

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 94-04
April 21, 1994

The Ethics Committee received a request for an opinion from Attorney [REDACTED] of [REDACTED] North Dakota. [REDACTED] posed several questions relating to what obligations, if any, he has as a result of a telephone conversation with a former employee of his client in which the former employee indicated that while still an employee he gave false testimony during a deposition in litigation involving [REDACTED] client. That litigation remains pending at this time. Presently, [REDACTED] and the former employee are involved in a legal dispute arising out of the termination of the former employee's employment. Although the former employee was previously represented by an attorney in connection with a workers' compensation claim against [REDACTED] client, [REDACTED] has indicated that he has no reason to believe the former employee is currently being represented by counsel.

The questions posed by [REDACTED] include: 1) whether there is any obligation to disclose the conversation to the court or opposing counsel; and 2) whether it would be appropriate to make further contacts with the former employee, directly or through his prior attorney, in an attempt to clarify the situation. While these questions raise some ethical concerns, to some degree they merely raise issues relating to litigation strategy or procedures. Such matters are outside the function of the Ethics Committee, and the Committee offers no opinions relative to obligations which [REDACTED] might have which do not arise out of the Rules of Professional Conduct. To the extent that ethical issues are raised, the Committee believes there are insufficient facts

to allow it to specifically respond to the questions presented, but it offers the following general guidance.

A lawyer's obligations of candor toward the tribunal are governed by Rule 3.3 of the Rules of Professional Conduct.¹ His obligations, if any, under Rule 3.3 are dependent upon the resolution of certain factual issues. Specific obligations are imposed with respect to evidence the lawyer "knows to be false." See Rule 3.3(a), (c) and (d), N.D.R.P.C. A lawyer is precluded from offering such evidence. Rule 3.3(a), N.D.R.P.C.² In addition, if evidence has been offered and the lawyer

¹Rule 3.3, N.D.R.P.C. provides, in relevant part:

- (a) A lawyer shall not:
 - (1) Make a statement to a tribunal of fact or law that the lawyer knows to be false; or
 - (2) Offer evidence that the lawyer knows to be false;
- (b) A lawyer may refuse to offer evidence that the lawyer believes is 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. This duty does not exist if the lawyer comes to know of the falsity of the evidence after:
 - (1) The lawyer withdraws in accordance with Rule 1.16.
 - (2) The issue to which the duty relates is determined by the highest tribunal that may consider the issue; or
 - (3) The time has expired for the determination in paragraph (c) (2).
- (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. This duty does not exist if the lawyer comes to know of the falsity of the evidence after:
 - (1) The lawyer withdraws in accordance with Rule 1.16;
 - (2) The issue to which the duty relates is determined by the highest tribunal that may consider the issue; or
 - (3) The time has expired for the determination in paragraph (d) (2).

²This is in contrast to Rule 3.3(b) which indicates that a lawyer may refuse to offer evidence that the lawyer merely "believes is false" without violation of the lawyer's ethical duty to represent his client diligently.

later "comes to know of its falsity," the lawyer may be obligated to make a disclosure to the tribunal under Rules 3.3(c) and (d), which would necessarily entail disclosure to opposing counsel.

Under Rule 3.3, the obligation to make a disclosure arises only when a lawyer "knows" of the falsity of the evidence. While [REDACTED] letter suggests that he has reason to question the veracity of the former employee's recent statement, it is for him and not the Committee to determine whether he has knowledge of false testimony. Cf. ABA Formal Opinion 93-375 (1993) (noting that in deciding a lawyer's ethical obligations under the rules which require a lawyer to disassociate herself from client fraud, "the lawyer must be able to rely on her own informed judgment as to whether in fact such a fraud is occurring"). If [REDACTED] reasonably questions the veracity of the former employee's statement that he gave false deposition testimony and believes the deposition testimony to be true, then [REDACTED] would not "know of its falsity" within the meaning of the Rules. However, it should be noted that a lawyer may not deliberately disregard facts he has a duty to see. See Nebraska State Bar Ass'n v. Holscher, 230 N.W.2d 75, 79 (Neb. 1975) ("knowingly" under the disciplinary rules includes conduct that is "careless and recklessly negligent"); Matter of Price, 429 N.E.2d 961, 964 (Ind. 1982) (conduct is "knowingly" done when one engaging in such conduct does so with an awareness of a high probability that he is doing so). Cf. U.S. v. Benjamin, 328 F.2d 854, 862 (2d Cir. 1964) (willfulness under the Securities Act is shown by proof that the defendant "deliberately closed his eyes to facts he had a duty to see").

