box 1695  
Bismarck, ND 58502-1695

Dear Murray:

[REDACTED] find ourselves in a quandry over our obligations as attorneys to report another attorney to the Grievance Committee for a possible violation of the Rules of Professional Conduct.

We have attempted to outline the relevant facts in the attachment. We have also outlined the ethical rules that we feel are of concern to us. At the present time, we do not know whether these facts would constitute an actual violation of the Rules of Professional Conduct, however, we are concerned that they might constitute a violation.

We are also concerned about our obligation to report incidences of violations pursuant to Rule 8.3 of the Rules of Professional Conduct.

We request a letter opinion from the Advisory Committee regarding our obligations as attorneys to report and/or to file a grievance against the attorney identified in the factual situation as "Attorney A."

If there is any further information that the Committee feels is necessary in order to enter an advisory opinion on this matter, please feel free to contact [REDACTED] and we will attempt to provide that information to the Advisory Committee without disclosing the identify of the other attorneys and clients involved in this question.

We ask that you hold the information contained within this letter and the attachment to it as CONFIDENTIAL and distribute that information only among members of the Advisory Committee.

Sincerely yours,  
[REDACTED]  
[REDACTED]

[REDACTED]  
Attachment

ATTACHMENT TO  
Letter to Murray Sagsveen  
April 2, 1993

**FACTS**

**Pre-1979:** CLIENT has purchased farm machinery on credit from IMPLEMENT DEALER A.

**October - November 1979:** CLIENT borrows money from BANK. As part of the security arrangement for the loan, BANK takes a security interest in CLIENT'S farm machinery. The monthly payments for the farm machinery are included in the loan amounts.

There is a dispute between CLIENT and BANK regarding the type of and amount of the loan agreement between them, which eventually results in a lawsuit between CLIENT and BANK. However, the Security interest or payment advances for the farm machinery are not part of the dispute.

**October 1981:** CLIENT buys combine from IMPLEMENT DEALER B. Pursuant to blanket security agreement executed in November, 1979, BANK has a security interest in combine.

**Prior to November 1982:** CLIENT cannot make his payments on the machinery he bought from IMPLEMENT DEALERS. IMPLEMENT DEALER A repossesses the farm machinery just prior to harvest and sues CLIENT for cost of repairs and deficiency. IMPLEMENT DEALER B sues CLIENT for cost of repairs to combine and deficiency.

**November 1982:** CLIENT calls on ATTORNEY A to represent him. At the same time, ATTORNEY A also represents BANK. There is animosity and a real dispute between CLIENT and BANK, and about BANK continuing to advance funds for the equipment payments, but the lawsuit between CLIENT and BANK has not been filed yet. ATTORNEY A does not inform CLIENT that he represents BANK.

ATTORNEY A represents CLIENT in the deficiency actions brought by IMPLEMENT DEALERS A & B. ATTORNEY A formulates a counterclaim for CLIENT against IMPLEMENT DEALER A claiming CLIENT suffered damage by the timing of repossession of farm machinery; and, as a result of the unreasonableness of the repossession, CLIENT was unable to harvest hay and corn crop, resulting in \$90,000 damages to CLIENT.

ATTORNEY A formulates a counterclaim against IMPLEMENT DEALER B claiming combine was not in proper working order when sold to CLIENT, and that, as a result of the combine's deficiencies, CLIENT was not able to harvest pinto bean crop, resulting in damage to CLIENT of value of crop.

February 1983: CLIENT consults with ATTORNEY B who represents CLIENT in a Chapter 11 Bankruptcy. ATTORNEY A, BANK, and IMPLEMENT DEALERS are all listed as creditors. ATTORNEY A still represents CLIENT in action with IMPLEMENT DEALERS.

1983-1985: CLIENT consults with ATTORNEY C, who agrees to represent CLIENT in a lawsuit against BANK. ATTORNEY C drafts Complaint which is served on BANK in May 1985.

May 1985: ATTORNEY A, representing BANK, corresponds with ATTORNEY C regarding the lawsuit between CLIENT and BANK, asking for an extension of time to file an Answer on behalf of BANK.

December 1985: ATTORNEY A files Answer to lawsuit in December 1985 on behalf of BANK. ATTORNEY A is now acting in direct opposition to CLIENT.

The value of the machinery repossessed by IMPLEMENT DEALERS and the fault for failure to harvest the crop is part of the issue of damages in the lawsuit between CLIENT and BANK. ATTORNEY A now claims on behalf of BANK that there was nothing wrong with the combine and that the timing of the repossession of the other farm machinery was not the cause of the damages suffered by CLIENT, but rather that the failure to harvest was the result of CLIENT'S poor farming practices.

1987: ATTORNEY D takes over CLIENT'S lawsuit against BANK.

May 1992: ATTORNEY C joins ATTORNEY A's firm.

1993: CLIENT now has new attorney (ATTORNEY D) in the lawsuit against BANK. ATTORNEY A continues to represent BANK after ATTORNEY C joined his firm. This appears to be a violation of Rule 1.10 of the N.D. Rules of Professional Conduct and ATTORNEY D moves to disqualify law firm containing ATTORNEYS A & C from representing BANK. District Court disqualifies law firm.

March, 1993: ATTORNEY D then discovers that ATTORNEY A had previously represented CLIENT in the actions with IMPLEMENT DEALERS. After consultation with CLIENT, ATTORNEY D discovers that ATTORNEY A had not disclosed his representation of BANK to CLIENT, nor had ATTORNEY A sought CLIENT'S permission to represent BANK in action CLIENT brought against BANK. It appears that ATTORNEY A represented both CLIENT and BANK during the same time frame.

### QUESTIONS

1. Did ATTORNEY A violate Rule 1.7 of the N. D. Rules of Professional Conduct regarding Conflict of Interest?

\* Rule 1.7 (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests.

\* (c)(1) & (2) If there's a possibility that the client's representation might be adversely affected by the lawyer's responsibilities to another client then the lawyer has to refrain unless the lawyer "reasonably believes" that the client's representation will not be adversely affected AND IF the client, after consultation agrees.

\* (d) Except as required or permitted by Rule 1.6 a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.

2. Did ATTORNEY A violate Rule 1.9 of the N.D. Rules of Professional Conduct regarding Former Client?

\* A lawyer who has formerly represented a client in a matter shall not thereafter.

(b) Represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation;

3. Do ATTORNEYS D have an obligation under Rule 8.3 of the Rules of Professional Conduct to report ATTORNEY A on a suspected ethical violation for either 1 or 2 above or for the violation of Rule 1.10 found by the court?

\* (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.