If [REDACTED] knows or comes to know that false testimony was

given, the existence of any obligation and the nature of that obligation under Rule 3.3 depends upon the resolution of additional questions including: 1) whether the testimony has been "offered" by him; 2) whether the evidence is "material;" and 3) whether the former employee can be considered [REDACTED] client in the pending litigation involving [REDACTED] client. These are issues which must be resolved by [REDACTED] before there can be any determination of his responsibilities under the Rule 3.3 of the Rules Professional Conduct.

While Rule 3.3 only applies in situations in which the lawyer has offered or intends to offer evidence, other rules may give rise to a duty of disclosure or other obligations. Under Rule 3.4, a lawyer has an obligation of fairness to the opposing party and counsel regardless of whether a duty to disclose exists under Rule 3.3. Among other things, he is precluded from obstructing another party's access to evidence and from concealing evidence. A lawyer also has an unqualified obligation of truthfulness. See Rule 4.1, N.D.R.P.C. The comments to Rule 4.1 indicate that this obligation may be violated "if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false." The obligation of truthfulness may give rise to a duty of disclosure.³ However, as noted in the comments to Rule 4.1, a lawyer

³The ABA/BNA Lawyers' Manual on Professional Conduct p. 71:203 (1984), notes that a lawyer violates his duty of truthfulness if he fails to make a disclosure when it is "necessary to prevent a prior statement made by the lawyer from being so materially misleading as to constitute a misrepresentation." It goes on to state: "If remaining silent would be the equivalent of misrepresentation, a lawyer has an affirmative obligation to disclose the true facts or new matter to persons who may act in reliance on the original statement." See also Kath v. Western Media, Inc., 684 P.2d 98, 101 (Wy. 1984) (quoting from the comment to Model Rule 3.3: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation").

"generally has no affirmative duty to inform an opposing party of relevant facts."

A lawyer also has a duty to avoid assisting a client with conduct that the lawyer knows is fraudulent. See Rule 1.2, N.D.R.P.C. Thus, disclosure or other remedial measures may be necessary when a lawyer knows that materially false statements or omissions have been made by or on behalf of the client relating to a transaction in which a lawyer's services are being or have been employed. See Matter of Price, 429 N.E.2d 961, 964-66 (Ind. 1982). Cf. ABA Formal Opinion 93-376 (1993) (under Model Rules 3.3(a)(2) and (4), a lawyer has the obligation to take remedial measures, including potentially disclosure to the tribunal, with respect to a false statement made by the client's agent during a deposition and which was incorporated into interrogatory answers).⁴

With respect to the questions raised by [REDACTED] relating to the appropriateness of contacts with the former employee, the Committee notes that such questions generally appear to fall outside the scope of

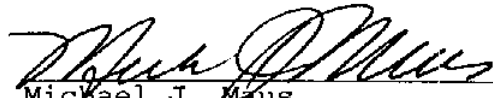
⁴Rule 3.3(a)(2) of the Model Rules specifically provides that a lawyer shall not knowingly "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client." Similarly, Rule 4.1(b) of the Model Rules specifically provides that a lawyer shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." While North Dakota Rules 1.2(d), 3.4, and 4.1 do not contain a similar provision regarding disclosure, disclosure may be appropriate under certain circumstances. As noted in ABA Formal Opinion 93-375 (1993), a lawyer's ethical obligation to disclose material information where nondisclosure might be misleading "may depend upon the role she herself played in creating any misimpression". Moreover, there may be instances in which the lawyer's obligation to maintain client confidences under Rule 1.6 may come into play. See ABA Formal Opinion 93-376 (1993) (noting that under the Model Rules "[i]f it is Rule 4.1 rather than Rule 3.3(a) that applies in this context, the prohibition on disclosure of client confidences in Rule 1.6 must be given full effect"). To the extent that an obligation arises under Rules 1.2(d), 3.4 and/or 4.1, where issues relating to client loyalty and confidentiality come into play, the lawyer should "explore options short of outright disclosure in order to rectify the situation." See ABA Formal Opinion 93-376 (1993).

the Rules of Professional Conduct. However, the Committee would direct attention to Rule 4.3, which governs a lawyer's obligations when dealing with a person who is not represented by a lawyer,⁵ and Rule 4.4, which governs a lawyer's general obligations to respect the rights of others.

This opinion is provided pursuant to Rule 1.2(B) of the 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 Pamela J. Hermes, and was approved by the Ethics Committee after its telephone meeting on April 21, 1994.


Michael J. Maus
Chairman

⁵The comment to Rule 4.3 provides:

This Rule prohibits a lawyer from misleading an unrepresented person as to the lawyer's role in a matter. An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. A lawyer also has an affirmative duty to clarify the lawyer's role to an unrepresented person when the lawyer knows or reasonably should know that the person misunderstands that role. During the course of a lawyer's representation of a client, the lawyer should not give legal advice to an unrepresented person other than the advice to secure counsel.

Comment to Rule 4.3, N.D.R.P.C. (emphasis added).

94-04

March 2, 1994

Mr. Michael J. Maus, Chair
SBAND - Ethics Committee
137 - 1st Avenue West
P.O. Box 370
Dickinson, ND 58602-0370

Dear Mr. Maus:

I would appreciate an opinion from the Ethics Committee of the North Dakota State Bar Association regarding the following fact situation and issue.

On February 10th I was requested by a client to write a letter to a former employee of the client's business. The letter basically set out my client's position that the former employee had violated various provisions of his termination/stock sale agreement. On February 18, I received a phone call from the former employee. While the former employee did have an attorney represent him in connection with a prior workmen's compensation claim against my client, to my knowledge, the former employee does not have an attorney representing him in connection with the current dispute with my client. In the telephone conversation, the former employee set out various defenses he believes he has to my client's position and generally discussed his position in the matter. Near the end of the conversation, he brought up a subject which he claims occurred while he was employed by my client. While still an employee he gave a deposition in connection with other litigation involving my client at which I was present.

The former employee went on to state that he had committed "perjury" at the deposition by giving a false answer to a specific question asked of him at the deposition. He stated that the question concerned an inquiry as to whether he had ever heard my client call another party to the litigation a "crazy old drunk." The former employee stated to me that he answered the question in

the negative and that the answer was false. During this phone conversation he stated that he had in the past heard my client refer to the other party as a "crazy old drunk." The litigation in which the deposition in question was taken is still pending.

This conversation occurred very quickly and based on the tone of the former employee's statements to me, I ended the conversation. Following the phone conversation, my associate and I went back through the deposition and could not find any reference to the specific question referred to by the former employee. In conversations with co-counsel who was also present at the deposition, he could not recall the specific question being asked. From the tone and nature of the former employee's conversation, I have an impression that the former employee is trying to create this controversy to gain a "bargaining chip" against my client in the current dispute between the former employee and my client. Obviously, we want to do what is required by the Rules of Professional Conduct in this situation, but it is difficult to know what direction one should take when the alleged question and false answer cannot be found in the deposition transcript.

The closest reference we could find in the deposition transcript was the following questions and answers:

- Q. He never - he never once complained to you about anything [our opponent] might have done or said?
- A. No. Just that he was hard to deal with. That was about it.
- Q. Has [my client] ever talked to you about [our opponent's] drinking?
- A. Well, I really haven't talked about it. I myself have a drinking problem, so I get - per se I can spot drunks better than other people and he'd asked me if I'd ever noticed anything about it. I've never seen him out of control or anything like that. He asked me that.

I would also point out that the deposition transcript and testimony has not been offered into evidence to the Court in any form.

What obligation do I have under these circumstances? From a review of the Rules of Professional Conduct, it appears that Rule 3.3 is probably the most applicable Rule to this situation. We note, however, that the rule sets up different standards depending on whether the giver of the false testimony is my client or not. Does

the Committee believe that the former employee in any way could be construed to be my client since he was employed by my client at the time of the deposition? Whether he is or is not construed as my client, we have not offered the deposition into evidence in any form.

Rule 3.3(c) addresses the issue of false testimony by non-clients, and provides as follows:

(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. This duty does not exist if the lawyer comes to know of the falsity of the evidence after:

- (1) The lawyer withdraws in accordance with Rule 1.16;
- (2) The issue to which the duty relates is determined by the highest tribunal that may consider the issue; or
- (3) The time has expired for determination in paragraph (c)(2).

As indicated, we have not offered the testimony in any form. Of course, we don't know to what extent our opponent has considered or intends to use the testimony of the former employee. The comments to Rule 3.3 states "when false evidence has been offered by a person other than a client, and the lawyer thereafter comes to know of its falsity, the lawyer must disclose its false character to the tribunal regardless of the client's wishes." My client denies that he would have made a statement as currently alleged by the former employee. I am not sure of the falsity of any testimony given by the former employee at the deposition. As indicated above, I suspect he is trying to use this current allegation as a threat in the current dispute.

Rule 3.3(d) applies to false testimony by clients and provides as follows:

(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. This duty does not exist if the lawyer comes to know of the falsity of the evidence after:

- (1) The lawyer withdraws in accordance with Rule 1.16;
- (2) The issue to which the duty relates is determined by the highest tribunal that may consider the issue; or
- (3) The time has expired for the determination in paragraph (d)(2).

If you conclude that the client provisions would be applicable, I don't represent him so there really is no way to withdraw. What would be my obligations under Rule 3.3(d) under this fact situation.

I would appreciate the Committee's guidance in this matter as to what obligation I have under the Rules of Professional Conduct. In addition to any general guidance you can give, I would like to know your opinions on the following questions:

1. Before informing anyone of this, should I attempt to try to get the former employee to confirm his statement to me over the phone by sending him the deposition transcript and asking him to specifically point to the questions in the deposition to which he allegedly gave false testimony [I enclose a proposed letter I would send to him along with the transcript]?
2. In the dispute with my client, the former employee is unrepresented, but I know he has had a lawyer in a prior workmen's compensation claim filed against my client. I have no reason to believe that the lawyer still does work for the former employee. Should I contact that lawyer to have him explore this with the former employee to try to get some specific reference to the answers in the deposition transcript which are allegedly false?
3. If I am unable to get any additional information or the former employee refuses to identify any specific question or discuss the matter further, do I have a duty to inform the Court and the opposing party based on the information given to me thus far?

[REDACTED]

March 2, 1994

Dear [Former employee]

This is a follow up to our phone conversation of February 18, 1994, at about 4:00PM. While we were discussing your current dispute with [former employer], you indicated that you had given false testimony in connection with a deposition you gave in the matter [case name]. Specifically, you indicated that at the deposition you were asked whether [my client] ever called [opponent's name] a "crazy old drunk." You said that you had answered that question "no" and that that answer was false, and that [my client] had indeed made such a statement.

Following our phone conversation, we reviewed the transcript of your deposition. We cannot find the specific question to which you referred in our phone conversation. We enclose a copy of the transcript of your deposition for your review. If you are now saying that some of your testimony may have been false, we may have an obligation to inform the Court and opposing counsel of this fact. Accordingly, since we cannot find a reference in the transcript to the specific question being asked of you, please refer us to the questions and answers you claim are not accurate and inform us of the correct answers in writing.

If you conclude that your response to any of the questions asked of you in your deposition may not have been accurate, before you respond to this request, you should immediately contact an attorney of your own to further discuss your obligations in this matter and the ramifications of this situation. Further, if you or your attorney want to contact the Court directly to discuss this further, please do so. We cannot advise you in this matter and you should seek independent counsel.

Please review this situation and discuss the situation with an attorney and take appropriate action.

Very truly yours,

[REDACTED]

[REDACTED]

[REDACTED]

Encl.

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4. If the former employee recants his current statement that he gave false testimony, do I still have a duty to disclose the statement and discussion which arose during the phone conversation to the Court and opposing counsel?
5. If you are of the opinion that the former employee was my client at the time the false testimony was given, what are my obligations at this time since I do not represent him in any capacity?

Your Committee's guidance in this matter would be greatly appreciated. If you or the Committee need additional information, please give me a call.

Very truly yours,

[REDACTED]

[REDACTED]

cc: Sandi Tabor (via facsimile)